



Public Defense Backup Center REPORT

Volume XVIII Number 3

May-June 2003

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Expert Testimony on Cross-Racial ID Accepted

Troy Radcliffe, an African-American, was accused of trying to murder a livery cab driver, a Dominican national. No forensic or corroborative evidence existed, only the complainant's identification. While still in the hospital, the complainant picked Radcliffe from a photo array, and later picked him out of a line-up. Before trial, Radcliffe's attorney asked Bronx Supreme Court Justice Massaro for permission to call an expert on cross-racial identification. Acknowledging the "touchstone of identification testimony is in its accuracy," Justice Massaro realized that the "greatest danger of conviction of the innocent exists in 'sole eyewitness' cases." The court reviewed cross-racial identification issues raised in other cases (*Arizona v Youngblood*, 488 US 51, 72 n. 8 [1988], *State v Cromedy*, 158 NJ 112 [1999]) and many studies highlighting its fallibility.

The court found: "In light of this growing body of research, the professional literature of behavioral and social science, reporting with systematic empirical validation, can be said to have found sufficient reliability to advance the phenomenon and to support a broad consensus of its scientific respectability to be admitted at trial. This to the level that there is general acceptance of same within the community of academic experts . . . allowing it as a subject of judicial notice." Exercising his discretion under *People v Lee*, 96 NY2d 157, 160 (2001), Justice Massaro granted the motion, permitting for the first time in New York expert testimony on cross-racial identification. *People v Radcliffe*, 2003 NY Slip Op 23621 (Sup Ct Bronx Co 4/8/03). The defendant was represented by David Feige and Karen Hamberlin from The Bronx Defenders.

OK to Advise Clients to Record Conversations Surreptitiously

A New York trial court has lifted the bar against lawyers advising their clients to surreptitiously tape-record conversations with third parties. The issue arose in the context of an employment discrimination suit. The plaintiffs, employees of Key Food, sued their employer

for racial and sexual bias in the workplace, alleging the use of obscenities and offensive epithets towards women and African-Americans. One of the plaintiffs was advised by counsel about surreptitiously taping conversations with her supervisor. According to plaintiff's attorney, Marc Rapaport, "I view the tapes as a kind of truth serum. Instead of a 'he said-she said' case, now jurors will know that at least some of the things — those caught on tape — were said. It is a very powerful tool."

Defendant, Key Food, attempted to disqualify Rapaport because of his advice, claiming it violated NY Code of Professional Responsibility DR 1-102, prohibiting attorneys from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation" and preventing them from circumventing "a disciplinary rule through the actions of another." Citing ABA and NY ethics opinions, the court denied Key Food's motion. "Contemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures, so long as the law of the jurisdiction permits such conduct." *Mena v Key Food Stores Co-operative*, 195 Misc2d 402, 758 NYS2d 246 (Sup Ct Kings Co 2003), (citing *ABA Formal Ethics Opinion* 01-422 [2001]; *NYCLA Committee on Professional Ethics*, Op 696 [1993].) See also Association of the Bar of the City of New York, Formal Opinion 2003-02. Taping has the potential for uncovering the smoking gun and has been successful in family law matters, fraud and consumer protection cases. (*NLJ*, 4/28/03.) Surreptitious recording is also a staple of law enforcement and prosecutors. Still, it is unclear whether this trial court ruling will become precedent for criminal defense work.

NYC Takes Aim at Gun Charges

Gun cases in five Brooklyn precincts—East

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Flatbush, Brownsville, East New York, Crown Heights, and Bedford-Stuyvesant—will be heard in a new specialty court. These areas account for more than half of the reported shootings in Brooklyn and a quarter of those citywide. Developed by the mayor’s office, police, prosecutors and the state Office of Court Administration, the Gun Court will consolidate before one judge everything from arraignment to disposition.

Acting Supreme Court Justice Vincent M. Del Giudice has been chosen to run the court. “We have committed to resolve these cases in 120 days rather than 180,” Chief Administrative Judge Lippman said. “It’s about managing our cases in a way that makes sense.” Unlike modern drug treatment courts, the aim of Gun Court is to speed cases through the system, not fundamentally change the approach. Gun Court will be staffed by three special prosecutors who will also train officers “on presenting facts in court testimony that justified the search of a defendant and the seizure of a weapon.”

Christopher Dunn, Associate Legal Director of the NYCLU, says “his office has concerns any time the court system collaborates with prosecutors and police in developing a new judicial process.” Justice Del Giudice was a former Bronx assistant district attorney, and once ran against Brooklyn District Attorney Charles Hynes. (*NYLJ*, 5/7/03.)

The concept of specialty courts focusing on guns is not entirely new. The nation’s first gun court was established in Providence, Rhode Island, in 1994. See *Promising Strategies to Reduce Gun Violence*, a report issued by the Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice during Janet Reno’s tenure as Attorney General. (NCJ 173950), Profile 37.

Lawyers Must Protect Public Defense Clients’ Financial Information

Hippocrates’ most important contribution to medical practice was the admonition, “Do No Harm.” It is a principle lawyers also take to heart. As a result, legal practice often places criminal defense lawyers on the horns of a dilemma. For instance, public defense attorneys sometimes learn information about clients’ finances that might create a conflict jeopardizing the representation. The Administrator of the Assigned Counsel Defender Plan for Nassau County raised this issue before the Bar Association’s Committee on Ethics: “May a lawyer assigned by the court to represent an indigent criminal defendant under a publicly funded Assigned Counsel Program ethically reveal his client’s financial ability to pay for the representation in accordance with a statute permitting such voluntary disclosure?”

The State Bar previously opined that disclosure was not permitted: “Assigned counsel may not reveal client confidences or secrets to support a motion for leave to

withdraw from a court-appointed representation, but may disclose a client secret if ordered to do so by the court.” NYS Op 681 (1996). However, it did not consider County Law 722-d, which states: “Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel *may* report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.” (emphasis added.) The Nassau Bar concluded that the Code of Ethics trumped the discretionary language of the statute.

“A lawyer who represents an ostensibly indigent defendant under a publicly funded Assigned Counsel Program, who subsequently learns that the client has intentionally misrepresented his or her financial eligibility for the program, as mandated by DR 4-101 may not report the client’s misrepresentation to the court for the purpose of terminating the assigned representation or to secure repayment of the fee to the program by the client. The attorney, however, pursuant to DR 7-102(b) must call upon the client to rectify a fraud upon the tribunal. If the client fails to do so the attorney should seek to withdraw from the representation, but may not reveal the client’s misrepresentation unless ordered to do so by the court. . . . An attorney may not voluntarily use information about a client to the detriment of the client, even if disclosure is permitted (but not required) by statute.” The Opinion emphasized that assigned lawyers should not be enlisted to police the financial eligibility of their clients. Nassau County Ethics Opinion 2003-01.

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THE REPORT IS PRINTED ON RECYCLED PAPER

Counties Cannot Impose Fees for Probation Services

In early 2003, the Essex County Attorney wrote to the NYS Attorney General (AG) about localities collecting fees for probation work. The fees would include: \$300 for a pre-sentence investigation report; \$40 per month for probation supervision; \$30 per session of a Victim Impact Panel (providing information about how DWI offenders have impacted complainants and their families); \$10 per drug test; and \$3 per day for electronic monitoring. In an informal opinion, the AG concluded that the "State has evinced an intent to preempt the area of probation services and thus that a county may not enact a local law imposing fees on individuals requiring these services except as specifically authorized by State statute." Only limited exceptions exist, permitting an administrative fee of \$30 per month for probation services involving certain Vehicle and Traffic Law and Family Court matters. Exec Law 257-c; NY AG Op 2003-4 (4/27/03).

Counties Examine Public Defense Systems in Light of New Law

The new legislation raising 18-b rates (*see* "From My Vantage Point" in the last issue of the *REPORT*) was included in the budget bill vetoed by the governor and passed over his veto on May 15, 2003. (*NYLJ*, 5/16/03.) As counties and public defense lawyers struggle to determine just what the statute means for them, NYSDA is working to help. Links to the bill, and related stories, can be found on the NYSDA web site. Check the Hot Topics pages, "Assigned Counsel Rates" and "New York Public Defense Funding" for the latest developments: www.nysda.org.

Ontario County was among the first counties reported to be looking at changes to their public defense system and considering how the new law should affect their decisions. (*See Finger Lakes Times online*, 5/20/03). The Fulton County Public Defender reportedly told the County Supervisors that the portion of his budget necessary for paying attorneys to do work the Public Defender could not do could possibly triple. (*The Leader-Herald* [Gloversville], 7/1/03.)

The new legislation and its effect on counties and existing offices will be a major topic at the July 20 Chief Defender Convening at NYSDA's Annual Meeting and Conference in Saratoga Springs, to which New York State Criminal Justice Director Chauncey Parker has been invited. County officials and others with questions about the bill are encouraged to call Executive Director Jonathan E. Gradess at the Backup Center (518-465-3524).

Court Cases Over 18-b Fees Continue

While the legislation was pending, judicial proceedings regarding assigned counsel rates continued. Broome County tried for a third time to obtain judicial review of Family Court and County Court orders awarding assigned counsel compensation in excess of statutory limits. The 3rd Department declined to review the rates in the ostensible declaratory judgment action and reversed a Supreme Court order declaring the challenged orders to be valid. *Kraham v Mathews*, No. 91678, 2003 NY App Div LEXIS 5223 (5/8/03) [a summary of the decision will appear in a future *REPORT*].

Before that, a Manhattan Supreme Court Justice dismissed a challenge to the 2001 court rule allowing administrative judges to override enhanced fees awarded by trial judges. (*Levenson v Lippman*, No. 0109292/2002 [3/25/03], *NYLJ*, 4/4/03.)

In news related to the New York County Lawyers Association (NYCLA) lawsuit to raise assigned counsel fees, NYCLA refused to take part in an early June celebration at which the chief judge, key lawmakers, and bar leaders hailed the first legislative increase in assigned-counsel rates in 17 years. A NYCLA spokesperson expressed concern that "the new rate structure is at best a stop-gap remedy for a continuing crisis." (*NYLJ*, 6/2/03.)

NYCLA Lawsuit Leads to Awards

New York City criminal defense lawyer Norman Reimer is a "Champion of Justice," and was recognized as such by the National Association of Criminal Defense Lawyers (NACDL) for his work to end the injustice suffered by people unable to afford counsel. The award was presented at NACDL's 2003 Spring Meeting. Known to be the primary force behind the NYCLA assigned counsel fee lawsuit, Reimer previously received NYSDA's Service of Justice Award (*see Backup Center REPORT* Vol. XVII, No. 1 [2002]) and the New York State Association of Criminal Defense Lawyers Gideon Award for this effort.

The National Legal Aid and Defender Association (NLADA) presented a 2003 National Exemplar Award to Frank S. Moseley, partner, of Davis Polk & Wardwell on June 12, 2003. Moseley led the *pro bono* team that filed the NYCLA suit. (*NYLJ*, 6/6/03.)

Defendants Shortchanged by FBI Crime Lab

Recent investigations into the work of the Federal Bureau of Investigation's Crime Laboratory have resulted in the indictment of scientist Kathleen Lundy for allegedly giving false testimony about ballistics analysis, and the resignation of technician Jacqueline Blake among allega-

tions of improper testing of over 100 DNA samples. Lawrence Goldman, President of the NACDL, observed: "We all have assumed the scientists are telling the truth because they do it with authority and tests. And as a result FBI scientists have gotten away with voodoo science." The charges against Lundy have caused one New York City prosecutor's office to strike her from their witness list in a murder trial. Meanwhile, the FBI Laboratory has requested the National Academy of Sciences to review its work on lead bullet analysis. The effect of these developments was summed up by retired FBI Metallurgist William Tobin, who commented: "Defense lawyers are being ambushed and jurors are being misled. There is no comprehensive or meaningful data whatsoever to support their analytical conclusions." (*AP*, 4/15/03.)

False Confessions Require True Remedies

The need for videotaping custodial interrogations in New York to combat coerced confessions has been underscored by a report prepared by the Civil Rights Committee of the New York County Lawyers' Association (NYCLA), *Report on the Electronic Recording of Police Interrogations* (NYCLA 2003). Current police practices encourage videotaping when a suspect is about to confess, but not during the interrogation process. New York, among other states, is considering legislation to mandate recording interrogations. NY Assembly Bill 05162; NYC Council Int. No. 027-2002. According to Eugene Nathanson, Co-Chair NYCLA Civil Rights Committee, "Police departments and prosecutors' offices that record custodial interrogations have almost universally found a positive impact on investigations and prosecutions." (*NYLCA Press Release*, 4/15/03.)

In Illinois, Senate Bill SB0015 on videotaping interrogations has been sent to Governor Blagojevich for approval. It requires audio- or videotaping of homicide-related interrogations and confessions. This legislation was on the slate of proposals to prevent wrongful convictions generated by former Governor Ryan's *Commission on Capital Punishment*. "We do not disagree with the videotaping bill," stated Greg Sullivan, Executive Director of the Illinois Sheriffs' Association. "We think its time has come. If there is police misconduct, we need to have evidence of it and we need to get rid of bad cops. We need to protect good cops, and we think videotaping is going to be a good tool." (*Chicago Tribune*, 5/19/03.)

Prosecutor Claims Lawyer Intimidated Witness

Canandaigua lawyer Douglas Rowe has been charged with witness intimidation for initiating contact with a Canandaigua woman who was scheduled to testify at a

grand jury hearing against his client. Rowe is represented by Rochester lawyer Karl Salzer. The indictment claims that Rowe sought to influence the witness's testimony by instilling fear in her that Rowe's client would injure her or someone else. The local judges have recused themselves from the case (*Democrat and Chronicle*, 4/17/03.) Other defense attorneys have rallied to Rowe's defense.

On the Hustings for Loan Forgiveness

Sen. Durbin (D-IL), along with Sen. DeWine (R-OH), has introduced federal legislation to remove the impediment of student loans that discourage new lawyers from entering public service. Senate Bill 1091, known as the Prosecutors and Defenders Incentive Act, creates a loan repayment option for lawyers committing to public service for at least three years. "With the cost of higher education continuing to climb, it is important that young lawyers choosing to defend the poor or serve as criminal prosecutors have access to the same quality legal education as their high-paid corporate counterparts," according to Sen. Durbin. US Department of Education statistics showed that the majority of law school graduates faced an average debt of \$72,000, contrasted with the \$34,000 entry-level salary of a public defender. (*Sen. Durbin Press Release*, 5/21/03.)

The Prosecutors and Defenders Incentive Act, based on a similar program for federal employees, offers repayment of up to \$6,000 per year of student loan debt, with a maximum of \$40,000 per person. Its purpose is "to encourage qualified individuals to enter and continue employment as prosecutors and public defenders." A public defender is defined as an attorney who "is a full-time employee of a State or local agency, or of a nonprofit organization operating under a contract with a State or unit of local government or as a full time Federal defender attorney employed in a defender organization. . . ." S. 1091. Enactment of such legislation might ease the burden of recruiting and retaining qualified public defenders. There is also a proposed amendment to the Higher Education Act of 1965 to expand loan repayment to family court lawyers, S. 407. For more information, visit the *ABA Commission on Loan Repayment and Forgiveness* web site, and the *NLADA Student Loan Forgiveness* web page.

Judicial Discipline News

The saga of New York Supreme Court Justice Thomas Spargo's duel with the Commission on Judicial Conduct continues. In 2002, the Commission charged Spargo with failing to comply with two sections of the election law, with engaging in political activity while on the bench, and with presiding over criminal cases at a time when he was representing the District Attorney. Spargo then sued the

Commission in Federal District Court. On Feb. 20, 2003, Judge David Hurd found that various sections of the Rules Governing Judicial Conduct cited in the charges were either vague, or violated Judge Spargo's constitutional right of free speech, and issued an injunction barring the Commission from enforcing Sections 1, 2(A) and portions of Section 5 of the Rules, not only as to Justice Spargo but as to any other judge as well. (*Spargo v NYS Comm'n on Judicial Conduct*; 244 FSupp2d 72 (NDNY 2003)). Since Sections 1 and 2(A) of the Rules were charged in most Commission cases, the injunction impeded many cases progressing through the Commission, and caused a flurry of law suits as other judges attempted to have their cases included in the injunction.

In June 2003, the Commission issued three disciplinary decisions, which omitted any mention of the enjoined sections because of the ongoing litigation in the *Spargo* case. The three cases were: *Matter of Pamela Kadur*, removing a judge for presiding over cases involving members of her family and for lack of candor; *Matter of Jo Hooper*, censuring a justice for disqualifying herself and her co-justice from a case, without notifying the co-justice, based on unsubstantiated reports her received from a third party; and *Matter of John Jarosz*, censuring a judge for failing to supervise his court clerk which allowed her to steal some \$3,000 from his court.

In the meantime, two cases very similar to the *Spargo* case were being heard by the Court of Appeals. In *Matter of William Watson* (No. 78 6/10/03]), the judge was charged with making pro-prosecution promises during an election campaign such as "Put a real prosecutor on the bench." In *Matter of Ira Raab* (No. 91 [6/10/03]), the judge was charged with engaging in political activity while on the bench, with contributing money to a political party that was not specifically related to the expenses of the judge's campaign, and with threatening a lawyer for taking an appeal. Significantly in both cases, the Commission had charged the same sections of the Rules Governing Judicial Conduct that the US District Court in *Spargo* had enjoined the Commission from enforcing.

The Court of Appeals upheld the Commission's charges in the *Watson* and *Raab* cases and censured both judges. Significantly, the court found that Section 1, 2(A) and 5 of the Rules Governing Judicial Conduct were constitutional. This holding not only repudiated Judge Hurd's finding, but undercut his premise that the federal courts had to intervene in the *Spargo* case, notwithstanding the doctrine of federal abstention, because the Court of Appeals was not required to rule on constitutional objections to Commission procedures. The Commission's appeal of Judge Hurd's decision in *Spargo* is now pending in the 2nd Circuit.

Downs Now NYSDA Attorney Investigator

The Backup Center welcomes to its staff Stephen F. Downs, who will be serving as an attorney investigator. Downs was formerly the Chief Attorney at the Commission on Judicial Conduct.

BTSP 2003

After a year's hiatus due to funding cuts, the NYSDA Defender Institute was able to again train over fifty lawyers in zealously and effectively representing clients who take their cases to trial. The coaches—respected, experienced attorneys and a range of highly experienced communications experts—worked with participants to build skills and confidence. A new format for the week-long event, held on the campus of RPI in Troy, New York, made the 2003 Institute a new and exciting one for coaches and participants alike.

Active Advisory Board Holds Hearings

In 2001, NYSDA fully reactivated its Client Advisory Board, which under the Association's by-laws must be made up of "poor people or their legitimate representatives." The Client Advisory Board's primary duties are to advise the Executive Director on the community program activities of the Association and assist in the design, execution and evaluation of those programs.

In 1998, NYSDA, in cooperation with the New York State League of Women Voters, held four fact-finding hearings on adequacy of defense services. Marion Hathaway, Chair of our Client Advisory Board, participated in each. The hearings were successful in gathering input from defender providers, government officials, and advocates in the field. The voices of clients, however, was not heard. This year, the Client Advisory Board is continuing this community input process with a new set of hearings, this time focusing on clients and client-designed standards for public defense representation.

In June, with the support of the Fortune Society of New York, the Client Advisory Board and the League collected testimony on the adequacy of public defense from clients and their families. The witnesses described their experiences with the public defense system and commented on draft client-produced standards.

This month, with the support of the Genesee Public Defender Office, the Board is studying the adequacy of counsel received by farmworkers of Western New York (Genesee, Monroe and Orleans Counties). The Board will be holding hearings on this topic on July 31. More hearings will follow in other targeted communities.

Marion Hathaway commented on the hearing process, "It is long past the time when clients are supposed to take a back seat and allow their thoughts and ideas to be overlooked. We are seeking input from all members of the client community to bring a new voice to the reform of the defender system."

Laura Johnson Heads LAS CAB

The Criminal Appeals Bureau (CAB) of the Legal Aid Society (LAS) of New York City is now headed by Laura Johnson, who moves from a position as co-Attorney-In-Charge of the LAS Special Litigation Unit. Andrew Fine will resume his former position as head of the Court of Appeals Section of CAB.

US High Court Upholds UM Law School Affirmative Action

Societal effects of race, and whether affirmative action is still required to alleviate long-standing racism in America, was the focus of one of the most anticipated decisions to come from the US Supreme Court in recent years. On June 23, 2003, the court upheld in a 5-4 decision the University of Michigan's law school admission policy that seeks a "critical mass" of minorities. On the same day, the court struck down, 6-3, the university's undergraduate program's admission process in which applicants receive additional "points" based on race. (*NY Lawyer*, 6/24/03.)

Anti-SPAM Donation Saves Staff Time—and Frustration

Spam is everywhere—it's in our e-mail boxes; in *The Reduction in Distribution of Spam Act* awaiting passage in Congress, in Virginia's law making spamming a class 6 felony (one to five year prison terms, fines and seizure of "ill-gotten profits and income"); in California's raising the SPAM stakes from misdemeanor to felony with a \$500 per message additional penalty possible; in Senator Chuck Schumer's proposal for an international anti-spam treaty.

Not wanting (or even able) to wait any longer for legislative relief due to the constant barrage of SPAM on NYSDA's mail servers, we now have a state-of-the-art solution to the SPAM problem. Michael Kocum, software author and president of Dataenter, a Vienna, Austria software company, was kind enough to donate to NYSDA a license for *XWall for Microsoft Exchange Server*, an extremely powerful and versatile SPAM filtering program for use on our Exchange 2000 email server.

We had looked at several server-side solutions for the

growing SPAM problem. Besides being the least expensive, XWall seemed to have the most features with the easiest administrative "interface" and be the fastest to get running of all, so the donation is even more significant. In addition to simple SPAM blocking based on rules we define such as host domain or IP address of spammers, XWall has a built-in "Bayesian" filtering system which scans each email message and takes a statistical approach to evaluating the text of the message to decide if it is actually SPAM or a real message. To date, after the program "learned" from a few days of processing inbound messages, we have had over 3,000 SPAMs blocked from our inboxes, with an almost 99% accuracy rate of not rejecting any "real" messages.

In addition to this Bayesian filtering, XWall does an amazing amount of other things to protect our email system. These include validating email senders' domains and rejecting mail from invalid domains; blocking attachments if requested to; running virus scans on messages; removing HTML and other formatting from messages; compressing outbound messages to save bandwidth; encrypting messages if requested to; detecting "looping" messages which could cause havoc on an email server; and running as a "service" on Exchange servers. It also can be used in conjunction with MAPS or other SPAM databases which have known SPAM originators documented and can be used to quickly compare messages' origination and block those from known spamming domains.

NYSDA wishes to thank Mr. Kocum and Dataenter for their kind donation and support in assisting us in our mission to improve the quality of public defense in New York State. ♪

Now Available!

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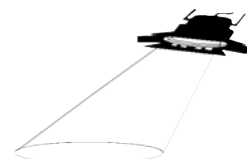
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SPOTLIGHT ON THE WEB

Information Center for New York Public Defense



On NYSDA's web site you will find the largest collection of defense news on the web; more than a dozen Hot Topics pages; resources such as the Immigrant Defense Project, Expert Directories, Public Defense Data, and NY Chief Defenders List; training calendars; thousands of Research Links; and much more. New information and resources appear on the site regularly. In *Spotlight on the Web* we highlight one page or resource, providing a glimpse of what is available. Please visit our web site, <http://www.nysda.org> to view the spotlighted area and others in full, and give us your comments. We welcome suggestions for improving access to public defense information through the web.

FEDERAL COURT DECISIONS AFFECTING STATE PRACTICE

Second Circuit Court of Appeals

[Murder Conviction Reinstated by Panel](#), New York Law Journal (2nd Cir), May 16, 2003. Read the court's decision in [Jones v Keane](#), No. 02-2382 (2nd Cir May 14, 2003)

[Apprendi](#) rule was procedural and did not apply retroactively to initial habeas corpus petition according to the Second Circuit Court of Appeals. [2nd Circuit Finds 'Apprendi' Not Retroactive for Habeas Relief](#), New York Law Journal (2nd Cir), May 12, 2003. Read the court's decision in [Coleman v United States](#), No. 01-2263 (2nd Cir May 7, 2003)

[Panel Orders Retrial Over Right to Confrontation](#), New York Law Journal (2nd Cir), May 5, 2003. Read the court's decision in [Cotto v Herbert](#), No. 01-2694 (2nd Cir May 1, 2003)

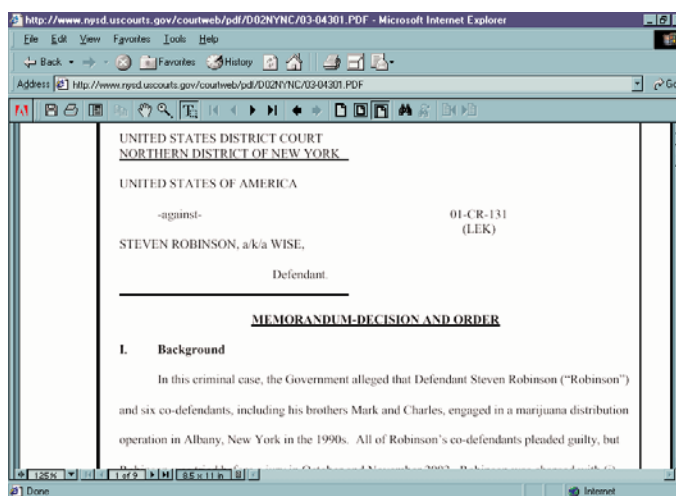
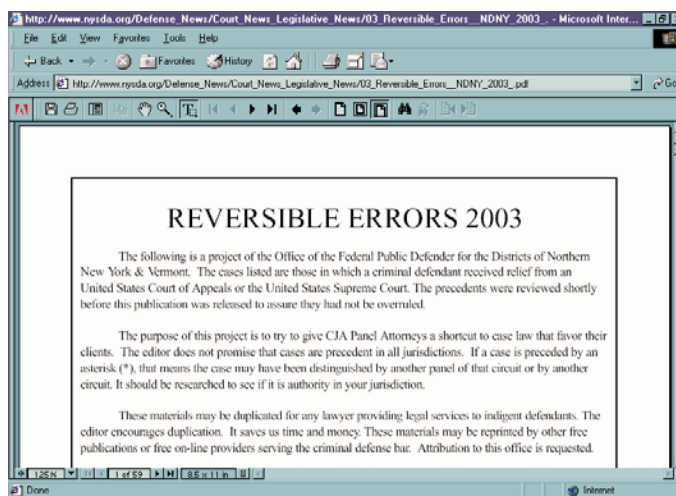
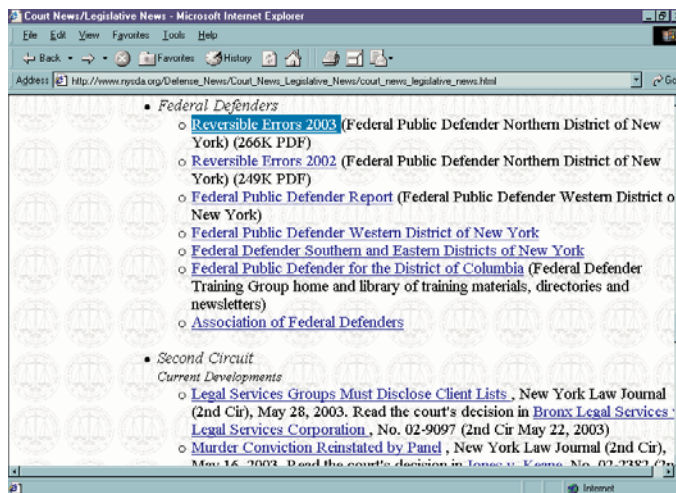
[2nd Circuit Allows Video Surveillance Into Evidence](#), New York Law Journal (2nd Cir), April 28, 2003. Read the court's decision in [United States v Davis](#), No. 02-1569 (2nd Cir April 22, 2003)

Capital sentencing scheme requiring juries for death sentences and allowing judges to sentence non-death first-degree murder defendants was not irrational according to the Second Circuit Court of Appeals. [New York's Death Penalty Sentencing Upheld](#), New York Law Journal (2nd Cir), April 4, 2003. Read the court's decision in [Holland v Donnelly](#), No. 02-2358 (2nd Cir March 31, 2003)

New York District Courts

[Murder Conviction Overturned After Judge Criticizes Prosecution's Case](#), New York Law Journal (NDNY), May 15, 2003. Read the court's decision in [US v Robinson](#), No. 01-CR-131 (NDNY May 14, 2003)

[Warrant Is Not Invalid Despite Affidavit](#), New York Law Journal (EDNY), May 5, 2003



CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association

Theme: 36th Annual Meeting and Conference

Dates: July 20-July 22, 2003

Place: Saratoga Springs, NY

Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; website www.nysda.org

Sponsor: National Association of Criminal Defense Lawyers

Theme: 21st Century Forensics & the Defense of a Criminal Case

Dates: July 30-August 2, 2003

Place: Denver, CO

Contact: Viviana Sejas: tel (202)872-8600 x232; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org

Don't Miss the Training You Need!

Check our website for the latest Seminar Information

The *REPORT* is posted there long before the printed issue is mailed!

Also see the "Training Calendar" for new developments.

Sponsor: Trial Lawyers College

Theme: Death Penalty Seminar

Dates: August 8-15, 2003

Place: Dubois, WY

Contact: tel (760)322-3783; fax (760)322-3714; website www.triallawyerscollege.com

Sponsor: New York State Association of Criminal Defense Lawyers

Theme: Cross to Kill

Date: September 6, 2003

Place: Ithaca, NY

Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail info@nysacdl.org; website www.nysacdl.org

Sponsor: National Criminal Defense College

Theme: Advanced Cross Examination 2003

Dates: October 10-12, 2003

Place: Atlanta, GA

Contact: NCDC: tel (478)746-4151; fax (478)743-0160; e-mail office@NCDC.net

Sponsor: National Association of Criminal Defense Lawyers

Theme: Annual DWI Meeting and Seminar

Dates: October 16-18, 2003

Place: Las Vegas, NV

Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org

Sponsor: National Criminal Defense College

Theme: Trial Practice Institute 2004

Dates: June 13-26, 2004

July 18-31, 2004

Place: Macon, GA

Contact: NCDC: tel (478)746-4151; fax (478)743-0160; e-mail office@NCDC.net

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Dates: June 11-18, 2004

Place: Dubois, WY

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Immigration Practice Tips

Defense-Relevant Immigration News

by Saadia Aleem, Manny Vargas, and Marianne Yang
of NYSDA's Immigrant Defense Project* (IDP)

US Supreme Court Finds Mandatory Detention of Deportable Immigrants with Criminal Convictions Constitutional During Immigration Proceedings.

The Supreme Court held on Apr. 29, 2003, that it is constitutionally permissible for the government to deny noncitizens convicted of certain crimes release on bond pending completion of deportation or removal proceedings held after they are released from criminal custody. The 5-4 majority in *Demore v Kim* reversed the 9th Circuit Court of Appeals, which had found that Congress's 1996 mandatory detention provision violated the due process rights of lawful permanent resident immigrants. The *Kim* majority found that Congress was justified in requiring that immigrants who had been convicted of crimes be detained for the limited period of time necessary to complete their removal proceedings, and noted what the Court called Congress's authority to create immigration laws that would be "unacceptable if applied to citizens." 123 SCt 1708, 1717 (2003).

The holding means that most noncitizens convicted of crimes that subject them to removal will now be subject to mandatory detention by the federal government upon release from criminal custody. The mandatory detention provision covers lawful permanent resident immigrants ("green card" holders) convicted of any crime falling within certain grounds of criminal deportability. This includes an aggravated felony, two crimes involving moral turpitude, one crime involving moral turpitude for which the individual has been sentenced to a term of imprisonment of at least one year, a controlled substance offense, or a firearm offense. See INA 236(c); 8 USC 1226(c).

As a result of this decision, defense lawyers should advise their noncitizen clients that they may now face mandatory detention by the federal government after completion of their state or federal sentence. Unfortunately, immigration detention can mean additional months or, in some cases, years of federal custody in a detention facility—anywhere in the country. Most New York immigrants in federal immigration custody after completing a state criminal sentence are currently held in the federal detention facility in Batavia, New York, or in

* The Immigrant Defense Project provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the IDP on Tuesdays and Thursdays from 1:30 p.m. to 4:30 p.m. at (212) 898-4132.

local jails or other facilities in New Jersey, Pennsylvania, or Louisiana.

If you have a client who has already been released from criminal custody, but who was released from immigration custody after a bond hearing, be aware that the federal immigration authorities have already begun to re-detain individuals who had been released after bond hearings held pursuant to lower court decisions that had found that the mandatory detention statute unconstitutional. As this was going to print, efforts to re-detain individuals were concentrated on the West Coast. If you have a New York client and want to determine his or her risk for re-detention, please contact our hotline, (212) 898-4132, for the latest developments.

New Address and Phone # for the IDP

We continue to receive letters and phone calls directed to our old address. Please note current contact information:

Immigrant Defense Project – NYSDA
2 Washington Street, 7 North
New York, NY 10004
Hotline #: (212) 898-4132

Lawyers seeking to avoid mandatory detention or re-detention of a noncitizen client should take note of the following aspects of the Supreme Court's decision:

- The court relied on the petitioner's concession of deportability during agency proceedings. Individuals who did not and do not concede deportability can argue that this case does not apply to them. As it is the government's responsibility to prove the deportability of a lawful permanent resident immigrant, this is one more reason for such an individual not to concede deportability during immigration removal proceedings.
- The decision leaves open the opportunity to challenge the applicability of the mandatory detention statute through a *Matter of Joseph* hearing. *Matter of Joseph* is a 1999 Board of Immigration Appeals (BIA) precedent decision holding that a lawful permanent resident will not be held in custody pursuant to the mandatory detention statute if the Immigration Judge or the BIA finds that the government is substantially unlikely to prevail on a charge of deportability. 22 I&N Dec. 799.
- The Court distinguishes this case from prior precedent limiting the government's authority to detain immigrants by finding that most immigrants are in custody for only a "brief period" (about 4 months). In fact, many immigrants are held in custody for significantly longer periods.

Such delay, sometimes the result of government postponements, could form the basis for seeking a client's release.

The American Immigration Law Foundation plans soon to circulate a practice advisory listing and detailing these and other arguments that may be raised to distinguish an individual's case from *Demore v Kim*. When completed, that practice advisory should be available at their website: www.aifl.org.

2nd Circuit issues favorable decisions that reduce the likelihood that certain NY crimes will be deemed a "crime of violence."

On Apr. 22, 2003, the 2nd Circuit ruled that a conviction under New York's 2nd degree manslaughter statute (Penal Law 125.15(1)) is not a "crime of violence" and therefore not an aggravated felony for immigration purposes. *Jobson v Ashcroft*, 326 F3d 367 (2d Cir. 2003). That same day, the court also ruled that a conviction under a Connecticut misdemeanor assault statute, which is materially identical to New York's misdemeanor simple assault statute (Penal Law 120.00[1]), is not a "crime of violence" and therefore not an aggravated felony for immigration purposes. *Chrzanoski v Ashcroft*, 327 F3d 188 (2d Cir. 2003).

Conviction of an aggravated felony generally results in the mandatory deportation of noncitizens from the United States. Together, *Jobson* and *Chrzanoski* dramatically reduce the likelihood that some other New York State convictions will be deemed aggravated felonies. See INA 101(a)(43)(F) (defining "aggravated felony" to include conviction of a "crime of violence" with a prison sentence of at least one year).

The decisions also reduce the likelihood that some New York State convictions arising from domestic violence situations will trigger the separate "crime of domestic violence" ground of deportability. See INA 237(a)(2)(E). Under the immigration laws, a crime cannot be a crime of domestic violence unless it is also a "crime of violence." For example, a conviction for simple assault against a spouse under Penal Law 120.00 will not be deemed a crime of domestic violence in the 2nd Circuit because, in light of *Chrzanoski*, it will not be deemed a crime of violence.

The immigration laws reference the following definition of "crime of violence" in the federal criminal code: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. See 18 USC 16.

In *Jobson*, the 2nd Circuit interpreted the second prong

of the above definition to require that an offense pose a substantial risk that a defendant will *use physical force*, and that the risk is of an *intentional* use of that force. Applying a categorical approach, the court held that the minimum conduct necessary to violate the New York's 2nd degree manslaughter statute is not "by its nature" a crime of violence under that second prong of the definition for two reasons. First, the risk that a defendant will *use physical force* in the commission of an offense is materially different from the risk that an offense will result in physical injury. The state statute, however, requires only the latter; passive conduct or omissions alone are sufficient for a conviction under the statute. Second, an unintentional accident caused by mere recklessness, which would sustain a conviction under the state statute, cannot properly be said to involve a substantial risk that a defendant will *use physical force*.

In *Chrzanoski*, the court ruled that the Connecticut misdemeanor assault at issue is not a crime of violence under the first prong of the "crime of violence" definition because use of force is not an element. Again applying a categorical approach, the court reasoned that although that Connecticut statute requires proof that a defendant intentionally caused physical injury to another,* the statute does not have as an element that the defendant *use physical force* to cause that injury, which is required by the first prong of the crime of violence definition.

NYSDA submitted an *amicus curiae* brief in support of the petitioner in *Jobson*. The brief was drafted, submitted, and argued before the 2d Circuit by Deirdre von Dornum, formerly of the law firm of Wilmer, Cutler & Pickering as *pro bono* counsel to NYSDA. The IDP also recruited *pro bono* co-counsel for the *Chrzanoski* case, Katherine Goldstein, also of the law firm of Wilmer, Cutler & Pickering.

The Bottom Line: These 2nd Circuit decisions are good news for criminal defense attorneys and their noncitizen clients. Conviction for New York 2nd degree manslaughter or 3rd degree assault will now certainly not be deemed a crime of violence aggravated felony or a crime of domestic violence that may trigger negative immigration consequences, at least in any case where removal proceedings take place within the 2nd Circuit. Moreover, many other New York convictions—for example, certain other assault and related offenses (menacing, endangerment, stalking), certain homicide and related offenses and certain criminal mischief and harassment offenses—are now less likely to be deemed crimes of violence or crimes of domestic violence in light of the recent decisions. Practitioners should be aware, however, that *Jobson* and *Chrzanoski* control only in the 2nd Circuit. A

* As does subsection (1) of New York's misdemeanor simple assault statute.

client who ends up in removal proceedings outside of the jurisdiction of the 2nd Circuit may be subjected to a broader definition of “crime of violence.”

Any *misdemeanor* conviction under a New York statute that does not include as an element the use, attempted use, or threatened use of force (*e.g.* hitting, kicking, punching, etc.) should not be deemed a crime of violence aggravated felony in any case where removal proceedings take place within the 2nd Circuit, even if the sentence imposed for that conviction is unavoidably for the maximum one year. It also should not be deemed a crime of domestic violence ground of deportability. An element of causing physical injury or serious physical injury in any statute will not, by itself, be sufficient to satisfy the crime of violence definition, even if the statute requires the defendant’s intentional causation of that physical injury.

Any *felony* conviction under a New York statute must be analyzed under both prongs of the “crime of violence” definition. In light of *Chrzanoski* and *Jobson*, a conviction under a felony New York statute should not be deemed a crime of violence aggravated felony or a crime of domestic violence ground of deportability in any case where removal proceedings take place within the 2nd Circuit if (i) the statute does not include as an element the use, attempted use, or threatened use of force (*e.g.* hitting, kicking, punching, etc.) and (ii) the minimum conduct punishable under the statute does not inherently pose a substantial risk that a defendant will intentionally use physical force. Here also, an element of causing physical injury or serious physical injury in any statute should not be sufficient to satisfy the crime of violence definition, even if the statute requires the defendant’s intentional causation of that physical injury. In addition, a statute that requires a *mens rea* of less than “intentional” should not, by itself, be sufficient to satisfy the crime of violence definition.

Practitioners should be aware that even if a conviction may not trigger the crime of violence aggravated felony or the crime of domestic violence grounds of deportability, the same conviction might trigger another ground of removal, such as the “crime involving moral turpitude” ground.

For further guidance on whether a conviction under a particular New York statute may be a crime of violence aggravated felony or a crime of domestic violence in light of *Jobson* and *Chzranoski*, practitioners are urged to call the IDP hotline at 212-898-4132 (Tues./Thurs. 1:30-4:30 p.m.). Also, reference our Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses, available in PDF file format on our website at www.nysda.org, listed under “Project Resources” of the “Immigrant Defense Project” page of the “NYSDA Resources” section.

2nd Circuit Upholds Dismissal of Illegal Reentry After Deportation Charge Based on a Finding of Fundamental Unfairness of the Prior Deportation Proceedings

The 2nd Circuit upheld on May 15, 2003, an Eastern District of New York federal court order dismissing a federal indictment charging illegal reentry after deportation in a case where the defendant’s immigration lawyer in the prior deportation proceedings had failed to file an application for relief that might have prevented deportation. *US v Perez*, 3 US App. LEXIS 9412 (2d Cir. 2003).

Under the illegal reentry statute, a noncitizen may only succeed in his or her challenge of a deportation order as an element of illegal reentry if: (1) all administrative remedies have been exhausted; (2) the deportation proceeding improperly deprived the immigrant of an opportunity for judicial review; and (3) the entry of the deportation order was fundamentally unfair. *See* 8 USC 1226(d).

The 2nd Circuit found that the defendant, *Perez*, had met the two requirements set forth in its prior precedents to establish fundamental unfairness. One, there was a fundamental procedural error based on the ineffective assistance of his counsel in failing to timely file his application for relief in the deportation proceedings. Two, prejudice resulted from that error because *Perez* was eligible for the relief and could have made a strong showing in support of a grant of such relief. The court also found that this ineffective assistance of counsel effectively denied *Perez* the opportunity for judicial review. In addition, the Court found that, although *Perez* did not appeal his deportation order to the Board of Immigration Appeals (BIA), he had satisfied the exhaustion requirement by appealing the denial of his motion to reopen to the BIA. The fact that he did not explicitly state that he was claiming ineffective assistance of counsel was irrelevant for exhaustion purposes because the BIA was fully aware of *Perez*’s contention that his lawyer knew of the deadline for *Perez*’s application for discretionary relief from deportation.

In *Perez*, the 2nd Circuit reaffirmed its 1994 holding in *Rabiu v INS*, 41 F3d 879 (2d Cir. 1994) that failure of an attorney to file an application for discretionary relief, where the immigrant client had a *prima facie* case for such relief, constitutes ineffective assistance of counsel. In finding that this ineffective assistance of counsel improperly denied *Perez* the opportunity for judicial review of his deportation order, the court rejected the government’s attempt to distinguish *Rabiu* on the grounds that it involved a direct attack on appeal of a deportation order, not a collateral attack in subsequent illegal reentry criminal proceedings. Citing *United States v Mendoza-Lopez*, 481 US 828 (1987), in which the Supreme Court found troubling the use of the result of an administrative proceeding to establish an element of a criminal offense, the Court stated: “Accordingly, it would not be logical to subject a

Immigration Practice Tips *concluded*

deportation order to less scrutiny in the criminal context than in the civil context of deportation, and we therefore hold that the standard of review is not higher on collateral attack than on direct attack.”

New York City Exempts Police Officers from New Immigrant Status Confidentiality Policy

New York City announced on May 30, 2003 the issuance of Executive Order 34, a new immigrant status confidentiality policy that exempts police officers from its general prohibition against City employees inquiring into the immigration status of persons with whom they come into contact. The Order prohibits most other City employees from making such inquiry unless it is relevant to determining eligibility for a program, service, or benefit, relevant to the provision of City services, or otherwise required by law. Police are exempted from the order’s key provisions. Unfortunately for noncitizen City residents—whether they be suspects, witnesses, or even victims of crimes—this means that the City now has no official policy of protecting them from police questioning their immigration status or disclosure of their immigration status to federal immigration authorities.

IDP Pro Bono Counsel Meade Recognized by NYSBA for Work on Behalf of Immigrants

On May 1, 2003, the New York State Bar Association (NYSBA) honored Christopher J. Meade of Wilmer Cutler & Pickering for his *pro bono* efforts in representing immigrants with criminal convictions. Meade has been at the forefront of defending the rights of immigrants in this country, a difficult task given the anti-immigrant sentiment enveloping much of the country. He has been nationally recognized for his expertise in retroactivity issues in immigration, and has been involved in impact litigation in the US Courts of Appeals for the 2nd, 3rd, and 4th Circuits to help immigrants with past criminal convictions apply for forms of discretionary relief that no longer exist, but that existed at the time of the criminal conduct. In a number of cases, Meade and his firm have submitted *amicus curiae* briefs on behalf of NYSDA’s IDP to help courts understand the impact of immigration laws on immigrants and their families. He has also worked closely with the Immigrants’ Rights Project of the American Civil Liberties Union in a number of pro-immigrants’ rights cases. In addition, Meade has recruited a number of excellent, conscientious lawyers from his firm to assist with what is often difficult and time consuming *pro bono* work. (See other Wilmer Cutler & Pickering efforts described above, p. 10.) ♪

* As does subsection (1) of New York’s misdemeanor simple assault statute.

Book Review

Criminal Law Slangage of New York

By Glenn Edward Murray and
Gary Muldoon
Gould Publications, 2003
120 pages
\$17.95

By Ken Strutin*

New York criminal practice abounds with acronyms, abbreviations, and terms of art. Defense lawyers familiar with ACD, DWI and 710.30 notices might find pause when they encounter a DRE (drug recognition examination)—which includes HGN (horizontal gaze nystagmus)—or the Green/Glover Test for assessing lesser-included offenses. A quick glance at *Criminal Law Slangage of New York* will awaken attorneys to gaps in their knowledge of working shorthand and the need for a good reference source to fill them. Two cicerones¹ of New York criminal practice, Glenn Edward Murray, author of *Collateral Consequences of Criminal Conduct* (NYSBA 1992) and Gary Muldoon, co-author of *Handling a Criminal Case in New York* (West Group 2002) pooled their vast experience and knowledge to bring this new, essential work into existence.

Criminal Law Slangage provides an easy method for deciphering New York criminal law expressions. Arranged in dictionary style, each entry includes a brief definition of the acronym or term, along with cites to legal and reference works. More than 500 expressions from AAB (the Administrative Adjudicative Bureau), to Zero Tolerance Law can be found. Written with the practitioner in mind, this collection of legal expressions serves double duty as an interpretative reference source and handy guide to essential concepts in New York criminal practice.

Defense attorneys will discover a constellation of interesting and useful legal terminology in *Criminal Law Slangage*. The book will help criminal lawyers expand their working vocabulary and provide fast reference to key cases and statutes. Here is a reference work to keep pace with the rapidly changing language of New York criminal law.

Ordering Information:

Gould Publications
1-800-847-6502
www.gouldlaw.com

* *Ken Strutin* is a legal information consultant for the New York State Defenders Association.

¹ Ed. note: A “cicerone” is a guide.

Resources Sighted, Cited, or Sited

NYSDA continually monitors the Internet and print materials for resources to aid criminal defense attorneys in their daily practice and to help them make the most of the web. Here are a few of the many recent sightings of interest that can be found on the NYSDA web site, www.nysda.org or contact the Backup Center.

Substantive Reports, Articles, and Statistical Info

New York's Appellate Division [First Department](#) and [Second Department](#) have launched web sites providing access to recent decisions and more. They each contain information on court rules, contact information, decisions (on appeals and motions), and some forms. They complement the web sites for the [Third Department](#) and [Fourth Department](#) published previously.

[Drug Court Report Year 2](#) (OCA 2003). This report describes the progress of the New York State Drug Court Program during 2001-2002. It evaluates the work of existing drug courts, characteristics of participants, and includes plans for expansion.

Prisoners' Legal Services of New York, Inc. has recommended publication of their periodical for inmates, *Pro Se*. Prisoners should be able to find a copy in every prison library; individual prisoners cannot be placed on a mailing list at this time. Any other requests or comments concerning the publication can be addressed to Tom Terrizzi, terrizzi@plsny.org.

[Evaluation of the Public Defender Office: Clark County, Nevada](#) (NLADA 2003). The [National Legal Aid and Defender Association](#) conducted a study to evaluate current practices and recommend alternatives for improving the efficient use of attorney and staff in the Clark County, Nevada Public Defender Office. Their report described the current state of indigent defense funding and operations nationally, and concluded with recommendations for improving the quality of representation provided by the Clark County office.

Among other materials available from NLADA include a recent American Council of Chief Defenders ethics opinion on excessive caseload: [ACCD Ethics Opinion 03-01](#).

[Criminal and Justice Data Online](#) (BJS). The Bureau of Justice Statistics at the Department of Justice has created a resource of criminal justice statistic sources. They include crime trends based on FBI Uniform Crime Reports, homicide trends, and law enforcement management statistics. The data, some of which extends back several decades, is broken down by state and reporting agency.

[Death by Discrimination—The Continuing Role of Race in Capital Cases](#) (AI 2003). This follow-up report by [Amnesty International](#) focuses on the persistence of race

in death sentence determinations in the United States. It relies upon case studies and research into juror attitudes underscoring the effect that race has on the deliberative process. The problems of race are also viewed in connection to the error-prone nature of the capital justice system.

[Arresting Protest](#) (NYCLU 2003). The [New York Civil Liberties Union](#) prepared a report concerning New York City and the NYPD's conduct towards anti-war protestors on February 15, 2003. It documents police actions taken against demonstrators, along with allegations of misconduct and constitutional violations. It concludes with recommendations to guard against abuses at future gatherings.

[2002 Wiretap Report](#) (AOUSC 2001) was published by the [Administrative Office of the United States Courts](#) and provides information about wiretap and interception activities conducted by the federal government.

[EFF Analysis of "Patriot II," Provisions of the Domestic Security Enhancement Act of 2003 That Impact the Internet and Surveillance](#) (2003). The Electronic Frontier Foundation (EFF) prepared an analysis of the proposed [Domestic Security Enhancement Act of 2003 or Patriot II](#). The proposed legislation includes permanent expansions of the government's information gathering powers. The EFF analysis examined every section of the January 9, 2003 draft.

[Introduction to Basic Legal Citation](#) (LII 2002-2003). This is the revised version of the 1993 Citation guide created by the [Legal Information Institute](#) at Cornell Law School. It covers basic legal citation, abbreviations and style rules with examples for citing electronic sources, judicial opinions, statutes, regulations, books, articles, etc. There are cross-reference tables for [The Bluebook](#) and [ALWD Citation Manual](#). The entire guide is online in frames format.

Also available online is the [Official Reports Style Manual](#) of the New York State Law Reporting Bureau.

Practice Pointers in the New York Law Journal

[Re-Examining Experts in the Post-'Daubert' Era](#), *NYLJ*, 5/5/03

[Unpreserved Sufficiency-of-Evidence Issues in Criminal Appeals](#), *NYLJ*, 5/1/03

[Counter-Terrorist Checkpoints in NYC: Are They Constitutional?](#), *NYLJ*, 4/29/03

[Workplace Exception: A Developing Concept in Cyberlaw](#), *NYLJ*, 5/19/03

[Second Bite at the Apple: Successive and Concurrent Prosecutions](#), *NYLJ*, 5/9/03

[Legal Implications of Attention Deficit/Hyperactivity Disorder](#), *NYLJ*, 5/8/03 ♪

Job Opportunities

The National Association of Criminal Defense Lawyers (NACDL) seeks an **Indigent Defense Counsel** to advocate nationwide for improvements in the quality of representation for individuals who are accused of crime and cannot afford to hire a lawyer. This staff person works closely with NACDL's Indigent Defense Committee and other national organizations and coordinates NACDL's involvement in systemic reform of state and local indigent defense systems across the country, including litigation, legislative initiatives, grassroots organizing, and media campaigns. The Indigent Defense Counsel drafts position papers, reports, advocacy materials, and amicus briefs, and writes a monthly column on indigent defense in NACDL's magazine. Required: JD; admitted to, or willing to apply for, admission to the DC bar; and strong writing and organizational skills. Experience in impact litigation, grassroots organizing, coalition-building, and/or legislative advocacy is particularly valuable. Send resume, writing sample, contact information for three references, and salary history to: NACDL, 1150 18th Street, N.W., Suite 950, Washington, DC 20036 (Attn: Cecelia Hannon); via email to: cecelia@nacdl.org; or via fax (202)872-8690

Assistant Public Defender sought for Broome County Public Defender Office. Required: admitted in New York; experienced in criminal defense; willing to work as an assistant public defender; and ability to handle criminal trial work, administrative proceedings, parole and appellate proceedings. Salary in the 40's DOE. Send resume to: Jay L. Wilber, Broome County Public Defender, 229-231 State Street, Binghamton, NY 13901

The Hiscock Legal Aid Society in Syracuse seeks a **Staff Attorney** to represent persons unable to hire counsel in criminal matters. Required: ability to handle high volume caseload and a demonstrated commitment to public interest law and to serving the indigent. Admission to NYS bar preferred. Salary \$30,000+ DOE, generous benefits. EOE—persons of color and bilingual persons encouraged to apply. Send cover letter, resume, and three

references to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202

The Neighborhood Defender Service, an innovative Harlem-based public interest law office, seeks a **Director of Development** to be responsible for fundraising from foundations, law firms and individuals. Job entails grant writing, special events planning and direct mail. Required: at least 5 yrs experience; strong writing skills; excellent interpersonal and communication skills; initiative; and the ability to work with a small team. E-mail cover letter with salary requirements and resume to segarra@ndsny.org or mail to: Y. Segarra, NDS, 2031 5th Avenue, New York, NY 10035

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; website: www.oswaldmcmorris.net

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@thejustice-center.org

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.



Basic Trial Skills Program 2003.

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

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

Virginia v Black, 538 US __, 123 SCt 1536 (2003)

One respondent was convicted at trial of burning a cross at a Ku Klux Klan rally. Other respondents pled guilty to burning a cross on the property of an African-American. Virginia's law banned cross burning with "an intent to intimidate a person or group of persons," and provided that cross burning was *prima facie* evidence of intent. Va. Code Ann. 18.2-423. On appeal, the statute was found to violate the 1st Amendment.

Holding: The state Supreme Court did not, when it had the opportunity, disavow the model jury instruction stating that under the statute, intent to intimidate can be inferred from the act of cross burning itself; therefore, the instruction's construction of the statute is binding state law. *Terminiello v Chicago*, 337 US 1, 4 (1949). The 1st Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate, because burning a cross is a particularly virulent form of intimidation. Such prohibition is consistent with the holding in *R. A. V. v St. Paul*, 505 US 377 (1992). However, the *prima facie* evidence provision, as interpreted by the model instruction, is unconstitutional on its face. Judgment reversed and remanded.

Concurring: [Stevens, J] Cross burning with "an intent to intimidate" was not protected by the 1st Amendment, despite the statute's failure to cover all threatening expressive conduct.

Concurring and Dissenting: [Scalia, J] The statute is not invalid on its face, but the *prima facie* evidence provision required reconsideration by the state court.

Concurring and Dissenting: [Souter, J] The statute is unconstitutional because it made a content-based distinction within the category of punishable intimidating or threatening expression, regardless of the *prima facie* evidence provision.

Dissent: [Thomas, J] The statute was constitutional since it focused on intimidating conduct. The *prima facie* evidence clause did not violate due process—it was only an inference.

Counsel (Effective Assistance)

COU; 95(15)

Habeas Corpus (Federal)

HAB; 182.5(15)

Massaro v United States, 538 US __, 123 SCt 1690 (2003)

Federal prosecutors waited until after the petitioner's trial lawyer made his opening statement to reveal the existence of a bullet found in the complainant's car. The petitioner was on trial for racketeering connected with the shooting death of the decedent. Defense counsel rejected offers of adjournments to examine the bullet. After the petitioner was convicted and sentenced to life, new defense counsel appealed and claimed that the court erred in admitting the bullet, but did not raise ineffectiveness of counsel. Judgment was affirmed. The petitioner filed for *habeas corpus* relief claiming trial counsel had been ineffective. His claim was rejected because it was not raised on direct appeal.

Holding: An ineffectiveness of counsel claim can be raised in a motion under 28 USC 2255 whether or not the petitioner could have raised it on direct appeal. Requiring a criminal defendant to bring ineffectiveness claims on direct appeal did not conserve judicial resources or promote finality of judgments. Applying procedural-default rule to ineffectiveness claims compelled defendants to bring them prematurely and in the wrong forum with insufficient factual development for analysis under *Strickland v Washington* (466 US 668 [1984]). Such claims should first be heard in the trial court for full factual investigation. See *US v Galloway*, 56 F3d 1239 (CA10 1995). Judgment reversed.

Ed. Note: The following case is also discussed in *Immigration Practice Tips*, p. 9.

Aliens (Deportation)

ALE; 21(10)

Due Process (Prisoners)

DUP; 135(25)

Demore v Kim, 538 US __, 123 SCt 1708 (2003)

The noncitizen respondent is a lawful permanent resident convicted of first-degree burglary and later petty theft with priors. INS took him into custody in anticipation of deportation. INA 236(c). He conceded his deportability and waived a hearing. Detained for six months, he filed for *habeas corpus* relief (28 USC 2241), challenging the constitutionality of INA 1226(c), which allows mandatory detention for deportable aliens. Relief was granted and affirmed on appeal, on the grounds that 1226(c) violated due process.

Holding: Limited mandatory detention of deportable criminal aliens pending removal is constitutional. Congress had the power to achieve its goal of reducing risk of flight and danger to the community from deportable aliens with aggravated felonies pending removal proceedings by enacting 1226(c). *Reno v Flores*, 507 US 292 (1993). Judgment reversed.

Concurring: [Kennedy, J] The respondent failed to

US Supreme Court *continued*

contest his mandatory detention designation.

Concurring: [O'Connor, J] No jurisdiction existed to hear a *habeas* challenge to the Attorney General's decision to temporarily detain a criminal alien. 8 USC 1226(e)

Concurring and Dissenting: [Souter, J] The respondent did *not* concede deportability. Under due process, he was entitled to an impartial individualized determination by a judge that detention was necessary to a governmental purpose. *Zadvydas v Davis*, 533 US 678 (2001). Detention before a removal order impeded the respondent's ability to prepare his defense. *Stack v Boyle*, 342 US 1, 4 (1951).

Concurring and Dissenting: [Breyer, J] Since the respondent did not concede deportability, 1226(c) did not apply. Federal bail standards were sufficient. 18 USC 3143(b).

Civil Rights Actions (USC §1983 Actions) CRA; 68(45)

Federal Law (Procedure) FDL; 166(30)

Roell v Withrow, 538 US __, 123 SCt 1696 (2003)

The respondent, a state prisoner, filed a 42 USC 1983 action claiming that the petitioners, prison medical staff, deliberately disregarded his medical needs in violation of the 8th Amendment. The respondent orally, and later in writing, agreed to allow the magistrate to hear the entire case. Without waiting for the petitioners' response, the district court judge referred the matter to the magistrate for final disposition, contingent on all parties consenting. On appeal, the court *sua sponte* remanded on the issue of consent. At this point, petitioners filed written consent forms. The magistrate reported that petitioners impliedly consented earlier through their actions. However, she conceded that written consent was not timely filed and she did not have jurisdiction. Post judgment consent was found insufficient and jurisdictional errors nonwaivable.

Holding: The petitioners' choice to proceed with litigation before a magistrate, after being advised of the district court judge option, supplied implied consent and satisfied the purpose of the Federal Magistrate Act. 28 USC 636(c)(1). Congress intended to permit implied consent to reduce case backlogs, and protect the voluntariness of a party's choice whether to waive their right to an Article III judge in civil cases. S. Rep. No. 96-74, p. 4 (1979); H. R. Rep. No. 96-287, p. 2 (1979). Judgment reversed and remanded.

Dissent: [Thomas, J] Express consent to a magistrate's jurisdiction was required at least before a judgment was entered. Construing consent from the parties' conduct did not further the aim of protecting litigants' right to an Article III judge.

Admissions (Interrogation) ADM; 15(22) (35)
(Voluntariness)

Arrest (Probable Cause)(Warrants) ARR; 35(35)(55)

Search And Seizure (Consent) SEA; 335(55)
("Poisoned Fruit" Doctrine)

Kaupp v Texas, 538 US __, 123 SCt 1843 (2003)

The 17-year-old petitioner had been questioned by police about his role in the death of a young girl. Unable to obtain a warrant, police went to his house, roused him from bed and led him, half-dressed and in handcuffs, to the police station for questioning. He was not informed that he was free to go. Shown where the body was found, the petitioner was then taken to headquarters, uncuffed, advised of his *Miranda* rights, and questioned. His denials changed to admissions after being confronted with the confession of the decedent's brother. The petitioner's motion to suppress the admission as fruit of an illegal arrest was denied, and he was convicted of murder. The state appeals court found no arrest occurred until the petitioner was Mirandized and affirmed the conviction.

Holding: Removing the petitioner from his home involuntarily for police questioning without probable cause or a warrant violated the 4th Amendment. *Hayes v Florida*, 470 US 811, 815 (1985). The petitioner's tacit compliance in response to police request for questioning was not consent and did not establish voluntariness. *INS v Delgado*, 466 US 210, 215 (1984). An objectively reasonable person would not have believed he was free to go under those circumstances. Since the petitioner was arrested without probable cause before being questioned, his statements should have been suppressed. *Wong Sun v United States*, 371 US 471, 486 (1963). Judgment reversed and remanded.

Civil Rights Actions (USC §1983 Actions) CRA; 68(45)

Search and Seizure (Search Warrants SEA; 335(65[k])
[Issuance])

Inyo County v Paiute-Shoshone Indians, 538 US __, 123 SCt 1887 (2003)

The petitioner county government, investigating welfare fraud, obtained a search warrant for casino employment records kept by the respondent Native American Tribe on its reservation. The respondent filed a 42 USC 1983 action claiming sovereign immunity from the state warrant. A decision denying the claim was reversed on appeal in a decision finding that the lower court's balancing test was erroneous because the respondent's interest in self-government was vital and the petitioner's prosecution of welfare fraud could have been achieved less intrusively.

Holding: The respondent was not a person eligible to file or be subject to a §1983 action. *Kiowa Tribe of Okla v*

US Supreme Court *continued*

Manufacturing Technologies, 523 US 751 (1998). A “person within the jurisdiction” of the United States, or claimant under 1983 did not include sovereigns. *Pfizer v Government of India*, 434 US 308, 317 (1978). Section 1983 was intended to preserve private rights against government intrusion, *Will v Michigan Dept of State Police* (491 US 58, 66 [1989]), not to allow a sovereign body to withhold evidence in a criminal investigation. Claims under “federal common law of Indian affairs” were not considered. Judgment reversed and remanded.

Concurring: [Stevens, J] The respondent was a person under 1983, but failed to state a cause of action. No allegations were made that the petitioner’s warrant lacked probable cause or was defective.

Civil Rights Actions (USC §1983 Actions) CRA; 68(45)**Due Process (Miscellaneous Procedures) DUP; 135(10)****Los Angeles v David, 538 US __, 123 SCt 1895 (2003)**

The petitioner, City of Los Angeles, seized the respondent’s car in a no parking zone. The respondent paid a fine to regain his vehicle. Nearly a month later, his attempt to press his claim for return of the money because the seizure was unjustified failed. He filed a 42 USC 1983 action based on the petitioner’s failure to hold a prompt hearing. The denial of his claim was reversed on appeal, the court finding that due process mandated a hearing within 48 hours or at least 5 days of the towing.

Holding: A thirty-day delay in holding a deprivation hearing for a parking violation was routine, justified by administrative needs, and not a violation of due process. *Mathews v Eldridge*, 424 US 319, 335 (1976). The temporary deprivation of money (parking fine) was not a vital interest, unlike a temporary deprivation of employment or even of the use of a vehicle. A 30-day delay in presenting evidence was not detrimental to a fair proceeding. Given the government’s interest in enforcing parking regulations, and in light of administrative burdens, the delay does not warrant relief. *FDIC v Mallen*, 486 US 230, 242 (1988). Judgment reversed.

Double Jeopardy (Dismissal) DBJ; 125(5)**Habeas Corpus (Federal) HAB; 182.5(15)****Price v Vincent, 538 US __, 123 SCt 1848 (2003)**

At the end of the prosecution’s case in the respondent’s murder trial, the respondent moved to reduce the charge for insufficient evidence of first-degree murder. The day after the court expressed an opinion that “what we have at the very best is Second Degree Murder,” the prosecution was permitted to speak to the motion and

then to proceed on first-degree murder despite defense counsel’s claim that the court had directed a verdict. On the respondent’s state appeal, the court found a verdict had been directed, resulting in a double jeopardy violation. The state supreme court reinstated the conviction. The respondent’s federal *habeas corpus* motion under 28 USC 2254(d), based on double jeopardy, was granted, and affirmed on appeal.

Holding: The state high court’s decision upholding the conviction by finding no directed verdict and therefore no violation of double jeopardy was not “contrary to” or an “unreasonable application of” federal law. 28 USC 2254(d). The federal court of appeals erred by conducting *de novo* review instead of applying the proper *habeas* standard. The state court identified Supreme Court precedents holding that a trial judge’s characterization of a ruling was not binding. *US v Martin Linen Supply Co*, 430 US 564 (1977). The respondent did not show that the state court applied the precedents to his case unreasonably. *Woodford v Visciotti*, 537 US 19, 24-25 (2002). Judgment reversed.

Retroactivity (General) RTR; 329(10)**Weapons (General) WEA; 385(22)****Bunkley v Florida, 538 US __, 123 SCt 2020 (2003)**

A pocketknife with a blade of 2½ to 3 inches was found on the petitioner when he was arrested for burglary in 1986. Possession of the knife escalated a burglary charge to first degree, since the knife was said to be a “dangerous weapon.” The petitioner was sentenced to life imprisonment. Fla Stat 810.02(2)(b). A “common pocketknife,” which had long been excepted from the “dangerous weapon” statute under Fla Stat 790.001(13), was later defined by the Florida Supreme Court to be a knife with a blade four inches or less. *LB v State*, 700 So2d 370, 373 (1997). The petitioner’s motion to vacate his conviction was rejected by state courts at all levels. The state supreme court found the *LB v State* decision to be “evolutionary,” and hence not retroactive.

Holding: Due process required the state court to determine whether the common pocketknife exception defined in *LB* was a correct statement of law when the petitioner’s conviction became final in 1989. *Fiore v White*, 528 US 23, 29 (1999). The state supreme court, which found *Fiore* inapplicable without analysis, erred by failing to so determine. Judgment reversed and remanded.

Dissent: [Rehnquist, J] The state court “neither clarified the law that was in existence at the time of petitioner’s conviction nor changed the law with retroactive effect.” This was sufficient to end the retroactivity inquiry under *Fiore*.

US Supreme Court *continued*

Admissions (Interrogation) ADM; 15(22) (25)
(*Miranda* Advice)

Civil Rights Actions (USC §1983 Actions) CRA; 68(45)

Chavez v Martinez, 538 US __, 123 SCt 1994 (2003)

When the police frisked the respondent, a knife was discovered and a struggle ensued. After one officer yelled that the respondent had his gun, another officer shot the respondent several times. The respondent was arrested and questioned by the petitioner, a patrol supervisor, without *Miranda* warnings (*Miranda v Arizona*, 384 US 436 [1966]) during medical treatment. At first the respondent did not answer and pleaded for treatment; he later admitted taking the officer’s gun. No prosecution followed. The respondent filed a federal civil (“1983”) action claiming the police violated his privilege against self-incrimination and due process. The trial court rejected the petitioner’s qualified immunity defense.

Holding: Questioning of the respondent without *Miranda* Warnings after he was shot and while he was receiving treatment did not violate the 5th or 14th Amendments. The petitioner was entitled to qualified immunity. Without a prosecution, the respondent was not compelled to be a witness against himself. Police questioning alone was not the start of a “case” within the meaning of the 5th Amendment. *Withrow v Williams*, 507 US 680 (1993). Prophylactic rules like *Miranda* did not extend the scope of the rights they protected. *Warren v Lincoln*, 864 F2d 1436 (CA8 1989). Judgment reversed.

Concurring: [Souter, J] Liability for due process violation is still an open question.

Concurring: [Scalia, J] A due process claim was waived or, if considered, meritless.

Concurring and Dissenting: [Stevens, J] Interrogation of the respondent was intended to obtain an involuntary confession by torturous methods and violated his liberty interest.

Concurring and Dissenting: [Kennedy, J] Constitutional protection for a tortured suspect need not wait for the start of the case. *Kastigar v United States*, 406 US 441 (1972).

Concurring and Dissenting: [Ginsburg, J] The Self-Incrimination Clause applied to the time police used coercion to extract a statement. *Mincey v Arizona*, 437 US 385 (1978).

New York State Court of Appeals

Appeals and Writs (Counsel) (Time) APP; 25(30) (95)

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

People v West, No. 45, 5/1/2003

Upon his felony convictions, the defendant filed a timely notice of appeal in state court. Before perfecting his state appeal, he filed three *pro se habeas corpus* petitions in federal court seriatim which were dismissed for not exhausting state remedies. 28 USC 2254(b). Fourteen years after filing his state notice of appeal, the defendant sought permission to proceed on his state appeal as a poor person. The prosecution’s motion to dismiss based on laches was granted. The defendant challenged the action in federal court claiming a due process violation. Relief was granted and the appeal ordered reinstated for appointment of counsel to seek an extension. Again the Appellate Division dismissed.

Holding: Appellate Division did not abuse its discretion or violate due process in denying the defendant’s motion for poor person status to perfect an appeal. The defendant had been informed of his right and how to proceed as a poor person at sentencing, and several times later by federal courts. 22 NYCRR 606.5(b), 671.3, 821.2(a), 1022.11(b); *Norris v Wainwright*, 588 F2d 130, 137 (5th Cir 1979) *cert den* 444 US 846. He persisted in bypassing the state system. The state’s actions met due process for protecting the right to appeal. *Smith v Robbins*, 528 US 259 (2000). Preparation of the poor person’s application was not a critical stage of the proceedings requiring assistance of counsel. Judgment affirmed.

Appeals and Writs (General) APP; 25(35)

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

People v Chen, No. 102 SSM 5, 5/6/2003

Holding: Convicted of second-degree attempted murder, the defendant appealed claiming ineffectiveness of counsel as well as challenging his sentence.

The Appellate Division properly found that defense counsel was not ineffective. *People v Benevento*, 91 NY2d 708, 713-714. Resentencing after the Appellate Division’s decision rendered the sentencing issue moot. Judgment affirmed, sentencing appeal dismissed.

Trial (Public Trial) TRI; 375(50)

Witnesses (Confrontation of Witnesses) WIT; 390(7)

People v Frost, No. 46, 5/13/2003

Before the defendant’s trial for murder and weapons possession, the court granted the prosecutor’s motion for a protective order under CPL 240.50 to protect the identity of the witnesses. The prosecutor noted in support of the request the defendant’s criminal history and that of members of his family, his family’s alleged attempt to discourage potential witnesses, and the lack of community cooperation during previous investigations of the defendant. The ruling followed a hearing held without the defendant

NY Court of Appeals *continued*

or counsel. Additional *ex parte* hearings were held concerning closure of the courtroom. The defendant was convicted of the lesser felony, and the Appellate Division affirmed.

Holding: Exceptional circumstances existed to justify holding *ex parte* hearings to consider concealing the identities of prosecution witnesses, whose safety was at risk. *People v Castillo*, 80 NY2d 578, 586 *cert den* 507 US 1033. It is the better practice to allow defense counsel to participate in protective order hearings, yet defense counsel, who had represented the defendant and his family on other criminal matters, might have felt duty bound to reveal their contents to his client. *People v Vargas*, 88 NY2d 363, 379. The court did not abuse its discretion in conducting the hearing *ex parte*. CPL 240.90(3). Defense counsel did not propose less restrictive alternatives allowing participation by defense, *eg*, by requesting a redacted transcript or submitting questions to be put to the witness. The hearings did not concern guilt or innocence, only the safety of the witnesses. The defense was able to cross-examine at trial a witness whose identity was protected by use of a pseudonym, which was not a *per se* violation of the confrontation clause. Closure of the courtroom was justified. Judgment affirmed.

Instructions to Jury (Missing Witnesses) ISJ; 205(46)

People v Savinon, No. 69, 6/5/2003

On trial for rape, the defendant testified that the act was consensual. He noted that his friend and business associate, Camacho, was present. Neither defense nor prosecution called Camacho as a witness. The prosecution requested and received an adverse inference instruction. Defense counsel had met with Camacho once and claimed that Camacho declined to testify for fear of being arrested as an illegal alien. No subpoena had been served on him, and no immunity agreement on the immigration issue was reached with the prosecution. The defendant's conviction was affirmed.

Holding: It was not an abuse of discretion to grant an uncalled witness charge. *People v Macana*, 84 NY2d 173, 179-180. Such instruction permits the jury to draw an adverse inference against a party for not calling a witness who would normally have been expected to support that party's version of events. 1 CJI (NY) 8.55, at 451-453. To support the charge, there must be evidence that the witness's knowledge was material; the testimony would be favorable to the party against whom the charge was sought, based on their relationship (control), and the witness was available to that party. *People v Gonzalez*, 68 NY2d 424, 427 (1986). Camacho had a closer relationship with defendant than to the complainant or the prosecu-

tion, supporting a finding of favorability. Unsupported assertions about a fear of deportation were insufficient to make him unavailable. Defense counsel could have served a subpoena or sought a material witness order. *See People v McKenzie*, 281 AD2d 236, 237. Judgment affirmed.

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

People v Alvarez, No. 44, 6/10/2003

Holding: The defendant was stopped by a police officer on suspicion of drug possession. The defendant's motion to suppress evidence ultimately seized in the encounter was granted and upheld on appeal. The officer had observed the tops of folded white pieces of paper wrapped in black plastic in the defendant's left hand, which in the officer's experience were indicia of cocaine packaging. The defendant's attempt to turn away and hide the papers, resembling those used in cocaine packaging, as the police officer came near raised the level of reasonable suspicion to probable cause. Judgment reversed.

Conspiracy (Evidence) CNS; 80(20)

Evidence (Sufficiency) EVI; 155(130)

Homicide (Murder [Evidence]) HMC; 185(40[j])

People v Hafeez, No. 64, 6/10/2003

The defendant lured the decedent outside a bar to allow the co-defendant to attack and ultimately stab him to death. At trial, the defendant was convicted of several charges including depraved indifference murder, Penal Law 125.25(2), but was acquitted of intentional murder and possession of a weapon. On appeal, the murder and conspiracy counts were reversed for insufficiency.

Holding: No reasonable view of the evidence showed that the defendant shared his co-defendant's culpable mental state for depraved indifference murder. Penal Law 20.00; *People v Braithwaite*, 63 NY2d 839. The co-defendant's actions were deliberate and planned, supporting intentional murder. *See People v Sanchez*, 98 NY2d 373. The prosecution failed to show that the defendant's acts met the test for depraved indifference murder, *ie* that they were "imminently dangerous and presented a very high risk of death to others." *People v Register*, 60 NY2d 270, 274 (1983). There was "no valid line of reasoning that could support a jury's conclusion that defendant possessed the mental culpability required for depraved indifference murder. The 'heightened recklessness' required for depraved indifference murder was simply not present." However, the Appellate Division wrongly required as to the conspiracy count that there be evidence of a class A felony. That court must "consider whether the evidence supports the jury's conclusion that defendant conspired to

NY Court of Appeals *continued*

commit conduct constituting a class B felony.” Order modified, Matter remitted.

Concurring: [Rosenblatt, JJ] Intentional killing cannot support a depraved indifference state of mind. *People v Sanchez*, 98 NY2d 373. The element of depraved indifference, as opposed to recklessness, was not established.

Concurring and Dissenting: [Read, JJ] The defendant’s reckless conduct supported a depraved indifference murder verdict under an accomplice liability theory. Penal Law 20.00; *People v Poplis*, 30 NY2d 85, 87.

Evidence (Sufficiency) EVI; 155(130)

People v Hart, No. 125 SSM 8, 6/10/2003

Holding: The Appellate Division properly found that, viewing the record in a light most favorable to the prosecution, the evidence at the defendant’s first trial for grand larceny by false pretenses was legally insufficient to prove beyond a reasonable doubt that he made a false material statement about a past or presently existing fact. Penal Law 155.05(2)(a); *People v Norman*, 85 NY2d 609, 619. The prosecution, which appealed the Appellate Division’s order, did not challenge that court’s power to review the sufficiency of evidence at a first trial during the appeal from conviction following a second trial. Judgment affirmed.

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

People v Grice, No. 88, 6/26/2003

Police arrested the defendant for involvement in a shooting. At the stationhouse, the defendant signed an acknowledgement waiving his *Miranda* rights. Then his father arrived and advised police not to question the defendant because an attorney was en route. Before the attorney made contact or arrived, the defendant admitted being a lookout and hiding the gun for the shooter. His attorney telephoned the lead detective to ask that the interrogation be stopped after the admissions had already been made. The defendant’s suppression motion was denied, and his conviction was affirmed on appeal.

Holding: The defendant’s indelible right to counsel (NY Const, art I, § 6; *People v Bing*, 76 NY2d 331, 338-339) did not attach until his attorney (*See People v West*, 81 NY2d 370, 374) or a professional associate of the attorney notified police that he was represented by counsel. *See People v Ressler*, 17 NY2d 174, 178. Representations by the defendant’s father or any third party were insufficient to require the police to cease interrogation. The formality or nature of the relationship between attorney and defendant was less important than direct contact between counsel, or an associate, and the police. *People v Arthur*, 22 NY2d 325 (1968). Judgment affirmed.

First Department

Guilty Pleas (General) (Vacatur) GYP; 181(25) (55)

People v Pichardo, 298 AD2d 101, 748 NYS2d 545 (1st Dept 2002)

The defendant was sentenced in New York County to a term of imprisonment before pleading guilty in a Bronx case. At his plea hearing for the Bronx case, he was promised that the sentence imposed would run concurrent to any sentence he was serving on his New York County conviction. After receiving sentence in the Bronx case, the defendant was acquitted of the New York County conviction. The court granted the defendant’s motion to vacate his Bronx plea on the ground that it was induced by a promise that sentence would run concurrent with the New York County sentence.

Holding: The defendant’s motion to vacate the guilty plea should not have been granted, because the two convictions were “not so inextricably intertwined as to require vacatur.” In the totality of circumstances: the two indictments were unrelated, were not consolidated, were filed in different counties, and were before different judges. This is not a case where a guilty plea induced by a promise of a concurrent sentence should be vacated. *See People v Taylor*, 80 NY2d 1, *rev’d* 174 AD2d 430. Order reversed. (Supreme Ct, Bronx Co [Straus, JJ])

Appeals and Writs (General) APP; 25(35)

Counsel (General) COU; 95(22.5)

Discrimination (Gender) DCM; 110.5(30)

People v Garcia, 298 AD2d 107, 747 NYS2d 374 (1st Dept 2002)

During jury selection, defense counsel peremptorily challenged several female panelists and defended these challenges during a *Batson* inquiry. The defendant was convicted and on appeal argues for reversal based on the defense attorney’s gender-based discrimination at jury selection.

Holding: The general rule that all of a defense attorney’s decisions are binding upon his or her client applies here, as none of the exceptions are present. *See People v Catten*, 69 NY2d 546, 556. The defendant failed to show how he was adversely affected by a ruling in his favor obtained by his counsel. *See CPL 470.15(1)*. Interest of justice review is not warranted because a defendant who seeks reversal on the opposite basis of an argument he insisted (through counsel) that the trial court adopt should not be rewarded for encouraging the court to decide wrongly in his favor. *See People v Aezah*, 191 AD2d 312 *lv den*, 81 NY2d 1010. Finally, the defendant is not the proper party for asserting the right to serve on a jury on behalf of the challenged panelists. *Cf Powers v Ohio*, 499

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US 400, 413-414 (1991). Judgment affirmed. (Supreme Ct, Bronx Co [Straus, JJ])

Guilty Pleas (General) GYP; 181(25)

Sentencing (Appellate Review) SEN; 345(8) (10) (70.5)
(Concurrent/Consecutive)
(Resentencing)

**Re Application of Murray v Goord, 298 AD2d 94,
747 NYS2d 492 (1st Dept 2002)**

In 1996, the defendant was sentenced to two concurrent indeterminate terms of imprisonment on a pair of drug charges. The next year, he was convicted of manslaughter and sentenced to a prison term to be served consecutively with his previous ones. On appeal, the drug convictions were reversed. The defendant pled guilty to the drug charges in exchange for a prison sentence to run concurrently with the manslaughter sentence. The Department of Correctional Services (DOCS) said that his sentences would run consecutively. He commenced an article 78 proceeding; the court directed DOCS to recalculate the sentences to run concurrently.

Holding: DOCS did not have the discretion to ignore the terms of the order of commitment. Such an order “is binding on all persons subject to its mandate until vacated or set aside on appeal.” *Hughes v Cuming*, 165 NY 91. The most recent order of commitment issued by the court superceded any prior order. DOCS had no statutory basis to contest the terms of the defendant’s incarceration. See CPL 450.20(4), 450.30(2)(3) (limiting appeal of a sentence to the defendant and prosecutor). The court has discretion to impose either consecutive or concurrent sentences. See Penal Law 70.25(1). The original sentencing court’s imposition of a consecutive sentence for the manslaughter is not law of the case. When the original judgment in the drug case was reversed, the imposed sentence was vacated as well (see CPL 1.20[15]), making the consecutive sentence for manslaughter no longer viable as it relied on the drug charge as a predicate. Judgment affirmed. (Supreme Ct, Bronx Co [Ruiz, JJ])

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Informants)]) (Stop and Frisk) SEA; 335(10[g(iii)])(75)

**People v Rangel, 298 AD2d 139, 748 NYS2d 354
(1st Dept 2002)**

The police received two successive radio calls precipitated by a pair of anonymous 911 calls from a single anonymous individual. Both calls described in detail an individual resembling the defendant at a specific location.

The second call indicated that the person was carrying a gun and heroin. The police spotted the defendant and ordered him to put his hands in the air. He allegedly “started making like shuffling moves.” The officers frisked him and found heroin. His motion to suppress the heroin was denied.

Holding: The anonymous tip received by the police that the described individual was carrying a gun and heroin, without more, is insufficient to justify a stop and frisk. See *Florida v J.L.*, 529 US 266 (2000). Reasonable suspicion requires that an anonymous tip “be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” Suppression of the seized heroin is mandated as the anonymous tip fails to meet this requirement. See *People v William II*, 98 NY2d 93. Judgment reversed, indictment dismissed. (Supreme Ct, New York Co [Atlas, JJ])

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

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

**People v Bartley, 298 AD2d 160, 748 NYS2d 18
(1st Dept 2002)**

The court granted the defendant’s CPL 330.30(1) motion to set aside the verdict on grounds of ineffective assistance of counsel.

Holding: The record in this case permits review of the ineffective assistance of counsel claim. *People v Brown*, 45 NY2d 852. Many of counsel’s strategies were unsupportable, lacking either “strategic or other legitimate explanations.” See *People v Rivera*, 71 NY2d 705, 709. He failed to call the defendant’s dentist (after announcing intention to do so) or otherwise elicit testimony about the defendant’s missing front teeth, in a case where identification was contested and the complainant never mentioned missing teeth when providing a description. The prosecution’s contention that the court improperly entertained the defendant’s motion because it concerned matters outside of the record was unpreserved as it was not raised in response to the defendant’s motion. While it was raised in the prosecution’s motion to reargue, the contents of that motion are not appealable as it was denied. See *People v Auslander*, 169 AD2d 853. Arguments raised for the first time therein are unpreserved. *Shoulders v Brown*, 224 AD2d 960. Order affirmed, appeal from denial of motion to reargue dismissed. (Supreme Ct, New York Co [Solomon, JJ])

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

Prior Convictions (Right to Challenge Generally) (Sentencing) PRC; 295(21) (25)

First Department *continued*

People v Stevens, 298 AD2d 267, 748 NYS2d 589 (1st Dept 2002)

Before pleading guilty, the defendant was informed by the judge, “once we go forward, there will be no turning back. If you’re convicted after trial, given the circumstances of this case under which you were apprehended and the nature of your record, 25 to life, that’s what you’re going to get.” At sentencing, the court summarily dismissed the defendant’s challenge to his prior convictions being used to impose predicate status.

Holding: The judge’s pre-plea statement that upon a conviction at trial the maximum sentence would be imposed was “the type of outright coercion that has repeatedly been held to be impermissible.” See *People v Ali*, 277 AD2d 138, *rev’d on other grounds* 96 NY2d 840. It was error not to allow the defendant to withdraw his plea. The court failed to comply with the statutorily mandated procedures for adjudicating the defendant a predicate felon. The court summarily dismissed the defendant’s constitutional challenges to his prior convictions without giving him an opportunity to be heard and erroneously informed the defendant that the proper forum for such challenges was the appellate court. The defendant’s efforts to challenge the priors were effectively frustrated by his legal advisor who, in open court, expressed a view on the constitutionality of his prior convictions contrary to the defendant’s. See *People v Rozzell*, 20 NY2d 712. Judgment reversed, matter remanded. (Supreme Ct, New York Co [Torres, JJ])

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

Evidence (Weight) EVI; 155(135)

People v Roberts, 298 AD2d 295, 749 NYS2d 14 (1st Dept 2002)

At a suppression hearing, a detective testified that an individual arrested, brought to the station and *Mirandized* at 1:45 p.m. subsequently gave a statement implicating the defendant. The detective said that after he transcribed the individual’s statement and had him read and sign it, the detective left the station and arrested the defendant “after 2:00 p.m.” The defense introduced an on-line booking sheet indicating that the defendant was arrested at 1:30 p.m. In response, the detective testified that the time recorded was a mistake. Crediting the time on the booking sheet rather than the detective’s testimony, the court concluded that the detective had “tailored” his testimony to make the arrest constitutional. The court held that the police lacked probable cause to arrest the defendant, so all statements he made after his arrest were inadmissible. See *People v DeBour*, 40 NY2d 210.

Holding: The court’s “wholesale rejection of the detective’s testimony is not supported by the record.” Its findings of fact may be rejected since the court placed undue weight on the booking sheet and too little weight on the testimony. See *eg People v Tempton*, 192 AD2d 369, 371 *lv den*, 82 NY2d 760. “[T]he detective’s testimony provides the only reasonable explanation of how defendant came to be arrested. Before the detective obtained [the arrested individual’s] statement, he had no reason to believe that defendant was implicated.” The detective did not arrest the defendant when the defendant was originally stopped, then released after the complainant could not identify him. The defense offered no evidence to dispute the detective’s testimony that he arrested the defendant sometime after 2 pm and that the booking sheet was mistaken. Order reversed, motion denied, matter remitted. (Supreme Ct, Bronx Co [Hunter, Jr., JJ])

Forensics (General) FRN; 173(10)

Retroactivity (General) RTR; 329(10)

Kellogg v Travis, 298 AD2d 323, 750 NYS2d 12 (1st Dept 2002)

Holding: The DNA Databank Law (Executive Law 995-§995[f], as amended [L 1999, ch 560 § 1 and §9]) required the defendant, by reason of his conviction of two violent felonies and his subsequent length of imprisonment, to submit a DNA sample to the state DNA Databank. Although his convictions occurred before the law was passed, the statute does not constitute after-the-fact imposition of additional punishment for those convictions and therefore does not violate the *ex post facto* clause of the constitution. See *Collins v Youngblood*, 497 US 37, 42-43 (1990). The requirement that the defendant submit to DNA testing does not constitute punishment, as it is effected by a law “whose overall intent is manifestly nonpunitive.” See *Rise v State of Oregon*, 59 F3d 1556, 1562 *cert den* 517 US 1160. The court granted the defendants’ motion to dismiss; the order should also have declared that the state DNA Databank, as challenged, is constitutional. Order affirmed as modified. (Supreme Ct, New York Co [Braun, JJ])

Misconduct (Judicial) MIS; 250(10)

Matter of Collazo, 299 AD2d 96, 750 NYS2d 263 (1st Dept 2002)

On a petition by the Departmental Disciplinary Committee, the respondent was found guilty, pursuant to 22 NYCRR 603.4(d), Judiciary Law 90(2), and the doctrine of collateral estoppel, of professional misconduct; the hearing panel recommended two years suspension. The State Commission on Judicial Conduct had earlier found that the respondent, a civil court judge, made inappropriate comments about a female intern in the workplace and

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subsequently engaged in deceptive behavior concerning those comments.

Holding: The hearing panel's findings of fact and conclusions of law are confirmed. A sanction of public censure rather than the recommended suspension is appropriate, considering the mitigating factors offered by the respondent. His prior reputation was unblemished, he assisted members of his community for no financial gain, and in the seven years since this misconduct took place, the respondent did nothing improper. The removal of the respondent from the bench was significant punishment for his misconduct. *See Matter of Intemann*, 65 AD2d 974. Judgment affirmed as to findings of fact and conclusions of law, sanction modified.

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**
People v Antwine, 299 AD2d 151, 753 NYS2d 355 (1st Dept 2002)

After receiving the defendant's guilty plea to a violation of probation the court revoked his probation sentence and resented him to a term of one year imprisonment.

Holding: "Defendant's probation period was completed before the declaration of delinquency was filed, thus rendering that declaration void. Under the Penal Law, Supreme Court was limited to imposing a term of imprisonment, which combined with probation, would not total more than five years." *See Penal Law 60.01(2)(d), 65.00(3)(a)(i), People v Ladd*, 224 AD2d 881, 883 *aff'd* 89 NY2d 893. The plea and sentence for the parole violation must be vacated and the declaration of delinquency dismissed. Judgment of resentence reversed. (Supreme Ct, Bronx Co [Straus, JJ])

Evidence (Hearsay) **EVI; 155(75)**
Harmless and Reversible Error (Harmless Error) **HRE; 183.5(10)**
People v Perez, 299 AD2d 197, 749 NYS2d 134 (1st Dept 2002)

The defendant was convicted at a nonjury trial.

Holding: The court erred in redacting as hearsay the exculpatory portion of the defendant's videotaped statement while admitting the inculpatory segment. *See People v Dlugash*, 41 NY2d 725, 736. The redacted section should have been admitted to complete and explain the defendant's narrative. However, in the context of other evidence, the redacted segment was not especially probative and was cumulative to similar, admitted evidence. There was no significant probability that the fact finder would have reached a different verdict had it been admitted. The

error was harmless. *See People v Crimmins*, 36 NY2d 230. Judgment affirmed. (Supreme Ct, Bronx Co [Mogulescu, JJ])

Police (Misconduct)
POL; 287(30)(32)
Re Application of Grossman v Kerik, 299 AD2d 207, 749 NYS2d 532 (1st Dept 2002)

The petitioner police officer was suspended for thirty days without pay for using excessive force in making an arrest.

Holding: Due to the substantial evidence supporting the excessive force charge, there is no basis for disturbing the Administrative Law Judge's determinations. *See Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444. The petitioner's argument that an alleged juvenile delinquency adjudication against one of the complainants should be given preclusive effect on the issue of the petitioner's probable cause to arrest is not supported by record evidence. Summation comments by the petitioner's counsel are no substitute for such evidence. *See People v Roche*, 98 NY2d 70, 78. The petitioner has not made a sufficient showing that a Family Court adjudication such as the alleged delinquency finding should be given collateral estoppel effect in a police disciplinary proceeding. *See Matter of Juan C. v Cortines*, 89 NY2d 659. Regardless of the legality of the arrest, it was proper to find that the petitioner's act of "repeatedly slamming a 15-year-old's head into a wall" constituted excessive force. The imposed penalty is not shocking to the sense of fairness. *See Matter of Pell v Board of Educ.*, 34 NY2d 222, 223. Determination confirmed, petition denied. (Supreme Ct, New York Co [Madden, JJ])

Search And Seizure (Arrest/ Scene of the Crime Searches [Probable Cause {Informants}])
SEA; 335(10[g]{iii})
People v Braun, 299 AD2d 246, 750 NYS2d 58 (1st Dept 2002)

The police received an anonymous 911 call reporting the burglary of a store. The caller said she had spoken to the burglar and provided a description. Fitting the description, the defendant was stopped and the bag he was carrying was searched revealing several items all in their original packaging. The defendant was charged and his motion to suppress the evidence found in his bag was denied.

Holding: It is uncontroverted that aside from the information in the anonymous tip, the officers lacked reasonable suspicion to stop the defendant. *See People v DeBour*, 40 NY2d 210. Since this information was not "corroborated so as to render it 'reliable in its assertion of illegality'", its mere "'tendency to identify'" the defendant does not create reasonable suspicion sufficient to justify the stop. *People v William "II,"* 98 NY2d 93, 99, quoting *Florida v J.L.*, 529 US 266, 272 (2000). An anonymous tip-

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ster’s allegations of criminality must be corroborated by” the officers’ direct observation either of movements predicted by the tipster, or of conduct or other circumstances suggestive of criminal activity.” Judgment reversed, motion to suppress granted, indictment dismissed. (Supreme Ct, New York Co [Solomon, JJ])

Motions (General) MOT; 255(17)

Speedy Trial (Waiver) SPX; 355(50)

People v Reed, 299 AD2d 290, 750 NYS2d 71 (1st Dept 2002)

The defendant made a speedy trial motion to dismiss. Before jury selection, the defendant told the court that his motion had not been decided and expressly reserved his rights in that regard. The court noted this and said no more. The trial commenced and the defendant was convicted.

Holding: The defendant is entitled to a determination of his speedy trial motion. *See People v Samuels*, 133 AD2d 588. The motion was not abandoned; having brought the lack of a decision to the court’s attention before jury selection, the defendant was not obligated to repeat the protest in order to preserve the issue for review. *See People v Mezon*, 80 NY2d 155, 161. Since the defendant’s appeal is regarding a failure to rule, as opposed to a failure to rule correctly, his failure to produce any minutes relevant to the speedy trial issue is not fatal. If the defendant’s and prosecution’s original motion papers remain missing, the speedy trial motion should proceed on reconstructed papers. Appeal held in abeyance, matter remanded. (Supreme Ct, Bronx Co [Silverman, JJ])

Confessions (Counsel) (Miranda Advice) (Voluntariness) CNF; 70(23) (45) (50)

Counsel (Competence/Effective Assistance/Adequacy) (Right to Counsel) (Waiver) COU; 95(15) (30) (40)

People v Anonymous, 299 AD2d 296, 750 NYS2d 600 (1st Dept 2002)

While in custody and represented by counsel on unrelated charges, the defendant initiated contact with the police and prosecutor offering information regarding a murder, in hope of obtaining leniency on his pending charges. After consulting with his attorney, and being *Mirandized*, the defendant made statements implicating himself in the murder, for which he was then charged and convicted.

Holding: The defendant’s waiver of the right to remain silent and the right to counsel, effected separately by the defendant and his attorney, was knowing, voluntary and intelligent; he had discussed the waiver with his

attorney in several face-to-face meetings. *See People v Yut Wai Tom*, 53 NY2d 44, 53-54. The record does not support the defendant’s claim that he was misled by the prosecutor or his attorney as to whether his statements could be used against him, or that the prosecutor ignored misunderstandings. If counsel erred in permitting the defendant to speak alone with the prosecutor without immunity, no ineffective assistance claim is raised, since the disputed questioning took place during the preaccusatory, investigative stage where the right to meaningful legal representation had not attached. *See People v Claudio*, 83 NY2d 76, 78-80. The court order that brought the defendant from his holding cell to the prosecutor’s office did not constitute a commencement of formal adversarial judicial proceedings because the defendant sought the meeting. *See People v Sugden*, 35 NY2d 453, 461. Judgment affirmed. (Supreme Ct, New York Co [White, JJ])

Accomplices (Corroboration) ACC; 10(20)

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

Perjury (Evidence) PER; 280(15)

People v McAndris, 300 AD2d 1, 751 NYS2d 10 (1st Dept 2002)

Holding: The evidence supporting the defendant’s perjury conviction was legally insufficient since it established that although he signed affidavits before notaries, the notaries failed to administer any oath to the defendant. *See O’Reilly v People*, 86 NY 154. The evidence for the remaining charges was sufficient. Affidavits the defendant had filed in court that misrepresented the actual financial status of the firm for which he was the chief financial officer and the testimony of seventeen defrauded customers properly corroborated the accomplice testimony. *See People v Besser*, 96 NY2d 136. The corroborative proof was not rendered incompetent merely because an innocent interpretation was possible. *See People v Morhouse*, 21 NY2d 66, 74.

The remaining charges stand. The defendant failed to show that the prosecution’s late disclosure of *Rosario* material contributed to the result of the trial. CPL 240.75. The defendant was not prejudiced by the belated disclosures because each witness was available for further cross-examination. *See People v Martinez*, 71 NY2d 937. Denial of a mistrial was a proper exercise of the court’s discretion. A missing witness charge with respect to the president of the defendant’s firm who was also a participant in the criminal activity was also properly denied as untimely (*see People v Ramirez*, 221 AD2d 178 *lv den* 87 NY2d 1023) and on the merits, since there was a reasonable explanation for the decision not to call him. *See People v Rodriquez*, 38 NY2d 95, 101. He asserted his 5th Amendment privilege when the defendant called him. Judgment modified. (Supreme Ct, New York Co [McLaughlin, JJ])

First Department *continued***Defenses (Entrapment)** DEF; 105(30)**Instructions To Jury (General)** ISJ; 205(35)**People v Missrie, 300 AD2d 35, 751 NYS2d 16**
(1st Dept 2002)

At trial, the defendant entered an entrapment defense, raising the question whether the defendant was predisposed or was induced to attempt to kidnap the victim. See *People v McGee*, 49 NY2d 48, 61 *cert den* 446 US 942. The court instructed the jury that “the purpose of the defense of entrapment is to prevent a conviction of persons who although not criminals or predisposed to become criminals, nevertheless commit a crime because induced or encouraged to do so . . .” Counsel objected that “it suggests that someone who is a criminal is not entitled to an entrapment defense” and this prejudiced the defendant who has a criminal record.

Holding: Inclusion of the “although not criminals” phrase left the jury with the erroneous impression that the entrapment defense is not available to the defendant. See *People v Byrd*, 155 AD2d 350, 351. The phrase was deleted from the CJI charge in 1991. There was conflicting testimony as to whether or not the police informant did anything to induce or encourage the defendant. Resolution of the credibility issue in the defendant’s favor would have resulted in his acquittal based on the advanced defense. However, the jury was led to believe the entrapment defense was unavailable to the defendant. The error was not harmless. See *People v Crimmins*, 36 NY2d 230. Judgment reversed, remanded for a new trial. (Supreme Ct, New York Co [Yates, JJ])

Trial (Public Trial) TRI; 375(50)**People v Sanabria, 301 AD2d 307, 750 NYS2d 604**
(1st Dept 2002)

Holding: At trial, the prosecution called an undercover police officer as a witness and requested that the court close the courtroom. The defendant’s objection to closure and request for a *Hinton* hearing (*People v Hinton*, 31 NY2d 71 *cert den* 410 US 911) preserved for review the issue of whether the public could be excluded. At the hearing, the undercover said that he expected to return to the vicinity of the crime to participate in future undercover operations and expressed concern that individuals from that neighborhood might enter the courtroom and later recognize him on the street. The court proposed that a court officer be stationed at the door to ask those seeking entry where they resided. If an individual were from the area in question, the proceedings would be interrupted to discuss the matter. The defendant agreed to this arrangement. No one

other than attorneys entered or sought to enter the court. The potential risk to the officer justified the decision to restrict courtroom access, overriding the defendant’s right to a public trial. See *People v Jones*, 96 NY2d 213, 219, citing *Waller v Georgia*, 467 US 39, 48 (1984). Posting a court officer at the door to ask where entrants reside is a narrowly tailored measure in time and in locale for accomplishing its purpose and was no broader than necessary to protect the safety of the witness. Having failed to object to the court’s proposal or to suggest an alternative after the need to employ some means of protecting the officer was established, the defendant may not assign error to the procedure implemented. *People v Gray*, 86 NY2d 10, 20-21. Judgment affirmed. (Supreme Ct, Bronx Co [Benitez, JJ])

Article 78 Proceedings (General) ART; 41(10)**Freedom Of Information (General)** FOI; 177(20)**Re Application of Capruso v New York State Police,**
300 AD2d 27, 751 NYS2d 179 (1st Dept 2002)

The petitioner’s freedom of information law request for the State and City of New York to turn over copies of the operator’s manual for any radar devices used by police within the past two years was granted.

Holding: An *in camera* inspection failed to show that the requested information (manuals containing primarily technical specifications, operational instructions, and legal advice on ensuring successful prosecution of speeders) could be used by motorists to evade detection by police officers. See *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571-572. “Rather than do the geometry necessary to make the change in driving path necessary to evade detection, it is much more likely that a speeder, upon realizing the possibility of tracking radar, would simply apply his or her brakes, as respondents say they presently routinely do.” The numerous brands of radar and different frequencies employed would require a speeder to know which devices would be used on which roadway on a particular day to successfully exploit the information requested. There is no expectation of secrecy concerning the requested manuals, which accompany devices that are in public commerce. However, the State is not a “body or officer” against whom an article 78 proceeding may be brought and the proceeding is dismissed as to it. See CPLR 7802(a); *Ferrick v State of New York*, 198 AD2d 822, 823. Judgment affirmed as modified. (Supreme Ct, New York Co [Madden, JJ])

Counsel (Choice of Counsel) COU; 95(9.5) (10)
(Conflict of Interest)**Guilty Pleas (Vacatur)** GYP; 181(55)**People v Ulloa, 300 AD2d 60, 751 NYS2d 26**
(1st Dept 2002)

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The defendant, represented by assigned counsel, entered into a plea agreement conditioned on the defendant returning to court on the scheduled sentencing date. After failing to appear, the defendant was returned on a bench warrant two years later. Newly retained counsel appeared at the rescheduled sentencing proceeding. The court declined to accept retained counsel's notice of appearance unless the defendant was prepared to be sentenced. The retained attorney informed the court that he intended to move to vacate the plea because assigned counsel had pressured the defendant into the plea. Seeing no basis to vacate, and noting that the defendant had counsel, the court adjourned the case so that the assigned counsel could appear for sentencing, but refused to adjourn so the newly retained counsel could become familiar with the matter.

Holding: The adjournment to accommodate the newly retained counsel's representation should have been granted. The defendant's argument that prior counsel had coerced him into accepting the plea potentially placed the assigned lawyer in conflict with the defendant. *See People v Cruz*, 244 AD2d 564. Whatever the merits of this argument, request for new counsel in connection with vacatur was not frivolous. The court denied the defendant the opportunity to move to vacate his plea while represented by counsel of his choice, a fundamental right that narrows discretionary judicial power. *See People v Spears*, 64 NY2d 698. Judgment modified, matter remitted for resentencing. (Supreme Ct, New York Co [Shea, JJ])

Article 78 Proceedings (General)	ART; 41(10)
Counsel (Right to Counsel)	COU; 95(30)
Due Process (Miscellaneous Procedures)	DUP; 135(10)
Housing (General)	HOS; 186(15)

Re Application of Padilla v Martinez, 300 AD2d 96, 752 NYS2d 28 (1st Dept 2002)

At a Housing Authority hearing where the petitioner was unrepresented, it was determined that the petitioner had assaulted a staff member, and eviction was ordered. An article 78 proceeding followed.

Holding: "Despite petitioner's inappropriate and bizarre behavior during the hearing, the Housing Authority's apparent knowledge that petitioner had been treated by a psychiatrist, petitioner's testimony regarding her treatment by a psychiatrist, and the hearing officer's comments to the effect that petitioner needed psychiatric help," the authority violated its policy to give tenants "adequate procedural safeguards and reasonable accommodation of their mental disabilities." *See Blatch v Franco*,

1998 US Dist LEXIS 7717. According to policy, a removal hearing is not to occur until such a tenant has been found ineligible for protective services or has been appointed a guardian and/or a representative. While power under article 78 to overturn an agency's determination is limited, there is an obligation to insure that administrative proceedings comport with basic tenets of due process. *See People v David W.*, 95 NY2d 130, 139-140. This proceeding was manifestly unfair. *See Matter of Sowa v Looney*, 23 NY2d 329, 335. Determination annulled, matter remanded.

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

People v Lozado, 300 AD2d 147, 751 NYS2d 728 (1st Dept 2002)

Holding: "Defendant's absence from an off-the-record conference of which the subject was the scope and substance of a witness's identification testimony, i.e., a material stage of the trial at which defendant's presence would have had a substantial effect on his ability to defend against the charges, requires reversal of his conviction (*People v Casiano*, 294 AD2d 277 [reversing conviction of codefendant on grounds of his absence from same conference], *lv denied* __ NY2d __ [October 30, 2002])." Judgment reversed. (Supreme Ct, Bronx Co [Bamberger, JJ])

Aliens (Deportation) (General) ALE; 21(10) (30)

Guilty Pleas (Vacatur) GYP; 181(55)

People v Huang, 302 AD2d 90, 752 NYS2d 305 (1st Dept 2002)

The defendant made it clear that he would not enter into a plea if an INS immigration detainer were lodged against him. The prosecution informed defense counsel that no such detainer had been lodged. The defendant pled and the court pronounced sentence. While processing the defendant's release papers, it was learned that a detainer had been lodged. Since the sentence had not yet been incorporated into the judgment of conviction, the court granted the defendant's motion to vacate the plea pursuant to CPL 220.60.

Holding: The statute only permits the defendant to vacate his plea "prior to the imposition of sentence." It does not mention incorporating the sentence into the judgment. While there was a misrepresentation to the defendant by his counsel concerning the existence of an INS detainer, it was immaterial because the defendant was subject to the detainer whether he had entered into the plea or not. There is no precedent to support vacating a plea where its entry had absolutely no effect on the defendant's immigration status. *Cf United States v Khalaf*, 116 FSupp2d 210, 215-216 (D Mass). The disadvantages of detention in challenging deportation do not constitute the requisite prejudice required before a deficiency in the per-

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formance of counsel warrants 6th Amendment relief. See *Strickland v Washington*, 466 US 668, 687. Order reversed, motion denied. (Supreme Ct, New York Co [Yates, JJ])

Dissent: (Rosenberger, J) The court had discretion to permit the defendant to withdraw his plea. See CPL 220.60 [3]; *People v Walker*, 266 AD2d 727 *lv den* 96 NY2d 909.

Misconduct (General)

MIS; 250(7)

Matter of Singer, 302 AD2d 179, 752 NYS2d 655 (1st Dept 2002)

The respondent was suspended from the practice of law for one year by the Committee on Grievances of the Southern District of New York for accepting a fee totaling \$10,000 from a client he had been appointed to represent at public expense in federal court. The Departmental Disciplinary Committee sought his suspension from state practice.

Holding: As this is a proceeding under the doctrine of reciprocal discipline, the respondent was limited to arguing a lack of due process or an infirmity of proof in the federal proceeding, or that there is no reciprocal misconduct in this jurisdiction. See 22 NYCRR 603.3 (c). Reciprocal discipline is appropriate because the respondent admits the factual allegations and alleges none of the above defenses. See *Matter of Thomas*, 239 AD2d 27. Since the respondent is a solo practitioner, readily admits his wrongdoing and expresses sincere remorse, and in deference to the federal determination, a one-year suspension is appropriate. Because the respondent promptly notified the disciplinary committee of the federal suspension, and did not practice in New York during the suspension period, the suspension should be applied retroactively and should run concurrently with the federal suspension. See *Matter of Greenfield*, 211 AD2d 29.

Second Department**Juries and Jury Trials (Challenges) (Voir Dire)**

JRY; 225(10) (60)

People v Grant, 297 AD2d 687, 747 NYS2d 189 (2nd Dept 2002)

Holding: A prospective juror indicated during *voir dire* that he was adopting a young child who had been abused and that the juror might react to his child's history instead of judging this case on the merits. He did subsequently say he could be fair and base a decision only on the evidence and law. However, he never unequivocally stated that he would be able to ignore the concerns he expressed initially regarding his adoptive child's effect on

his thinking. The defense had to use a peremptory challenge to excuse this prospective juror because the court denied a challenge for cause. This was error. See *People v Johnson*, 94 NY2d 600. The defense exhausted its allotment of peremptories. The error cannot be considered harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosenzweig, JJ])

Juries and Jury Trials (Challenges) (Voir Dire)

JRY; 225(10) (60)

People v Rey, 297 AD2d 689, 747 NYS2d 253 (2nd Dept 2002)

Holding: A prospective juror seemed to indicate during *voir dire* that he could not fairly deliberate in this drug case because he had twice been the victim of violent crimes, including one in which he believed that those who held a gun to his head were on drugs. Saying that he would live with these experiences for the rest of his life, he said he would try but would find it very hard to separate his own experiences from the instant case. Defense counsel used a peremptory challenge to excuse this prospective juror when the court improperly denied a challenge for cause. Serious doubt having been raised about the prospective juror's ability to be impartial, the juror should have been excused if he failed to unequivocally state that he could be fair and impartial. See *People v Chambers*, 97 NY2d 417. The responses elicited by the court after interrupting the prosecutor's efforts to rehabilitate the prospective juror were insufficient. The defense used all its peremptory challenges. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Erlbaum, JJ])

Juries and Jury Trials (Discharge) (General)

JRY; 225(30) (37)

People v Francois, 297 AD2d 750, 748 NYS2d 384 (2nd Dept 2002)

Holding: Defense counsel asked that the jury be polled after it rendered a guilty verdict on all counts, including second-degree murder, multiple counts of first and second-degree robbery, and possession of a weapon. Juror number four said, when asked if that was his verdict, "[y]es, but not beyond a reasonable doubt." Outside the presence of the rest of the jury, he indicated that he had given in to the others, "could not 'reach a true and honest decision'" and could not resume deliberations. The court's subsequent acceptance of the verdict and discharge of the jury was error. Any uncertainties in a juror's polling response that engenders doubts about a full verdict must be resolved. This is the court's responsibility. See *People v Mercado*, 91 NY2d 960; Criminal Procedure Law 310.80. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Lewis, JJ])

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Guilty Pleas (General) GYP; 181(25)

People v Ortiz, 297 AD2d 758, 747 NYS2d 789 (2nd Dept 2002)

Holding: The parties and the court were apparently under the mistaken impression that attempted first-degree sale of drugs was an A-II felony, permitting a sentence of five years to life. *See* Penal Law 70.00(3)(a)(ii). However, such crime is an A-I felony. Penal Law 110.05(1); 220.43. The agree-upon sentence was illegally low. *See* Penal Law 70.00(3)(a)(i). With the consent of the prosecution, the conviction should be reduced to attempted second-degree sale “to effectuate the clear purpose and intent of the plea agreement (*see People v Carter*, 196 AD2d 633, 634. . .).” Order reversed, matter remitted for proceedings consistent herewith. (Supreme Ct, Kings Co [Feldman, JJ])

Juveniles (Delinquency—Procedural Law) (Disposition) JUV; 230(20) (40)

Matter of Kyle H, 297 AD2d 741, 747 NYS2d 797 (2nd Dept 2002)

Holding: The Family Court ordered a juvenile, the respondent, to be placed by the New York State Office of Children and Family Services (OCFS) in the Tryon Facility (a state facility) and provided with in-patient substance-abuse treatment and counseling. The order was phrased in terms of placement with a private agency under Family Court Act 353.3(4). The court’s decision expressed a preference for placement in a limited-secure state facility. The order is reversed to provide for placement under Family Court Act 353.3(3)(b). *Cf Matter of Quentin L.*, 231 AD2d 890. Ordering placement in a specific facility under that statute is error, as OCFS has the discretion to determine where to place a juvenile in its care. *See Matter of Kyle S.*, 64 AD2d 666.667. Under Executive Law 504, OCFS also has the discretion to determine the particular treatment program, based on its evaluation of the juvenile; directing placement in an in-patient substance-abuse program was error. Order reversed as appealed from, portions vacated, OCFS directed to place the respondent. (Family Ct, Suffolk Co [Freundlich, JJ])

Sentencing (Incarceration) (Pronouncement) SEN; 345(43) (70)

People v Marinaccio, 297 AD2d 754, 747 NYS2d 555 (2nd Dept 2002)

After being arrested in 1996 for DWI, the defendant was in custody for 294 days. He pled guilty to felony DWI

in 1997 and was sentenced to time served (*see* Penal Law 70.30[3]) concurrent with five years probation. After being arrested twice in 2000 for operating a vehicle under the influence of drugs or alcohol, he pled guilty and received concurrent prison sentences of one and a half to four and a half years. He also agreed to a consecutive term of one and a half to four and a half years for violating the 1997 probation. The court reduced that sentence to one and a third to four years.

Holding: The 1997 sentence was not illegal. Use of the colloquial phrase “time served” did not make his sentence one in excess of the statutorily-permitted six months of incarceration that may be combined with five years probation under Penal Law 60.01(2)(d) and 65.00(3)(a)(i). While the court should have expressly imposed a sentence of six months in jail, satisfied by the jail time pending conviction, that is the sentence that was effectively imposed. Amended judgment and sentences affirmed. (County Ct, Nassau Co [Cotter, JJ])

Instruction to Jury (Witnesses) ISJ; 205(55)

Lesser and Included Offenses (General) LOF; 240(7)

People v Johnson, 297 AD2d 822, 748 NYS2d 55 (2nd Dept 2002)

Holding: The defendant failed to sustain his initial burden of showing that the prosecution “failed to call a witness who could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable to the” prosecution. *See People v Macana*, 84 NY2d 173, 177. There was no showing that the witness was knowledgeable about the charged drug transaction and would naturally be expected to testify favorably to the prosecution. The conviction for seventh-degree possession of drugs must be vacated as it is a lesser-included offense of third-degree possession. *People v Biggs*, 280 AD2d 484. The defendant failed to move to dismiss the third-degree possession charge as a noninclusory concurrent count of the charge of criminal sale in or near school grounds, so it is unpreserved for review. *See People v Rodriguez*, 126 AD2d 681. It is also without merit. *See People v Reed*, 222 AD2d 459. Judgment modified, seventh-degree possession conviction vacated and dismissed. (Supreme Ct, Queens Co [Latella, JJ])

Identification (Lineups) (Photographs) IDE; 190(30) (35)

People v Bacenet, 297 AD2d 817, 748 NYS2d 28 (2nd Dept 2002)

The defendant was convicted of second-degree robbery after a joint trial with a co-defendant who presented alibi testimony and was acquitted.

Holding: Fifteen days after the incident, the complainant identified photographs of the defendant and co-

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defendant from a series of computer-generated arrays. In subsequent, separate line-ups she identified each of them. When she identified a photo of the defendant taken two days after the robbery, she commented that his appearance had changed. He had a mustache and goatee in the photograph; the person identified as the defendant had been described as clean shaven. At trial, she repeated that her assailant was clean shaven. There was no other evidence connecting the defendant to the crime, so the issue at trial was the accuracy of the eyewitness testimony. The prosecutor's elicitation of police testimony that the complainant had been asked if she recognized anyone in the lineup, that she answered without hesitation, and that an officer then completed processing of the defendant's arrest was error. This testimony implicitly bolstered that of the complainant. *People v Veal*, 158 AD2d 633, 634. Compounding the error was the detective's testimony that the photograph selected was an arrest photograph. See *People v Cuiman*, 229 AD2d 280, 282. The identification evidence was not so strong that it rendered identification no serious issue. *People v Caserta*, 19 NY2d 18, 21. The court failed to sufficiently guide the jury as to evaluating identification evidence; a more detailed charge should be given. *People v Daniels*, 88 AD2d 392. Judgment reversed. (Supreme Ct, Queens Co [McGann, JJ])

Defenses (Justification) DEF; 105(37)

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

People v Pritchett, 298 AD2d 411, 751 NYS2d 250 (2nd Dept 2002)

Police testified at trial that they had been allowed into the defendant's home by his girlfriend and found someone hidden in a closet who refused to come out when ordered. That person (the defendant) fired a gun when they tried to pull him out, and a gunfight ensued in which the defendant and both officers were injured. The defendant testified that when he was in the bedroom getting dressed, the door opened and shots were fired that caused him to lose consciousness. When he came to, he heard his girlfriend arguing with police. He retreated to the closet and used a prior tenant's gun to fire at police when they entered because he believed they were trying to kill him.

Holding: The trial court erred in refusing to instruct on the defense of justification as to the four counts of first-degree attempted murder. Viewing the record in the light most favorable to the defense, it cannot be said that no reasonable view of the evidence would support a jury finding of justification. See *People v Deis*, 97 NY2d 717. The failure to so instruct did not affect the criminal possession

of a weapon charge. See *People v Pons*, 68 NY2d 264, 267-268. Judgment modified, attempted murder convictions vacated, matter remitted for new trial on those counts. (Supreme Ct, Queens Co [Finnegan, JJ])

Family Court (General) (Violation of Family Court Orders) FAM; 164(20) (60)

Harassment (Evidence) HRS; 184(15)

Matter of Cavanaugh v Madden, 298 AD2d 390, 751 NYS2d 225 (2nd Dept 2002)

After a hearing, Family Court found that the appellant father had committed an offense that would constitute second-degree harassment and granted an order of protection against him, in favor of his eldest son.

Holding: The petitioner had the burden of proving by a fair preponderance of the evidence that (*inter alia*) the appellant had the "intent to harass, annoy or alarm another person" (see *People v Jemzura*, 29 NY2d 590; Penal Law 240.26[3]) in order to establish the family offense charged. See Family Court Act 812. The evidence showed that the appellant had a legitimate purpose for being at the property where his children and their mother lived, *ie* to pick up his younger children for court-authorized visitation. A 1999 order of protection that authorized "curbside pick up" had also authorized pickup "at the front door" as was done here; in any event, that order had expired at the time of this incident. As the appellant returned to his car from the front door, his eldest son approached with a baseball bat, cursed, threatened to call the police, and swung at the appellant. The appellant said that he grabbed the bat and wrestled it away, striking his son's head, and put the bat in the car. When the son then told some friends nearby, "Get him," the father took the bat and held it up to a boy who had approached him with a chain, took the chain, put it and the bat in the car and got in himself, whereupon the son spat at the car. This evidence did not establish intent to harass. The appellant did not initiate contact with the son and was leaving when the altercation occurred. Order reversed, petition dismissed. (Family Ct, Westchester Co [Klein, JJ])

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

People v Ng, 298 AD2d 470, 748 NYS2d 774 (2nd Dept 2002)

Holding: The court erred by denying unanimous challenges for cause made by the defendant and his three co-defendants to three prospective jurors who indicated that they might be unable to serve impartially. While the court tried to elicit assurances that the prospective jurors would obey the law, the court "never elicited assurances of impartiality" nor did it "address each prospective juror in a meaningful way to obtain individual assurances."

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The court’s efforts were not sufficient to establish individual impartiality. *See People v Bludson*, 97 NY2d 644, 646. Judgment reversed, new trial ordered.

Prisoners (Disciplinary Infractions and/or Proceedings) (Good Time) **PRS I; 300(13) (20)**

Matter of Bell v Goord, 298 AD2d 518, 748 NYS2d 514 (2nd Dept 2002)

Holding: There was no substantial evidence in the record of the Tier III disciplinary hearing to support a finding that the petitioner, a prisoner, knew about a demonstration and therefore no basis to infer that his refusal to comply with a direct order amounted to participation in a demonstration. There was substantial evidence to support the determination that the petitioner violated a direct order. *See Abdur-Raheem v Mann*, 85 NY2d 113. Relief is granted to the extent of annulling the finding of participation in a demonstration, dismissing that charge, which must be expunged from the petitioner’s institutional record, vacating the forfeiture of six months good-time credit, and remitting for a determination of how much, if any, good-time credit is to be forfeited for the remaining charge. *See Matter of Wells v Selsky*, 282 AD2d 799. Petition granted in part, matter remitted.

Contempt (Procedure) **CNT; 85(10)**

People v DeJesus, 298 AD2d 525, 748 NYS2d 660 (2nd Dept 2002)

The defendant was convicted by his guilty plea of second-degree murder and was summarily convicted of second-degree criminal contempt.

Holding: The defendant’s valid and unrestricted waiver of the right to appeal foreclosed appellate review of his sentence for excessiveness. *People v Kemp*, 94 NY2d 831. The court erred in summarily convicting him of criminal contempt (Penal Law 215.50) and imposing a consecutive 30-day sentence for that offense. No accusatory instrument was filed, as is required for second-degree criminal contempt. *Cf People v Leone*, 44 NY2d 315, 317. Judgment modified, contempt conviction vacated, and as modified, affirmed. (Supreme Ct, Kings Co [Firetog, JJ])

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

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

People v Radcliffe, 298 AD2d 533; 749 NYS2d 257 (2nd Dept 2002)

In moving to vacate his conviction, the defendant claimed that trial counsel failed to inform him of a pretrial offer if he would plead guilty. Affidavits from the defendant’s mother saying that counsel told her of this offer and from the defendant’s friend, saying he was present for that conversation, were submitted. The prosecution argued that the motion should be summarily denied because the defendant provided no affidavit from counsel and did explain why not. The court denied the motion without explanation.

Holding: The cases relied on by the prosecution do not support summary denial. In *People v Morales* (58 NY2d 1008), the defendant’s claim of intimidation and coercion by the court were not antagonistic to the attorney who represented him at that plea but from whom no affidavit was produced. Similarly, in *People v Scott* (10 NY2d 380), the *coram nobis* application was based not on trial counsel’s failure but on an alleged broken prosecutorial promise that had been communicated to the defendant by counsel. It would have been natural to provide an affidavit from the living and available attorney in that instance. Here, the defendant’s application is adverse and hostile to his former counsel. Requiring an affidavit from counsel, or an explanation of its absence, would be wasteful and unnecessary. *See People v Sherk*, 269 AD2d 755; *cf People v Gil*, 285 AD2d 7, 11-12. This court has not required affidavits of counsel in such instances. *See eg People v Park*, 211 AD2d 828. Order reversed, matter remitted for a hearing and new determination, including findings of fact, conclusions of law, and reasons. *See CPL 440.30(7)*. (County Ct, Westchester Co [Leavitt, JJ])

Auxiliary Services (Interpreters) **AUX; 54(30)**

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

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

People v Mendoza, 298 AD2d 532, 748 NYS2d 665 (2nd Dept 2002)

Holding: After the defendant was sentenced for murder and other charges, he sought to vacate the conviction due to ineffective assistance of counsel based on denial of two applications for a Spanish interpreter. The court denied the 440.10 motion because sufficient facts appeared on the record to allow review of the claim on direct appeal (*see CPL 440.10[2][b]*) and because the claim was without merit. The motion was not procedurally barred. While discussion of whether an interpreter was required does appear on the record, the defendant’s claim also involves affidavits and other matters *dehors* the record. *See People v Rivera*, 71 NY2d 705, 708. The court correctly concluded that the claim of ineffective assistance was without merit. A courtroom interpreter was provided at different times. Order affirmed. (Supreme Ct, Queens Co [Braun, JJ])

Second Department *continued***Sentencing (Persistent Violent Felony Offender)** SEN; 345(59)**People v Mitchell, 298 AD2d 602, 748 NYS2d 689 (2nd Dept 2002)**

Holding: The defendant was convicted of first-degree robbery, fourth-degree grand larceny, and fourth-degree criminal possession of a weapon. The court did not err in ruling that the prosecutor could ask the defendant if he testified about having five prior felony and two recent misdemeanor convictions. *See People v Hayes, 97 NY2d 203.* The claim of error as to a “no adverse inference” charge was unpreserved for review and was in any event without merit. *See CPL 300.10(2); People v Vereen, 45 NY2d 856.* But as the prosecution concedes, fourth-degree grand larceny (*see Penal Law 155.30*) is not an enumerated violent felony offense. *See Penal Law 70.02(1).* The defendant was erroneously sentenced as a persistent violent felony offender on that count. *See CPL 400.16(1); Penal Law 70.08.* Judgment modified, sentence on grand larceny conviction vacated, and matter remitted for resentencing. (Supreme Ct, Kings Co [Knipel, JJ])

Witnesses (Cross Examination) (Defendant as Witness) WIT; 390(11) (12)**People v Berrios, 298 AD2d 597, 750 NYS2d 302 (2nd Dept 2002)**

Holding: The defendant was convicted after trial of third-degree rape, third-degree sodomy, and third-degree sexual abuse in connection with two incidents of sexual contact with a 15-year-old complainant when the defendant was 21. He denied sexual contact. “We agree with the defendant that the prosecutor committed reversible error when he repeatedly asked him on cross-examination whether the prosecution’s witnesses, including the complainant and certain Suffolk County police detectives, lied during their testimony (*see People v Simms, 130 AD2d 525; People v Sepulveda, 105 AD2d 854, 857; People v Calderon, 88 AD2d 604; People v Santiago, 78 AD2d 666.*) ‘Whether the defendant believed that the other witnesses were lying is irrelevant’ (*People v Crossman, 69 AD2d 887, 888.*)” Judgment reversed, new trial ordered. (County Ct, Suffolk Co [Ohlig, JJ])

Forfeiture (General) FFT; 174(10)**Guilty Pleas (Withdrawal)** GYP; 181(65)**People v Erwin, 299 AD2d 366, 749 NYS2d 159 (2nd Dept 2002)**

Holding: The defendant pled guilty to third-degree possession of drugs. He was sentenced to 5 to 10 years in prison and civil forfeiture of \$332. “The plea minutes do not indicate that the defendant agreed to the payment of a civil forfeiture as a condition of the agreed-upon sentence. Accordingly, at sentencing, the defendant should have been given the opportunity either to withdraw his plea or to agree to pay the civil forfeiture in addition to a prison sentence (*see People v Cisco, 208 AD2d 643; cf. People v Ford, 246 AD2d 665, 666; People v Concepcion, 188 AD2d 483.*)” Judgment modified, sentence vacated, matter remitted. (County Ct, Dutchess Co [Dolan, JJ])

Counsel (Right to Counsel) COU; 95(30)**Family Court (General)** FAM; 164(20)**Matter of Alexander v Maharaj, 299 AD2d 354, 750 NYS2d 100 (2nd Dept 2002)**

Holding: The appellant father was asked by Family Court if he had made any effort to contact an attorney. The appellant said he had been served with the writ and petition the night before and had not had time to talk to an attorney. When he asked for time to do so, the court asked if he had access to a phone to call a lawyer. The appellant said he did not know what type of attorney he would need. The court then went forward with the proceeding, sustained the writ of *habeas corpus* and released the subject child to the respondent mother. “The father was not apprised of his right to counsel or informed of his right to obtain an adjournment to confer with counsel (*see Family Court Act § 262[a][iii]*).” Review of the colloquy between the court and the appellant indicates that he did not explicitly waive the right to counsel. *See gen Matter of Rockland County Dept. of Social Servs. v Champagne, 131 AD2d 488.* Judgment reversed, matter remitted for further proceedings including a new hearing and determination. (Family Ct, Westchester Co [Klein, JJ])

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)**People v Torres, 299 AD2d 429, 749 NYS2d 437 (2nd Dept 2002)**

Holding: The prosecution appealed from orders vacating judgments on the ground that at the time of his guilty pleas, “the defendant had not been represented by an attorney permitted to practice law, and therefore, as a matter of law, had not received the effective assistance of counsel.” One order was superseded by an amended order and the appeal as to that order is dismissed. All other orders are affirmed. (Supreme Ct, Queens Co [Chetta, JJ])

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

Lesser and Included Offenses (General) LOF; 240(7)

People v Wells, 299 AD2d 430, 749 NYS2d 421 (2nd Dept 2002)

Holding: The defendant was convicted, *inter alia*, of two counts of second-degree criminal trespass as lesser included offenses of two counts of first-degree burglary based on a single act. As the prosecution conceded, one conviction for second-degree trespass must be vacated. The constitutional guarantee against double jeopardy protects defendants "'against multiple punishments for the same offense' (*North Carolina v Pearce*, 395 US 711, 717; *see United States v DiFrancesco*, 449 US 117, 129; *People v Sailor*, 65 NY2d 224, 229, *cert denied* 474 US 982.'" Both convictions of criminal trespass were based on the same conduct. *See Matter of Auer v Smith*, 77 AD2d 172, 181-182. Judgment modified, conviction of second count vacated, and as modified, affirmed. (County Ct, Orange Co [Patsalos, JJ])

Guilty Pleas (General) GYP; 181(25)

Sentencing (Appellate Review) (General) SEN; 345(8) (37)

People v DeBoue, 299 AD2d 422, 749 NYS2d 282 (2nd Dept 2002)

The defendant pled guilty to first-degree manslaughter, with a promise of a determinate 11-year prison sentence if he complied with a cooperation agreement outlined at the plea and contained in a related document. He was warned that failure to cooperate could lead to a sentence as harsh as 25 years. After a hearing, the court found he had not cooperated, and sentenced the defendant to 12½ to 25 years. Assigned counsel requests a discretionary reduction to no more than 11 to 22 years, as recommended by a prosecutor after it was discovered that the originally-promised sentence was illegal.

Holding: The defendant's purported waiver of his right to appeal was not valid. *See People v Chiavaro*, 261 AD2d 632. The sentencing court properly found that the defendant did not fully comply with the agreement. After his plea and while being prepared to testify against a codefendant, he significantly changed his account of his own participation in the offense. The sentence imposed is within the range of what he could be subjected to for violating the agreement by revealing himself to be or have been untruthful. *Cf People v Schaefer*, 136 AD2d 661. Given this determination, there is no need to decide whether the

defendant's cooperation would have required specific performance of the bargain by imposition of a sentence acknowledged to be illegal. *Cf Matter of Van Leer-Greenberg v Massaro*, 87 NY2d 996. Particularly in light of the extremely violent nature of the offense, the request for a discretionary reduction is without merit. *See People v Suitte*, 90 AD2d 80. Judgment affirmed. (Supreme Ct, Kings Co [Tomei, JJ])

Discrimination (Race) DSC; 110.5(50)

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

People v Battle, 299 AD2d 416, 749 NYS2d 571 (2nd Dept 2002)

Holding: When the prosecutor had offered six peremptory challenges to black prospective jurors, the defense made a *Batson* (*Batson v Kentucky*, 476 US 79 [1986]) application, asking that the prosecutor be required to provide race-neutral explanations for all six challenges. Where the defendant's *Batson* application was timely, having been made before the end of jury selection, the court erred by requiring an explanation only as to the sixth challenge. *See People v Ramirez*, 295 AD2d 542. The matter must be returned to the trial court to give the prosecution an opportunity to show nonpretextual race-neutral reasons for the other five challenges. *See People v Hymes*, 282 AD2d 546, 547. Appeal held in abeyance, matter remitted. (Supreme Ct, Queens Co [Rosenzweig, JJ])

Misconduct (Prosecution) MIS; 250(15)

Witnesses (Cross Examination) WIT; 390(11)

People v Ramashwar, 299 AD2d 496, 749 NYS2d 886 (2nd Dept 2002)

Holding: The prosecutor improperly injected her own credibility into the trial by questioning two defense witnesses about alleged prior statements to her by telephone. When the witnesses tried to explain or did not recall those statements, the prosecutor sought to impeach them with their alleged prior comments. This deprived the defendant of a fair trial. *See People v Bailey*, 58 NY2d 272, 277. The prosecutor also improperly commented on the inconsistencies in summation. *Cf People v Galloway*, 54 NY2d 396. It put her credibility in issue for jury consideration and evaluation. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Kohm, JJ])

Guilty Pleas (Withdrawal) GYP; 181(65)

Sentencing (Restitution) SEN; 345(71)

Second Department *continued***People v Lou, 299 AD2d 559, 751 NYS2d 44
(2d Dept 2002)**

The defendant initially pled guilty to a felony with a promised probation sentence plus a confession of judgment not to exceed \$100,000. The defendant withdrew the plea, and sought an agreement for a misdemeanor plea, but negotiations broke down when the defendant refused to sign a confession of judgment. The court eventually invoked the initial plea, imposed sentence, and issued the confession of judgment without the defendant's signature.

Holding: The unelaborated waiver of appeal included in the initial plea was ineffective. *See People v Brown*, 296 AD2d 860. A defendant always has the right to challenge the voluntariness of a plea. *See People v Goss*, 286 AD2d 180, 181-182. The court erred by imposing the original plea. Upon the defendant's request, the court was required to conduct a hearing to determine the amount of restitution. *See Penal Law 60.27(2); People v Butti*, 294 AD2d 591 *lv den* 98 NY2d 729. Since there was conflicting proof as to the identity and value of the missing items, such a hearing was the only way to make an accurate determination of the appropriate restitution. *See People v White*, 266 AD2d 831. The ordinary remedy, to vacate the restitution and remit for a hearing, is not sufficient here. Restitution was an integral part of the plea agreement, and the parties never reached a meeting of the minds on this essential element. In fact, the court threatened to jail the defendant for contempt for refusing to sign a confession of judgment. The motion to withdraw should have been granted. Judgment reversed, matter remitted. (Supreme Ct, Queens Co [Lebowitz, JJ])

Speedy Trial (General) SPX; 355(30)**People v Battle, 299 AD2d 555, 750 NYS2d 522
(2d Dept 2002)**

Holding: The defendant was not denied his statutory right to a speedy trial. CPL 30.30. On May 22, 2000, when the defendant made the speedy trial motion, the prosecution indicated that they would need three weeks, to June 19, 2000. Three weeks from May 22, however, was June 12. This error was never corrected. Although the prosecution was tardy in its response, chargeable days should commence on June 19, not June 12, because that was the date specified by the court. The total time charged was therefore within the statutory six months. *See CPL 30.30(1)(a); People v Cortez*, 80 NY2d 201, 207 n3. Judgment reversed, indictment reinstated. (Supreme Ct, Queens Co [Rosenzweig, JJ])

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)**People v Brown, 300 AD2d 314, 752 NYS2d 347
(2d Dept 2002)**

Holding: "The defendant correctly contends that the defense counsel's deficient representation deprived him of a fair trial. Among the deficiencies in counsel's performance were his failure to prepare for trial, which was counsel's first trial involving allegations of child abuse (*see People v Droz*, 39 NY2d 457, 462), his inability to effectively cross-examine the 10-year-old complaining witness, his unfamiliarity with the law regarding the admissibility of prompt outcry hearsay testimony (*see People v McDaniel*, 81 NY2d 10, 16-17), and his indication during his summation that he found the complaining witness' testimony believable. While no single error on counsel's part would constitute ineffective assistance of counsel, the cumulative effect of these errors deprived the defendant of meaningful representation (*see People v Zaborski*, 59 NY2d 863, 865; *People v Lindo*, 167 AD2d 558, 559)." Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [McGann, JJ])

Instructions to Jury (Missing Witnesses) ISJ; 205(46)**Witnesses (Cross Examination) WIT; 390(11)****People v Badine, 301 AD2d 178, 752 NYS2d 679
(2d Dept 2002)**

The defendant was charged with sexual abuse of his daughter. The sole evidence was the complainant's testimony and evidence of her prompt outcry to her mother, who did not testify at trial and whose testimony would have concededly undermined the prosecution's case.

Holding: The court erred in preventing the defense from cross-examining the complainant regarding her charges of rape against her cousin's brother, which had been dismissed for insufficient evidence. The complainant's allegations may have been false and are therefore admissible to impeach her credibility. *See People v Harris*, 151 AD2d 981. This issue was preserved at trial and while not raised on appeal may be considered. *See People v Stubbs*, 30 AD2d 932 *cert den sub nom Stubbs v New York*, 393 US 1108. The court further erred by not granting the defendant's request for a missing witness charge. While the request was made after both parties rested, and therefore technically untimely, the issue is reached in the interest of justice. *See CPL 470.15(6)(a)*. During the trial, the prosecution elicited testimony concerning a prompt outcry by the complainant to her mother. The mother was the only one who could have verified that claim, which would be knowledge regarding a material issue. *See People v Macana*, 84 NY2d 173, 177). As the complainant's mother, she "would naturally be expected to testify in support of the People's position." *See People v Gonzalez*, 68 NY2d 424, 431. The prosecution failed to meet their burden to show the mother was not under their control, as there is

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no evidence on the record as to the status of the neglect proceeding upon which they relied. *Cf People v Geer*, 213 AD2d 764. The mother’s predicted contradiction of the complainant’s testimony was crucial to the jury’s weighing of the evidence against the defendant. *See Laffin v Ryan*, 4 AD2d 21, 27. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Gerges, JJ])

Dismissal (In the Interest of Justice) DSM; 113(20)

People v McIlwain, 300 AD2d 320, 751 NYS2d 503 (2nd Dept 2002)

Holding: On Mar. 22, 2000, the defendant pled guilty to fifth-degree possession of drugs for an offense that occurred while he was on parole. He was released pending sentencing, initially scheduled for May 24, 2000. Over repeated objections by the prosecution, the court granted several adjournments. The defendant took that opportunity to enroll in a Fortune Society program on Sept. 13, 2000, and reportedly completed it as of Mar. 13, 2001. Approximately 18 months after his guilty plea, the defendant, still awaiting sentencing, moved to dismiss the indictment in the interest of justice. CPL 210.40(1). The court erred in granting the motion, which had been based largely on the defendant’s completion of the program. “The defendant failed to establish any compelling factor, consideration, or circumstance which would justify dismissal of the indictment against him in the interest of justice (*see People v Algarin*, 294 AD2d 589; *People v Flemming*, 291 AD2d 506).” Order reversed, indictment and plea reinstated, matter remitted for sentencing by a different justice. (Supreme Ct, Kings Co [Lewis, JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

People v Mitchell, 300 AD2d 377, 751 NYS2d 530 (2nd Dept 2002)

Holding: The court properly relied on its own recollection of the plea proceedings, presentence report, and case summary by the Board of Examiners of Sex Offenders, not the defendant’s statements, in finding that the prosecution had presented clear and convincing evidence that the defendant failed to accept responsibility for the offense and had refused treatment. *See gen Doe v Pataki*, 3 FSupp2d 456, 472. The defendant’s statement at his plea that he had been intoxicated but knew what he was doing was contrary to his statement in the presentence report that he had admitted guilt saying he was drunk and on crack and had no recollection of the events due to his condition. Taken together these statements do not reflect the genuine acceptance of responsibility set out in the Risk Assessment Guidelines. *See People v Marinconz*,

178 Misc2d 30, 35. Statutory and regulatory changes making mandatory the computer accessibility of level three sex offender information on the Division of Criminal Justice Services homepage, which occurred after the defendant’s risk assessment hearing, did not deny him due process. The sex offender risk level determination (Correction Law 168-q [L 2000, ch 490] as amended) is regulatory, not criminal, in nature. It is not intended to effect punishment. *See People v Clark*, 261 AD2d 97. The defendant had no right to appear and be heard about the effect of the regulatory issue on him, as the publication of the on-line directory is “merely a proper exercise of the state’s police power to regulate present and ongoing conduct and to protect the community.” *See Doe v Pataki*, 120 F3d 1263 *cert den* 522 US 1122. Order affirmed. (Supreme Ct, Kings Co [Goldberg, JJ])

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

People v Thomas, 300 AD2d 416, 752 NYS2d 70 (2nd Dept 2002)

Holding: The police lacked reasonable suspicion to forcibly detain the defendant based on a vague and general description of the robber as a black male wearing black clothing. *See People v Dubinsky*, 289 AD2d 415. The defendant was arrested in line waiting to purchase a sweater at a store several blocks from the crime scene, wearing dark blue clothes. *See People v Hargroves*, 296 AD2d 581. There was no evidence that he was out of breath, engaged in any suspicious behavior, or tried to flee. *Cf People v Ellison*, 222 AD2d 693. That he allegedly looked “back and forth” in the store, and was wet from the rain, did not indicate he was the robber. His statement to police in the store, the on-the-scene show-up identification, and the physical evidence seized from him must be suppressed because his arrest was unlawful. *See People v Gethers*, 86 NY2d 159, 162. Items found at other locations were not recovered incident to the arrest and need not be suppressed. Judgment reversed, motion granted to the extent indicated, new trial ordered. (Supreme Ct, Queens Co [Cooperman, JJ])

Dismissal (In the Interest of Justice) DSM; 113(20)

People v Ward, 300 AD2d 418, 750 NYS2d 786 (2nd Dept 2002)

Holding: The defendant was on parole for narcotics offenses when arrested on the present class B felony drug offenses involving sale of cocaine in August, 1999. Over prosecutorial objection, the court repeatedly adjourned the matter for a year to allow the defendant to enroll in and complete a drug treatment program. The court erred in then dismissing the indictment in the interest of justice,

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a remedy which should be granted sparingly and only “in ‘those rare cases where there is a “compelling factor” which clearly demonstrates that prosecution of the indictment would be an injustice’ (*People v Flemming*, 291 AD2d 506, quoting CPL 210.40[1]; see *People v Algarin*, 294 AD2d 589).” This record lacks any such factor. Order reversed, indictment reinstated, remitted for further proceedings before a different justice. (Supreme Ct, Kings Co [Lewis, JJ])

Arrest (Warrantless) ARR; 35(54)

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

People v Robinson, 300 AD2d 511, 751 NYS2d 543 (2nd Dept 2002)

Holding: Entry to the homeless shelter where the defendant was arrested was controlled by a sign-in blotter and a metal detector, maintained by the shelter’s employees. The defendant’s contention that the shelter’s supervisor and guard supervisor lacked authority to consent to the arresting detective’s entry to the shelter or to the defendant’s room was unpreserved for review and is without merit. By virtue of their control over access to the shelter and its rooms, the supervisors were authorized to consent to entry by anyone with legitimate business in the shelter and the rooms. See *People v Nalbandian*, 188 AD2d 328. The warrantless arrest was proper. Further, the defendant did not demonstrate any actual expectation of privacy which society is prepared to recognize as reasonable. See *Minnesota v Olson*, 495 US 91 (1990). Judgment affirmed. (Supreme Ct, Kings Co [Tomei, JJ])

Instructions to Jury (Burden of Proof) (General) ISJ; 205(20) (35)

Sentencing (Persistent Felony Offender) SEN; 345(58)

People v Rosario, 300 AD2d 512, 750 NYS2d 894 (2nd Dept 2002)

Holding: The court made several errors in instructing the jury. It failed to tell the jury that the prosecution had the burden of proving every element of the charged crimes beyond a reasonable doubt. See *People v Newman*, 46 NY2d 126; CPL 70.20. It failed to say that the burden never shifts to the defendant. See CPL 300.10(2). It failed to include in the charge various definitions relating to the elements of the charged crimes. See *People v Blacknall*, 63 NY2d 912. The court did not respond appropriately to the deliberating jury’s inquiries. See CPL 310.30; *People v O’Rama*, 78 NY2d 270. Nor did it respond appropriately to individual jurors’ concerns about sequestration. See *People v Carter*, 40 NY2d 933. These unpreserved errors are

reached by way of the interest of justice jurisdiction.

As a new trial is required, other errors are noted. Testimony about the defendant’s prior bad acts in the workplace should not have been allowed. See *People v Molineux*, 168 NY 264. At sentencing the court failed to indicate on the record, as required by Penal Law 70.10(2), why it found the defendant’s history and character, and nature of his crimes, warranted sentencing as a persistent felony offender. See *People v Brown*, 268 AD2d 593. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Douglass, JJ])

Attorney/Client Relationship (Confidences) ACR; 51(10)

Counsel (Malpractice) COU; 95(23)

Mayorga v Tate, 302 AD2d 11, 752 NYS2d 353 (2nd Dept 2002)

Holding: The right to waive the attorney-client privilege in the interest of a deceased client’s estate survives the death of the client. Statements of the erroneous proposition that the power to waive the privilege ends with a client’s death (*eg Matter of Alexander*, 205 Misc 894, 985) are nonbinding dicta. Just as an incompetent client’s conservator may waive the privilege on that client’s behalf (CPLR 4503[a]), an executor may waive the deceased client’s privilege. This is true at common law. See 8 Wigmore, Evidence § 2329, at 640 (McNaughton rev. 1961). No appellate authority supports the proposition that any statute requires a departure from common law. The trial court properly found that the defendant attorney in this malpractice action could not invoke the privilege, which was effectively waived by the assignee of the executor of the deceased client’s estate. Order affirmed.

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

People v Escalona, 300 AD2d 505, 751 NYS2d 540 (2nd Dept 2002)

Holding: The defendant pled guilty to contempt in exchange for a promise of probation conditioned on completing a TASC program and refraining from violating an existing order of protection. He was warned that he would be sentenced to two to four years in prison if he violated either condition. He later moved to withdraw his plea on the grounds that an immigration hold, unknown to the parties at the time of the plea, made him ineligible for the TASC program. After a hearing, the court found he had violated the plea agreement by making several post-plea telephone calls to the complainant, and sentenced him to prison. The impossibility of complying with the TASC condition might have required that he be allowed to withdraw the plea “had he otherwise honored his end of the agreement (see *e.g. People v DeValle*, 94 NY2d 870; *People v Selikoff*, 35 NY2d 227, cert denied 419 US 1122)...”

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The prosecution had honored its end of the agreement, and the defendant subjected himself to the enhanced sentence by violating a condition completely unrelated to his eligibility for TASC. *Cf People v Rodriguez*, 289 AD2d 512. “[T]he plea agreement was in fact fulfilled when the Supreme Court imposed the enhanced sentence that had been promised to the defendant as a possible consequence of his deliberate violation of the condition that he not violate the order of protection (*see People v Smith*, 223 AD2d 465; *but see People v Kelly*, 220 AD2d 937. “ Judgment affirmed. (Supreme Ct, Kings Co [Leventhal, JJ])

Family Court (Violation of Family Court Orders) FAM; 164(60)

Matter of O’Herron v O’Herron, 300 AD2d 491, 751 NYS2d 594 (2nd Dept 2002)

Holding: The appeal is not academic, even though the modified order of protection has expired, given “the enduring consequences which may potentially flow from an adjudication that a party has committed a family offense.” *See Matter of Mazzola v Mazzola*, 280 AD2d 674, 675. The Family Court’s finding that the appellant made no threat that would lead to physical harm, and its express questioning of whether the appellant “intended to do anything,” negated a necessary element of third-degree menacing. *See Penal Law 120.15; cf Yvette H. v Michael G.*, 270 AD2d 123. As the modified order of protection was based on a conclusion that the appellant was guilty of only third-degree menacing, the order must be reversed. *See Family Court Act 841(a)*. Modified order of protection reversed as appealed from, proceeding dismissed. (Family Ct, Westchester Co [Horowitz, JJ])

Contempt (Procedure) CNT; 85(10)

Matter of Brunetti v Gary, 300 AD2d 583, 751 NYS2d 870 (2nd Dept 2002)

Holding: In an article 78 proceeding to review a determination that the petitioner was guilty of criminal contempt, the respondent moved to dismiss the proceeding. Summary contempt was not warranted where the “petitioner’s conduct did not disrupt or threaten to disrupt the proceedings nor did it destroy or undermine, or tend seriously to destroy or undermine, the dignity of the court so that the court was unable to continue to conduct its normal business in an appropriate way (*see 22 NYCRR 701.2[a]; Matter of Godosky v LaTorella*, 258 AD2d 461...).” The respondent gave the petitioner no warning that his conduct was contumacious before adjudicating him in contempt. *See 22 NYCRR 701.4; Matter of Abramovitz v*

LaTorella, 274 AD2d 514. The petitioner had no reasonable opportunity to respond to the charge. *See Taylor v Hayes*, 418 US 488, 496-500 (1974). Motion denied, petition granted, determination annulled. (Supreme Ct, Kings Co)

Third Department

Admissions (Miranda Advice) ADM; 15(25)

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

People v Marrow, 301 AD2d 673, 753 NYS2d 205 (3rd Dept 2003)

The defendant sought to plead guilty to a superior court information charging a class E felony for maintaining an apartment to which others came to sell drugs. At the attempted plea, he denied knowing that others had drugs for sale. After being warned that he risked a B felony, he was indicted on the A felony of first-degree possession, convicted at trial, and sentenced to 15 years to life. After he moved to vacate, claiming ineffective assistance of counsel (who was later disbarred) at the plea stage, he appealed.

Holding: While executing a search warrant for the defendant’s premises, the police asked the un-Mirandized defendant if a sweatshirt containing cocaine was his. He said the sweatshirt was his but denied knowledge of the cocaine. His motion to suppress this statement was improperly denied, given the court’s determination that the defendant was under arrest once the cocaine was found. *See People v Dickson*, 260 AD2d 931, 932 *lv den* 93 NY2d 1017. The prosecutor used the statement during summation.

Before trial, the defendant demanded that the prosecution disclose all prior bad acts it might use, and asked for a *Sandoval* hearing. *People v Sandoval*, 34 NY2d 371. No prior bad acts were disclosed at the hearing. On cross-examination of the defendant at trial, the prosecutor asked about his alleged failure to report income to social services while receiving welfare. This constituted error, even though the defendant denied the allegations, since the proper pretrial procedures had not been followed and no limiting instruction was given. *See People v Beasley*, 184 AD2d 1003 *affd* 80 NY2d 981. These errors combined to deprive the defendant of a fair trial. Judgment reversed, matter remitted. (County Ct, Broome Co [Smith, JJ])

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

People v Merrihew, Jr., 301 AD2d 970, 755 NYS2d 462 (3rd Dept 2003)

Holding: The prosecution declared readiness for trial of the defendant on Sept. 23, 1998. On May 26, 1999 the

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court *sua sponte* declared a mistrial. The action is deemed to have commenced on that date, when the order occasioning the retrial became final. *See* CPL 30.30 (5)(a). Therefore, the prosecution had until November 26, 1999 to declare readiness for trial (six months from commencement of the action). *See* CPL 30.30 (1)(a). The retrial did not commence until Jan. 31, 2000. The prosecution's assertion that they remained ready to proceed does not substitute for the fact that they failed, after the mistrial, to declare readiness in either open court or by written notice. "Therefore, they were not 'ready for trial' within the meaning of the statute." *See People v Chavis*, 91 NY2d 500, 505. The defendant's motion to dismiss on speedy trial grounds was improperly denied. Judgment reversed, indictment dismissed. (Supreme Ct, Ulster Co [Lamont, JJ])

Fourth Department

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

People v Burroughs, 295 AD2d 959, 744 NYS2d 608
(4th Dept 2002)

The court permitted the prosecutor to exercise a peremptory challenge to excuse the only black prospective juror and accepted as race-neutral the prosecutor's explanation that the age of the prospective juror was the concern.

Holding: While facially race-neutral, age can become pretextual if it bears no relationship to the facts of the case or if other jurors of similar age are not objected to on that ground. *See People v Smalls*, 249 AD2d 495 *lv den* 92 NY2d 986. That the prospective juror was 38 had no relationship to the facts of this forgery case. The prosecutor did not ask for the ages of other prospective jurors, and opposed the defendant's peremptory challenge to a 29-year-old woman. Judgment reversed, new trial granted. (Supreme Ct, Erie Co [Buscaglia, JJ])

[Ed. note: *See digest of reargument denied, infra p. 43*]

Family Court (General) FAM; 164(20)

Juveniles (Visitation) JUV; 230(145)

Matter of Lonobile v Betkowski, 295 AD2d 994,
744 NYS2d 609 (4th Dept 2002)

The court dismissed the petitioner's request for visitation of his child. The petitioner was incarcerated before the child's birth in November 1994. At the hearing, a clinical psychologist who had been working with the child, who was described as impulsive, immature, and distractible, testified that it would be advisable to wait until

the child is seven years old before telling him that the petitioner is his father. The psychologist could see "no good coming from [visitation] right now" for the child.

Holding: There is a general presumption that it is in a child's best interest to have visitation with his or her non-custodial parent. *See Matter of Davis v Davis*, 232 AD2d 773. A parent's incarceration will not by itself make visitation inappropriate. *See Matter of Cook v Morales*, 275 Ad2d 938, 938-939. However, the court here was entitled to credit the testimony of the psychologist that visitation would be detrimental to the child's welfare. *See Matter of Lonobile v Betkowski*, 261 AD2d 829. The court properly dismissed the visitation petition as not in the child's best interest. Order affirmed. (Family Ct, Monroe Co [Miller, JJ])

Family Court (Violation of Family Court Orders) FAM; 164(60)

Matter of Oneida County v Hurd, 295 AD2d 70,
743 NYS2d 758 (4th Dept 2002)

The Hearing Examiner granted the petitioner's request that the respondent be found to have failed to pay child support. The order directed the petitioner to serve a copy of the order by mail upon the respondent and the respondent's attorney. Despite the petitioner's failure to mail a copy to the respondent's attorney, he received one (apparently from the respondent) and made objections. The court deemed these objections untimely and dismissed them.

Holding: Since the respondent's attorney was not served with a copy of the court's order as the order expressly instructed, the time period to file objections never began to run. *See* Family Ct Act 439(e). Additionally, CPLR 2103 (b) applies to the order requiring that "'papers to be served upon a party . . . shall be served upon the party's attorney' unless otherwise proscribed by law or order of the court." Reversal is also required because the petitioner failed to establish on the record that the requisite order with notice of entry was mailed. Order reversed, matter remitted. (Family Ct, Oneida Co [Cook, JJ])

Family Court (General) FAM; 164(20)

Sex Offenses (Corroboration) SEX; 350(2)

Matter of Tomas E. and Cara E., 295 AD2d 1019,
744 NYS2d 747 (4th Dept 2002)

The court found by a preponderance of the evidence that the respondent mother neglected her children. This evidence came in the form of the uncorroborated, written out-of-court testimony of the respondent's child that the respondent had knowledge that the child's father was abusing her.

Holding: Out-of-court statements by a child are admissible, but "'if uncorroborated, are insufficient to

Fourth Department *continued*

form the basis for a finding of neglect.” See Family Court Act 1046 (a) (vi). Such statements may be corroborated by “[a]ny other evidence tending to support the reliability of the previous statements.” The father’s unsworn statement of admission in which he mentions the respondent observing him abuse the child on one occasion can not be considered corroborating evidence because it was not made during the course of the fact-finding hearing and because the petitioner did not attempt to offer it as evidence against the respondent. The sworn testimony of the school counselor, the Child Protective Services supervisor, and the psychologist that the child told them her mother was aware of the abuse does not corroborate the child’s story; “repetition of an accusation by a child does not corroborate the child’s prior account.” See *Matter of Francis Charles W.*, 71 NY2d 112, 124 rearg den 71 NY2d 890. Since there was no corroboration of the child’s story, the court’s findings are vacated as not supported by legally sufficient evidence. Order reversed. (Family Ct, Allegany Co [Hartley, JHO])

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

People v Brown, 296 AD2d 860, 745 NYS2d 368 (4th Dept 2002)

Holding: “The record establishes that [the defendant’s] waiver of the right to appeal is invalid because it was not knowing, voluntary and intelligent. During the plea colloquy, [the court] stated, ‘And you’re waiving your right to appeal on this matter,’ and defendant responded ‘Yes.’ That single reference to defendant’s right to appeal is insufficient to establish that the court ‘engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice.’” *People v Kemp*, 255 AD2d 397. The court’s sentence is neither unduly harsh nor severe. Order affirmed. (County Ct, Monroe Co [Maloy, JJ])

Family Court (General) FAM; 164(20)

Sex Offenses (Juveniles) SEX; 350(12)

Matter of Cerino P., 296 AD2d 868, 744 NYS2d 627 (4th Dept 2002)

Holding: The 15-year-old respondent was adjudicated a juvenile delinquent because he had sexual intercourse with a 14-year-old girl. The female participant testified that she had initiated the encounter and willingly engaged in sexual intercourse. If this act were committed by an adult, it would have been sexual misconduct under Penal Law 130.20. However, only the respondent was charged even though he and the female were only one

year apart in age and were equally at fault factually. See Family Ct Act 315.2 (1). The respondent’s “adjudication as a juvenile delinquent is ‘manifestly unfair.’” See *Matter of Jessie C.*, 164 AD2d 731, 736 app dismsd, 78 NY2d 907. Order reversed, petition dismissed. (Family Ct, Livingston Co [Cicoria, JJ])

Grand Jury (Witnesses) GRJ; 180(15)

Matter of Harry Eugene Dunlap, 296 AD2d 856, 745 NYS2d 364 (4th Dept 2002)

A prosecution witness at the petitioner’s Pennsylvania trial testified that she had not been truthful in a portion of her New York grand jury testimony. The petitioner’s motion for disclosure of that grand jury testimony in connection with an application for post conviction relief in the Pennsylvania case was denied.

Holding: The credibility of the witness had already been impeached during the Pennsylvania trial. There was “no compelling need for her grand jury testimony to impeach her credibility further.” See *Matter of District Attorney of Suffolk County*, 58 NY2d 436, 444. Furthermore, partial disclosure of grand jury testimony does not constitute a waiver of the general secrecy provisions applicable to grand jury proceedings. Order affirmed. (County Ct, Ontario Co [Henry, Jr., JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

People v Case, 298 AD2d 929, 748 NYS2d 90 (4th Dept 2002)

Holding: The defendant had been convicted of a sex offense at the time his risk level was determined following his conviction of a second offense. That he had not been convicted of the first offense at the time he committed the second did not prevent the court from considering the first offense when determining his risk level under the Sex Offender Registration Act (SORA) for the second offense to be level three. The legislature focused on the dangers of recidivism when passing SORA (Correction Law 168 *et seq*) and admonished courts to review “any relevant materials and evidence submitted by the sex offender and the district attorney” Correction Law 168j-n(3). Judgment affirmed. (County Ct, Genesee Co [Noonan, JJ])

Weapons (Possession) WEA; 385(30)

People v Merriweather, 298 AD2d 950, 748 NYS2d 105 (4th Dept 2002)

Holding: The photo array shown to the complainant contained six photos of men with similar features and hair styles. The defendant’s contention that the array was unduly suggestive because his hair was shown in cornrows is rejected; the viewer’s attention was not drawn to

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his photo in such a way as to indicate that a particular selection was urged. *People v Rogers* 245 AD2d 1041. The defendant correctly asserts that first-degree robbery could not serve as the predicate crime for the noninclusory concurrent count of first-degree criminal use of a firearm. See *People v Brown*, 67 NY2d 555, 560-561 *cert den* 479 US 1093. The issue was not preserved for review but is addressed as a matter of discretion in the interest of justice. Judgment modified, and as modified, affirmed. (Supreme Ct, Erie Co [Tills, JJ])

Instructions to Jury (Missing Witnesses) ISJ; 205(46)

Witnesses (Child) WIT; 390(3)

**People v Fenske, 298 AD2d 951, 748 NYS2d 106
(4th Dept 2002)**

Holding: The defendant was acquitted of one count of second-degree assault, and convicted of third-degree assault, endangering the welfare of a child, and second-degree criminal contempt. The contention that the court erred in refusing to give a missing witness charge concerning a child not called by the prosecution is rejected, because a four-year-old child “cannot be said to be knowledgeable about a material issue in a case” (*People v Kirkby*, 295 AD2d 929, ___).” A reasonable view of the evidence that the complainant’s injuries may have resulted from “slap-boxing” by the defendant and the complainant would support a finding that the defendant committed the lesser offense of third-degree (reckless) assault rather than the charged offense of second-degree (intentional) assault, so the court’s instructions to the jury on the lesser offense were appropriate. CPL 300.50(1). Judgment affirmed. (County Ct, Ontario Co [Doran, JJ])

Possession (General) POS; 288.3(10)

Search and Seizure (Arrest/Scene of the Crime Searches [Identification]) SEA; 335(10[g(ii)])

**People v Williams, 298 AD2d 964, 747 NYS2d 664
(4th Dept 2002)**

Holding: There was no evidence that the defendant owned or regularly occupied the apartment in which alleged drug paraphernalia (small plastic baggies) were found, pursuant to a search warrant, in a closed kitchen drawer. The defendant was in the living room, 15 to 30 feet from the kitchen, when police entered. He was subsequently arrested for the baggies. There was insufficient evidence that he exercised dominion or control over the kitchen. *People v Manini*, 79 NY2d 561, 573. The evidence

found on his person was not incident to a lawful arrest and should have been suppressed. See *Wong Sun v US*, 371 US 471 (1963). Judgment reversed, suppression granted, matter remitted. (County Ct, Monroe Co [Kohout, JJ])

Trial (Mistrial) TRI; 375(30)

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

**People v Covington, 298 AD2d 966, 748 NYS2d 117
(4th Dept 2002)**

Holding: The court did not abuse its discretion by denying a mistrial after a police officer stated during cross-examination that in preparing for trial he had referred to a transcript of the parole hearing. The officer’s reference to the parole hearing was improper, but occurred during open-ended questioning by defense counsel, who declined the court’s offer of a curative instruction. Cf *People v Johnson*, 219 AD2d 809, 810. Judgment affirmed. (County Ct, Monroe Co [Kohout, JJ])

Guilty Pleas (General) GYP; 181(25)

**People v Pangburn, 298 AD2d 989, 747 NYS2d 672
(4th Dept 2002)**

Holding: The appeal is considered *de novo* after the defendant’s motion for a writ of error *coram nobis* was granted due to appellate counsel’s failure to raise an issue that would have resulted in reversal. The defendant’s pleas of guilty to first-degree and second-degree burglary must be vacated because in his factual allocution the defendant negated an essential element of the charges. He said that his only intent was to expose himself to someone in the home. Penal Law 245.01. The conduct of exposing oneself is only a violation, not a crime as is required by the burglary statutes. Further, the location was not a public place, as is required by the statutes proscribing exposing oneself and public lewdness. After the defendant negated the element in question, the court failed to conduct the further inquiry to determine that the plea was knowing and voluntary. See *People v Lopez*, 71 NY2d 662, 666. The issue is addressed despite the failure to preserve it. *People v Ocasio*, 265 AD2d 675, 676. Judgment reversed, plea vacated, matter remitted. (County Ct, Livingston Co [Cicoria, JJ])

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

Guilty Pleas (Withdrawal) GYP; 181(65)

**People v Stephens, 299 AD2d 822, 750 NYS2d 704
(4th Dept 2002)**

Holding: This matter was remitted to the trial court for a *de novo* determination of a motion to withdraw the

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guilty plea because assigned counsel had become a witness against the defendant at the original motion. *People v Stephens*, 291 AD2d 841, 842. After new counsel was assigned and the case adjourned a few days for a hearing, the former attorney was called as a witness by the prosecution. The court did not require that the attorney be sworn or ask the defendant if he wanted to cross-examine the lawyer. The court then required the defendant to be sworn and invited him “to make a ‘statement,’ which defendant did under questioning by his new attorney.” The prosecution was not invited to cross-examine the defendant. It was proper for former counsel to be heard on the motion based on allegations that former counsel had improperly advised the defendant about potential terms of incarceration. See *People v Santana*, 156 AD2d 736, 737 *lv den* 79 NY2d 863. However, the defendant was denied effective assistance of counsel on the motion, where the court failed to allow the defense to go forward on the motion and new counsel failed to seek the full hearing that had been promised. This was particularly so in light of a statement by former counsel at the sentencing proceeding that he had told the defendant he could receive a sentence of 25 years to life. Again, the matter must be returned for a hearing. Appeal held, decision reserved, matter remitted for assignment of new counsel and a *de novo* determination of the motion to withdraw the plea, before a different justice. (Supreme Ct, Erie Co [Tills, JJ])

Instructions to Jury (Burden of Proof) ISJ; 205(20)

People v Allen, 301 AD2d 57, 750 NYS2d 700 (4th Dept 2002)

Holding: This appeal *de novo* follows the grant of a motion for a writ of error *coram nobis*, based on the ineffective assistance of appellate counsel. *People v Allen*, 273 AD2d 945. The issue is whether a jury instruction specifically defining the reasonable doubt standard is required. The weight of federal authority is against the defendant’s position that a definition must be given. As a federal constitutional matter, no such definition is required. *Victor v Nebraska*, 511 US 1, 5 (1994). Several other states have held that no reasonable doubt definition is required. See *eg Chase v State*, 645 So2d 829, 850 (Miss) *cert den* 515 US 1123 *reh den* 515 US 1179. While no New York case has ruled on the specific issue, many cases address the adequacy of various reasonable doubt charges. See *eg People v Cubino*, 88 NY2d 998, 1000. The Criminal Procedure Law provides that the court must state fundamental legal principles that apply to criminal cases in general, including the requirement that guilt be proven beyond a reasonable doubt. CPL 300.10(2). Courts are required to “use general terms to explain to the jury the important yet subtle difference

between a reasonable doubt and one which is based on conjecture or caprice’ (*People v Antommarchi*, 80 NY2d 247, 251, *rearg denied* 81 NY2d 759).” Amplification of the definition of reasonable doubt often leads to error. *People v Redd*, 266 AD2d 12, 14 *lv den* 94 NY2d 866; *People v Malloy*, 55 NY2d 296, 303 *cert den* 459 US 847. New York courts must convey to the jury the requisite standard of proof, but need not necessarily give a specific definition of reasonable doubt. The charge here, read as a whole, conveyed the requisite information. Judgment affirmed. (County Ct, Seneca Co [Falvey, JJ])

Evidence (Privileges) EVI; 155(115)

Statute of Limitations (General) SOL; 360(13)

People v Mills, 302 AD2d 141, 750 NYS2d 230 (4th Dept 2002)

Holding: The defendant was indicted in 2000 for second-degree murder based on the 1978 drowning of the decedent. By requesting a jury instruction on the lesser included charge of criminally negligent homicide, the defendant waived any statute of limitations defense applicable to that crime. See *People v Legacy*, 4 AD2d 453, 455. The evidence before the grand jury was sufficient to support a charge of depraved indifference murder. See *People v Mayo*, 36 NY2d 1003, 1005. Testimony indicated that the defendant, then 17, pushed the 12-year-old decedent into the lake off a pier, that the decedent hit his head and did not surface, that the defendant did not attempt to save the decedent knowing that he had not surfaced, and lied to others so they would not try to save the decedent. Nearly identical evidence was offered at trial and would have been sufficient to have sustained a conviction of the charged offense.

The defendant’s statements to his wife that he had killed before and would again were not protected by the spousal privilege of CPLR 4502(b). They were threatening, and were not made in absolute confidence induced by the marital relationship. *People v Melski*, 10 NY2d 78, 80. There was no error in the wife’s appearance at the grand jury or in the use of the grand jury testimony to impeach her at trial. See CPL 60.35(1). Judgment affirmed. (County Ct, Oneida Co [Dwyer, JJ])

Dissent: [Scudder, JJ] The defendant did not waive the statute of limitations defense. The judgment should be reversed.

Parole (Revocation Hearings [Evidence] [General]) PRL; 276(45[c] [d])

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

Fourth Department *continued***People ex rel Johnson v NYS Division of Parole, 299 AD2d 832, 750 NYS2d 696 (4th Dept 2002)**

Holding: While the exclusionary rule applies to all stages of the parole revocation process, a Hearing Officer has no authority to rule on suppression issues, and may consider any evidence that has not been ruled to have been illegally obtained. A parolee may not seek to litigate the legality of evidence at a preliminary parole revocation hearing in a *habeas* proceeding. *People ex rel Victory v Travis*, 288 AD2d 932, 933 *lv den* 97 NY2d 611. However, a parolee cannot be denied the opportunity to litigate prospective use of that evidence at a final parole revocation hearing. On the merits of the suppression issue, the Supreme Court erroneously determined that the petitioner was subjected to an unreasonable search and seizure. The police were entitled to approach the vehicle after it was pulled over for perceived violation of a local noise ordinance, whether or not the ordinance was later found to be unconstitutionally vague. *See Michigan v DeFillippo*, 443 US 31, 37-40 (1979). Judgment reversed, petition dismissed. (Supreme Ct, Onondaga Co [Brunetti, JJ])

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

Evidence (Sufficiency) EVI; 155(130)

People v Petrosino, 299 AD2d 851, 750 NYS2d 410 (4th Dept 2002)

Holding: The defendant was acquitted of first-degree assault and second-degree assault (intentionally causing serious physical injury) but convicted, *inter alia*, of second-degree assault (causing physical injury using a dangerous instrument). Penal Law 120.05(2). Viewed in the light most favorable to the prosecution, the evidence showed that the defendant punched or threw the complainant, causing the complainant's head to strike the pavement of the parking lot. The defendant jumped on the complainant, punched him repeatedly in the face, then, while wearing boots, kicked the complainant in the side of the head as he lay unconscious. There was no evidence of injury to the side of the head, and the medical witness did not say that the kick to the side of the head caused or contributed to the complainant's injuries. Because the evidence fails to establish that the kick was a "sufficient direct cause" of the complainant's wounds, it is insufficient to sustain the second-degree assault conviction. *People v Torres*, 267 AD2d 715. The evidence was sufficient to support a conviction of the lesser offense of attempted second-degree assault, to which the judgment is reduced. Penal Law 110.00, 120.05(2); *see* CPL 470.15(2)(a). Judgment modified, and as modified, affirmed, matter

remitted for sentencing. (County Ct, Wayne Co [Kehoe, JJ])

Forensics (General) FRN; 173(10)

People v Davis, 299 AD2d 874, 749 NYS2d 204 (4th Dept 2002)

Holding: The defendant failed to meet the burden of establishing that evidence on which he sought DNA testing pursuant to CPL 440.30(1-a) is still in existence. *See People v Ahlers*, 285 AD2d 664 *lv den* 97 NY2d 701. The court properly denied the motion for testing. Order affirmed. (County Ct, Onondaga Co [Fahey, JJ])

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

People v Lack, 299 AD2d 872, 752 NYS2d 176 (4th Dept 2002)

Holding: The defendant's challenge to admission of evidence concerning his prior conviction and the tape recording of the threats underlying it is based on a misreading of *People v Molineux*, 168 NY 264. Using a transcript of the tape for the jury to follow along was not improper. *See People v Williams*, 281 AD2d 933 *lv den* 96 NY2d 869. The defendant failed to show that the complainant's confidential psychiatric records could so impact her credibility that their use in the interest of justice would outweigh their confidentiality. *People v Felong*, 283 AD2d 951, 952. The defendant received meaningful representation from his third trial attorney. *See gen People v Baldi*, 54 NY2d 137, 147. No hearing was required to sentence the defendant as a second felony offender; he failed to specify what he wanted to controvert and to challenge the constitutionality of the underlying felony. *People v Pane*, 292 AD2d 850, 851 *lv den* 98 NY2d 653. His challenges to postrelease supervision are without merit. *Cf Matter of Connelly v New York State Div. Of Parole*, 286 AD2d 792 *lv dismsd* 97 NY2d 677.

The court erred in ordering the sentence for first-degree criminal contempt to run consecutively to that imposed for aggravated criminal contempt. Both offenses were based on the same conduct. *See* Penal Law 215.52; *see also People v Ramirez*, 89 NY2d 444, 451. Any sentence modification with respect to those two counts would affect the aggregate sentence. The remainder of the sentence is not unduly harsh or severe, but "the interplay of the sentences imposed on the various counts is complex (*see e.g. People v Losicco*, 276 AD2d 565, *lv denied* 96 NY2d 802)." The entire sentence is vacated. Judgment modified, matter remitted for resentencing on all counts. (County Ct, Jefferson Co [Martusewicz, JJ])

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

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

Fourth Department *continued*

**People v Rodriguez, 299 AD2d 875, 749 NYS2d 751
(4th Dept 2002)**

Holding: On appeal *de novo* following grant of the defendant’s motion for a writ of error *coram nobis*, the question of whether the court erred in denying a challenge for cause to a prospective juror is not preserved, as the defendant did not join his co-defendant’s challenge. *People v Faison*, 250 AD2d 777 *lv den* 92 NY2d 924. Addressed as a matter of discretion in the interest of justice, the error warrants reversal. As was determined on the co-defendant’s appeal, the prospective juror, having given equivocal responses about his impartiality, failed to state unequivocally that his prior state of mind would not influence his decision in this case. *People v Escoto*, 283 AD2d 962, 963 *lv den* 96 NY2d 901. Judgment reversed, new trial granted on counts one, two, and three. (County Ct, Onondaga Co [Burke, JJ])

Sentencing (Excessiveness) (General) SEN; 345(33) (37)

**People v Monacelli, Jr., 299 AD2d 916, 750 NYS2d 690
(4th Dept 2002)**

Holding: The court did not abuse its discretion by issuing an order of protection. *See gen* CPL 530.13(4). “The court was not required to obtain the consent of the person for whose benefit the order of protection was issued and an order of protection ‘may be issued independent of a plea agreement’ (*People v Roman*, 243 AD2d 831, 831; *cf. People v Warren*, 280 AD2d 75, 77).” The order of protection did not make the sentence unduly harsh or severe. Judgment affirmed. (County Ct, Orleans Co [Noonan, JJ])

Sentencing (Fines) SEN; 345(36)

**People v Schlau, 299 AD2d 932, 749 NYS2d 924
(4th Dept 2002)**

Holding: The defendant was sentenced to a year of incarceration and a fine of \$5,000 for felony driving while intoxicated. Vehicle and Traffic Law 1192(3); 1193(1)(c)(ii). He was undisputedly indigent at the time of sentencing. A fine was not discussed as part of the plea agreement. The court did not set forth a basis for determining the amount of the fine, which is vacated. Judgment modified, and as modified, affirmed. (Supreme Ct, Erie Co [Buscaglia, JJ])

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

**People v James, 299 AD2d 932, 750 NYS2d 227
(4th Dept 2002)**

Holding: The defendant was improperly sentenced as a second felony offender. Penal Law 70.06(1)(b). It is

unclear on the record whether the alleged predicate felony, a Florida conviction of aggravated assault with a deadly weapon, is equivalent to a New York conviction of felony assault or criminal possession of a weapon. *Cf. People v Gonzalez*, 61 NY2d 586, 589-592. If a foreign statute is so broad that the conduct proscribed could, in New York, be either a felony or a misdemeanor, a court may look beyond the statute to the accusatory instrument in the foreign jurisdiction. The records underlying the predicate here were not provided to the sentencing court, and so are not in the record on appeal. The case is returned for resentencing upon review of those records. Judgment modified, sentence vacated, matter remitted. (County Ct, Wayne Co [Parenti, JJ])

Sentencing (Restitution) SEN; 345(71)

**People v Diola, Jr., 299 AD2d 962, 750 NYS2d 716
(4th Dept 2002)**

Holding: The court erred in ordering the defendant in this grand larceny case to pay restitution over \$12,780, an amount that was higher than the amount alleged in the indictment, and to a complainant not mentioned in the indictment. This is contrary to the rule that a defendant may not be ordered to pay restitution for conduct that is not an offense within Penal Law 60.27(4)(a). *See People v Taylor*, 242 AD2d 925. The offense for which the restitution above \$12,780 was ordered was not part of the same transaction as that charged, or contained in any other accusatory instrument disposed of by the plea, as set forth in the statute. Judgment modified, restitution vacated, matter remitted for a hearing to determine proper restitution. (Supreme Ct, Onondaga Co [Brunetti, JJ])

Indigence (General) IDG; 195(10)

**Probation and Conditional Discharge PRO; (5) (30)
(Conditions and terms) (Revocation)**

**People v Brandon F., 299 AD2d 962, 750 NYS2d 707
(4th Dept 2002)**

Holding: The defendant was required, as a condition of probation, to comply with the rules and regulations of a sex offender group treatment program. That program required, *inter alia*, that the defendant buy a workbook, attend counseling sessions, and keep a journal. Failure to bring the workbook to counseling would count as an absence. The defendant did not buy a workbook until he was terminated from the program. He attributed his two absences from counseling to his financial inability to buy the workbook. He also failed to keep a journal. The failure to buy a workbook cannot serve as the basis for probation violation where no proof was offered by the prosecution to establish that the defendant had the financial ability to buy one. *See gen People v Amorosi*, 96 NY2d 180, 184. There

Fourth Department *continued*

was no financial component to the requirement that the defendant keep a journal, however, and the defendant provided no excuse for his failure to keep a journal. *People v Costanza*, 281 AD2d 120, 123 *lv den* 96 NY2d 827. Adjudication affirmed. (County Ct, Cattaraugus Co [Himelein, JJ])

Family Court (General) FAM; 164(20)

Sentencing (Restitution) SEN; 345(71)

Matter of Lamedh B. v Erie County Attorney, 299 AD2d 966, 750 NYS2d 708 (4th Dept 2002)

Holding: Family Court lacked authority under Family Court Act 353.6(1)(a) to order restitution for the complainant's unreimbursed dental expenses. See *Matter of Keith Z.*, 195 AD2d 729. The court has only that power explicitly conferred on it by statute. *Matter of Martin v Martin*, 127 AD2d 266, 269. The amount of restitution is reduced to \$60. Order modified and as modified, affirmed. (Family Ct, Erie Co [McLeod, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Delinquency-Procedural Law) JUV; 230(20)

Matter of Brandon M. v Erie County Attorney, 299 AD2d 966, 750 NYS2d 548 (4th Dept 2002)

Holding: The respondent-appellant's admission to the allegations in the juvenile delinquency petition was defective because the court failed to comply with the non-waivable provisions of Family Court Act 321.3. Particularly, the court did not conduct an adequate allocation of the respondent and his mother. See *Matter of Brian H.*, (appeal no. 2), 239 AD2d 925. Order of disposition reversed, fact-finding vacated, matter remitted. (Family Ct, Erie Co [McLeod, JJ])

Family Court (General) FAM; 164(20)

Matter of Joshua K., 299 AD2d 968, 750 NYS2d 720 (4th Dept 2002)

Holding: Family Court abused its discretion by ordering that the respondent, adjudicated a person in need of supervision based on his admitted failure to go to school and uncontroverted need for treatment or supervision, be placed for 12 months in the custody of the Oswego County Department of Social Services (DSS). The court found that "the 'Liberty Resources report'" supported such placement, when in fact that report recommended that the respondent remain in his mother's custody, continue in counseling, be reviewed for mental health treat-

ment, and cooperate with appropriate services. The only other report in the record, from a clinical psychologist, recommended that the respondent remain at home, go to weekly therapy, be referred for possible medication for mental health issues, and be monitored for compliance with probation. Order modified, portion placing the respondent in DSS custody vacated, matter remitted "for further proceedings on the petition including an appropriate disposition taking into account respondent's current age and circumstances." Family Ct, Oswego Co [Roman, JJ]

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

People v Burroughs, 299 AD2d 969, 753 NYS2d 256 (4th Dept 2002)

Holding: The prosecution contends that the reversal of the defendant's conviction (*People v Burroughs*, 295 AD2d 959) overlooked *People v Childress* (81 NY2d 263). But in *People v Payne*, 88 NY2d 172, 182, the Court of Appeals said that once a court has ruled on the ultimate issue of intentional discrimination following the prosecution's explanation for why a challenge was race neutral, the preliminary issue of a *prima facie* showing of discrimination is moot. The prosecution further contends that, as to finding pretextual the prosecutor's explanation that the prospective juror was challenged because of her age (38), not race, the record contains no reference to a 29-year-old prospective juror whose challenge by the defense was objected to by the prosecution. Those transcript pages are 150 and 187. Reargument denied.

[Ed. note: See digest of original decision, *supra* p. 37]

Ethics (Prosecution) ETH; 150(15)

Matter of Feindt, 301 AD2d 185, 754 NYS2d 790 (4th Dept 2002)

Holding: The respondent, a former assistant prosecutor, was arrested for petit larceny based on allegations of theft of a witness fee payment. The charge was adjourned in contemplation of dismissal. The respondent violated DR 1-102(a). She engaged in illegal conduct adversely reflecting on her honest, trustworthiness, or fitness as a lawyer, conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct adversely reflecting on her fitness as a lawyer. In mitigation, she made full restitution, exceeded the amount of required community service, cooperated with the grievance committee's investigation, admitted the misconduct, and expressed extreme remorse. The misconduct occurred when the respondent was suffering from depression, for which she has received counseling. She voluntarily discontinued the practice of law after her arrest, and had a previously unblemished record. The respondent is censured. ⚖️

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