



# Public Defense Backup Center REPORT

VOLUME XV NUMBER 2

March 2000

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

## Defender News

### Public Defense Budget Uncertainties Continue

With pundits predicting that the state budget will again be substantially late, and NYSDA's Public Defense Backup Center and other public defense organizations cut from the executive budget as described in the last issue of the *REPORT*, uncertainty about funding plagues public defense lawyers and staff seeking to plan program projects or personal schedules. The Association received an outpouring of support for the Backup Center, and thanks everyone—lawyers, clients, and others—who wrote letters. Public defense funding has been included for now in a one-house resolution passed by the Assembly the week of the anniversary of the U.S. Supreme Court's *Gideon v. Wainwright* decision on the right to counsel. No date for final action on the budget is known.

### New Law, Client Issues and More: 14th Annual Metropolitan NY Trainer

Over 300 defense lawyers registered for the 14th Annual Metropolitan New York Trainer on March 4, sponsored by NYSDA in cooperation with 15 defender agencies from the New York metro region. Held at New York University Law School, the sessions focused on narrow areas of criminal law such as domestic violence, led by The Legal Aid Society's Susan Hendricks and Laura Johnson, and on broad areas such as search and seizure, led by New York practitioner, author and adjunct professor Barry Kamins. Attendees heard Monroe County Public Defender and NYSDA Board President Edward Nowak's customary, comprehensive compilation of recent cases from the Court of Appeals. Defense lawyers were challenged by Cardozo professor and practitioner Ellen Yaroshefsky to think about ethical implications of counseling clients. They were educated by Steven Banks

of LAS's Civil Division and Homeless Rights Project about the complexities of the City's shelter system and its impact on the criminal cases and lives of homeless clients. In the final session, participants received tips on effective summations from well-known New York criminal defense practitioner Lynne Stewart. NYSDA thanks the presenters, the co-sponsoring agencies, and the participants for another successful training event. Materials from the Trainer are available from the Backup Center for \$20.

### Race Matters in Matters of Justice

Public awareness of tension between racial minorities and law enforcement is running high. A litany of headlines over the last several months has kept the issue of race and the criminal justice system in the limelight. It is not just the acquittal of four white New York City police officers in the killing of West African immigrant Amadou Diallo (e.g., *Times Union*, [www.timesunion.com/diallo/](http://www.timesunion.com/diallo/)). It is not just the NYPD killing of two other unarmed black men (Malcolm Ferguson and Patrick Dorismond), followed by public demonstrations of outrage and grief. (E.g., *Daily News* 3/26/00.) It is not just continuing revelations of racial profiling by law enforcement agencies across the country, documented on the "Race and Law" page of the "Hot Topics" section of the NYSDA web site. ([www.nysda.org](http://www.nysda.org)) Nor is it just stories of black lawyers struggling to have their abilities recognized, or of U.S. Supreme Court justices failing to adequately explain why prestigious clerkships in their court are held mostly by white men. (*Times Union*, 1/9/00; *Washington Post*, 3/16/00.) It is not just stories of statistical links between poverty and crime—and poverty and race, with explosions in the delinquency rate among black youth mirroring the rate of poverty. (*Columbus [OH] Dispatch*, 3/18/00.) It is all these things and more, lead-

### Contents

- 1 Defender News
- 3 Book Review
- 4 Conferences & Seminars
- 5 Job Opportunities
- 5 Sighted, Cited, or Sited
- 6 Immigration Practice Tips
- 8 Case Digest:
- 8 US Supreme Court
- 9 NY Court of Appeals
- 10 First Department
- 16 Third Department

**BTSP Application: Due May 1, 2000**

**Defender Institute Basic Trial Skills Program**

**June 11-17, 2000**

**Application inside (printed issues only)**

ing many to believe that today as in times past, justice is “never here” for African Americans and other minorities. (See related book review, p. 3.)

### **Brennan Center Begins Criminal Justice Program**

As questions about racism and unfairness in the criminal justice system increase, the Brennan Center for Justice at NYU School of Law has announced a new Criminal Justice Program to tackle some of the system’s most important policy and legal issues. Academic Director of the program will be Professor Kim Taylor-Thompson, former head of Washington, DC’s Public Defender Service. She has already begun work on two inaugural projects, while the Center searches for a Program Director [see p. 19]. One project will “examine the role of defender institutions in their communities.” The other will “explore the fair enforcement of criminal law with a particular focus on the influence of race.”

### **Raising Race in the Courtroom**

Lawyers and others continue to debate whether race should have been a more overtly discussed subject in the Diallo trial. Meanwhile, lawyers have to consider and choose whether and how to address race as an issue, and courts have to decide what is permissible. For example, the Court of Appeals recently held, without deciding when or whether the defense could use expert testimony to challenge cross-racial identifications, that a prosecutor cannot bolster a witness’s identification by noting that it was a same-race situation, at least where race-based identification formed no part of the record. *People v Alexander*, \_\_NY2d \_\_ (No. 205, 12/21/99, digest in *Backup Center REPORT*, Vol. XV, #1.)

### **Buffalo LAB Selects Schopp**

David C. Schopp is the new Executive Attorney of The Legal Aid Bureau of Buffalo, Inc. At the time he was tapped for the top post by the organization’s Board of Directors, he was serving as the Supervising Attorney of the Law Guardian Unit. He spent much of his 12 years at the Bureau as an attorney in the Felony Appeals Unit. Prior to his term at Legal Aid, he was associated with Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria. Schopp is a member of NYSDA, as well as the Erie County Bar Association and the National Association of Criminal Defense Lawyers.

### **Gideon Coalition Grows and Goes (Back) to Albany**

On March 14, Gideon Coalition members once again gathered in Albany to tell legislators and others about recurring problems in the provision of defense services to poor people across the state. Composed not just of public defense programs including NYSDA, but also bar organizations, the League of Women Voters of New York, and others, the Coalition annually marks the March 18, 1963 *Gideon* anniversary by advocating for improved public defense. This year, the

Coalition (now 50 members strong) stressed that while restoration of public defense funds cut by the executive for the next fiscal year is vital, it is only part of the solution to persistent problems in public defense. Advocating that legislators “Restore and Don’t Ignore,” delegations wearing orange Preserve the Right to Counsel buttons carried the message: New York’s public defense system needs to be strengthened and reformed.

Among the issues addressed by the Coalition were: lack of oversight to assure provision of quality public defense services across the state; tremendous disparity in funding between the prosecution and defense, including the 1999 raise in district attorney salaries with no concomitant hike in public defenders’ pay; high caseloads; failure to inform criminal defendants of their right to appointed counsel and to provide adequate representation; low assigned counsel rates and routine cutting of assigned counsel vouchers; and appellate delay resulting in defendants serving their full sentence before their cases, even those with meritorious appellate issues, are decided.

Gideon Day 2001 will be held on March 20. Mark your calendars now!

### **Death Claims AC Administrator**

Donald Weinberger, who was for 10 years the Assigned Counsel Plan Administrator for the 2nd Department of the Appellate Division, died Feb. 12. Prior to becoming AC Administrator, Weinberger had been Chief of Operations of The Legal Aid Society (LAS) for over a decade, and had held other LAS supervisory positions before that. His wife, Susan Starr-Weinberger, told the *REPORT* that her husband had a lifelong commitment to defense work, and recounted his involvement in major events affecting public defense, including the start-up of the union at LAS and the work of the departmental screening panels established following the re-institution of New York’s death penalty. The Association extends its sympathy to his family and colleagues. ☪

#### **Public Defense Backup Center *REPORT***

A PUBLICATION OF THE DEFENDER INSTITUTE

**Volume XV Number 2 March 2000**

**Managing Editor** Charles F. O’Brien  
**Editor** Mardi Crawford  
**Contributors** Stephanie Batcheller,  
Sybil A. McPherson, Al O’Connor

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

**The *REPORT* is printed on recycled paper.**

# Book Review

## Law Never Here: A Social History of African American Responses to Issues of Crime and Justice

By Frankie Y. Bailey and Alice P. Green  
Praeger, 1999; 236 pages

by Barbara DeMille\*

A child in Buffalo in the 40s, my father a teacher in an all-white high school occupying the center of a black neighborhood, I learned about the East Side. Colored people preferred to live there, jammed close together in decaying housing; they did not respect education; they drank a lot, they danced, they sang.

There were always exceptions, those “good” blacks who transcended their nature, working hard at their janitoring and sleeping car portering, always properly respectful to whites.

I absorbed this mishmash of destructive information without ever being given specific facts. Discrimination in a Northern city was fostered, and enforced, through a passive ignorance, a cruel ability to overlook mistreatment and humiliation for a group not one’s own, by a refusal to see humanity in a different color. Those with a darker skin were not only different on the outside; they were different on the inside, in their abilities and aspirations, from us who lived on the West Side.

At that white high school in that black neighborhood in 1939, I squirm to recall my friends and my appearing in the school play. Billed as the Little Topsies, our picture in black face was in the evening news.

All this youthful ignorance came flooding back shamefully, as I read Frankie Bailey’s and Alice Green’s *Law Never Here*. What shamed, as I read of cruelty, injustice, lynchings, and nullifying juries, ranging from times of slavery up to accounts of our present day “prison-industrial complex,” was my own past acquiescence.

Most racial prejudice is like that, insidious not aggressive, stupidly accepting of a status quo, not pro-active—a great abyss of unconcern where moral outrage ought to be. A main thesis of Bailey and Green’s book is that criminal justice, racial prejudice, and social justice are inextricably intertwined.

“They [African Americans] did not believe they could receive justice in the courtroom until they received social justice”—in the lunchroom, the restroom, the bus station, the employment line. The very look of the segregated courtroom in the South spoke volumes to the all-white jury on how the scales of justice should be weighed.

\* *Barbara DeMille is a freelance writer with a Ph.D. from the State University of New York at Buffalo who has taught literature at the college level and published several scholarly articles. Her work was also heard on Northeast Public Radio, WAMC, from 1993 to 1995, and has appeared in many magazines and newspapers including the New York Times and Christian Science Monitor.*

*Law Never Here* is primarily a record, a text most useful as an exhaustive compendium of both the legal and social struggles of black Americans over three centuries. It is well footnoted, with a lengthy bibliography, as well as an extensive bibliographical essay at the conclusion citing further books, articles, documentaries, and popular films to extend the subject.

The tone is never polemical. Rather the authors’ points are made quietly, insistently, cumulatively as they cite case upon case of the law in America being used not to protect black citizens but to facilitate their enslavement—first to white owners under the Fugitive Slave Act of 1850, then, following the Emancipation Proclamation in 1863, to money lenders, to landholders for whom they farmed, to bosses from whom they got substandard pay, to landlords in ghettos where they were forced to live.

Legal and social gains that were sought and sometimes secured are recorded too, from the Reconstruction period in the South, through various vain attempts to outlaw lynching, to the cultural recognition of the Harlem Renaissance. Signal legal gains are there too: the Supreme Court’s finding that due process had been denied in the Scottsboro case; its 1954 blow to segregation in *Brown v Board of Education*; Truman’s integration of the military and interstate transportation in 1948; the Civil Rights Act of 1964. But as the authors make clear, the way has been hard, often bloody, and always uphill.

It would be good to be able to say that this book traces a continual upward movement from the enslavement in an inferior status of black people in our country to rights being awarded to all without consideration of color. Unfortunately, this is not the case. The authors end with a particularly damning account of the treatment of minorities by law enforcement in Los Angeles in the recent past, against which to lay our present day preoccupation with harassing, convicting, and imprisoning black men.

The law, Bailey and Green conclude—for black Americans most often “never here” as protection—remains largely a way of enforcing black subservience. Speaking of the post-bellum South, the authors sum up:

*... some of the prisoners who served on chain gangs were former slaves . . . now experiencing a new type of bondage. This is not to dismiss the crimes committed by blacks during the period. It is instead to point out that for both groups of black prisoners—both those guilty of a criminal offense and those caught up in the system because of the corruption of a white landowner or a white law enforcement officer—the parallels between slavery and prison were clear. . . . It is very difficult not to realize that even in what was supposed to be freedom, black Americans continued to be harassed, imprisoned, and abused by the criminal justice system.*

Unfortunately for too many black citizens, who crowd our prisons for non-violent offenses, the above quotation applies now as it did then. *Law Never Here* is an unblinking record, a persistent catalogue of white power over black, used sometimes to help, most often to ignore, too often to grind down. ♪

# Conferences & Seminars

**Sponsor:** Massachusetts Association of Criminal Defense Lawyers and The Fully Informed Jury Association  
**Theme:** Jury Nullification: Putting the Government on Trial  
**Date:** April 14, 2000  
**Place:** Needham, MA  
**Contact:** FIJA; fax (406)793-5550; e-mail: HLM5550@montana.com; web site [www.fija.org](http://www.fija.org)

**Sponsor:** Association of the Bar of the City of New York  
**Theme:** Collateral Consequences of Conviction  
**Date:** April 24, 2000  
**Place:** New York City  
**Contact:** ABCNY: (212)382-6600

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Train the Trainers  
**Dates:** April 27-29, 2000  
**Place:** St. Louis, MO  
**Contact:** NLADA: tel (202)452-0620; Fax: (202) 872-1031, e-mail: [info@nlada.org](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org)

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

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

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Anatomy of a Murder (Case)  
**Dates:** May 3-6, 2000  
**Place:** Tucson, AZ  
**Contact:** NACDL: tel (202)872-8600; fax (202)872-8690; e-mail: [assist@nacdl.com](mailto:assist@nacdl.com); web site [www.criminaljustice.org](http://www.criminaljustice.org); [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** New York State Bar Association Continuing Legal Education  
**Theme:** Immigration Law  
**Dates:** May 9-10, 2000  
**Place:** New York City  
**Contact:** Tel (800)582-2452 or (518)463-3724; fax (518)487-5618; fax on demand (800)828-5472; web site [www.nysba.org](http://www.nysba.org)

**Sponsor:** New York State Bar Association Continuing Legal Education  
**Theme:** Primer on Evidence for the Criminal Practitioner  
**Dates & Places:**  
May 10, 2000—Uniondale, LI  
May 12, 2000—Buffalo, NY & New York City  
May 23, 2000—Albany, NY  
**Contact:** Tel (800)582-2452 or (518)463-3724; fax (518)487-5618; fax on demand (800)828-5472; web site [www.nysba.org](http://www.nysba.org)

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

**Sponsor:** New York State Bar Association Criminal Justice Section  
**Theme:** CLE at Spring Meeting  
**Date:** May 19-21, 2000  
**Place:** Chautauqua Institution, NY  
**Contact:** Kim McHargue (518)487-5630

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

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Defender Advocacy Institute  
**Dates:** June 1-6, 2000  
**Place:** Dayton, OH  
**Contact:** NLADA: tel (202)452-0620; Fax: (202) 872-1031, e-mail: [info@nlada.org](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org)

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

**Sponsor:** New York State Defenders Association  
**Theme:** Defender Institute Basic Trial Skills Program  
**Dates:** June 11-17, 2000  
**Place:** Troy, NY  
**Contact:** NYSDA: tel (518)465-3524; Fax: (518)465-3249, e-mail: [info@nysda.org](mailto:info@nysda.org); web site [www.nysda.org](http://www.nysda.org)

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

**Sponsor:** National Institute for Trial Advocacy  
**Theme:** Building Trial Skills Program: Northeast Regional  
**Dates:** August 15-22, 2000  
**Place:** Hempstead, NY  
**Contact:** NITA: tel (800)225-6482 or (219)239-7770; fax (219)282-1263; e-mail: [nita.1@nd.edu](mailto:nita.1@nd.edu); web site: [www.nita.org](http://www.nita.org)

# Job Opportunities

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

## Beat Those Short Application Deadlines!

### GET JOB NOTICES EARLY ON THE WEB

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

pellate Defender, 45 W 45th St, 7th Floor, New York NY 10036

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

sume, and writing sample to the above address.

The Wayne County Public Defender's Office seeks an **Assistant Public Defender**. The position involves handling felony and misdemeanor cases. Experience in criminal defense, including trial experience, preferred. EOE, minorities encouraged to apply. Send resume, writing sample and references to: Ronald C. Valentine, Esq., Wayne County Public Defender, 26 Church Street, 2nd Floor, Lyons NY 14489

Prisoners' Legal Services of New York (PLS), which provides civil legal services to incarcerated persons in state prisons, seeks **Staff Attorneys** for their Plattsburgh office. Staff attorneys handle a wide variety of individual and impact litigation. Previous legal service experience is preferred; recent law grads with an interest in public interest law are encouraged to apply. Types of cases

(Continued on page 19)

# Resources Sighted, Cited, or Sited

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

- ✓ **NYS Felony Sentencing Guidelines**, Bonnie Cohen-Gallet (2000), booklet (20 pgs), \$8.95 (quantity discounts available), ISBN:1-889031-33-X. Looseleaf Law Publications, Inc. tel (800) 647-5547; fax (718)539-0941; e-mail [llaw-pub@erols.com](mailto:llaw-pub@erols.com); web site [www.LooseleafLaw.com/](http://www.LooseleafLaw.com/). [Subtitled "Condensed and Arranged for Quick and Easy Reference," this publication is fine for judges or for a quick reference at a bench conference. It is better organized and far easier to use than McKinney's sentencing pamphlet. For case preparation, defense advocates will do well to also refer to the electronic resource noted in the Introduction to the booklet; developed by Tompkins County District Attorney George Dentes, the comprehensive sentencing software CrimeTime, (reviewed in *Backup Center REPORT*, Vol. XIII, #6) is available at [www.co.tompkins.ny.us/distatto](http://www.co.tompkins.ny.us/distatto)). Cohen-Gallet's condensed booklet, unlike CrimeTime, is not specific to Penal Law provisions and therefore does not refer to SHOCK or Willard eligibility within felony class categories, or give information about merit time or DNA test requirements. As with any handy reference resource, practitioners must be aware that the book-

let has gaps. For example, it does not reflect the decision in *People v Tolbert* (93 NY2d 86), concerning the possible minimum sentence for a class E persistent violent felon.]

- ✓ **New York Evidence With Objections**, Jo Ann Harris, Anthony J. Bocchino, and David A. Sonenshein (1999), pocket book (190 pgs), \$25.95, ISBN:1-55681-660-X. National Institute for Trial Advocacy, tel (800)225-6482; fax (219)282-1263; e-mail [nita.1@nd.edu](mailto:nita.1@nd.edu); web site [www.nita.org](http://www.nita.org). [Nearly as small as a palm computer, this book (4 by 6 inches) is arranged alphabetically from Ambiguous Questions to Subsequent Remedial Measures. Each topic includes one or more suggested objections, one or more responses to an objection, cross-references to New York law, and a brief explanation. Not limited to criminal evidence, the book strives to note when the evidentiary rules are different for criminal cases, such as when a prior conviction is offered against a witness other than a criminal defendant—crimes (felonies and misdemeanors) are admissible in civil cases under CPLR 4513, while offenses (crimes and infractions, other than traffic)—are admissible for impeachment in criminal cases under CPL 60.40(1) g.]
- ✓ **Handling the DWI Case in New York, 1999-2000 ed.**, Peter Gerstenzang, softbound book (1,411 pgs), \$85 postpaid. West Group, (800) 344-5009; web site [www.store.westgroup.com](http://www.store.westgroup.com). ☺

## ☞ MORE RESOURCES ON THE WEB

Space constraints limit the number of resources that can appear in this section of the *REPORT*. Check the NYSDA web site for additional items of interest: [www.nysda.org](http://www.nysda.org)

# Immigration Practice Tips

## Defense-Relevant Immigration News

by Manuel D. Vargas\*

### Parole Division Issues New Guidelines for Conditional Parole for Deportation

The New York State Division of Parole is reinitiating the conditional parole for deportation only (CPDO) program under new stricter standards. As reported earlier, the CPDO program had been suspended for most noncitizen inmates for close to two years. (See *Backup Center REPORT*, Vol. XV, No. 1, p. 12.) According to Executive Director Martin Cirincione, however, Parole is reinitiating the CPDO process under the new guidelines this month (March 2000).

The Division's newly revised Policy and Procedures Manual item for CPDO lists two possible types of CPDO cases: (1) those involving inmates who have not yet reached their parole eligibility date, *i.e.*, early CPDO, and (2) those involving inmates who are eligible for regular parole having reached or advanced beyond their minimum term of imprisonment, *i.e.*, regular CPDO. Noncitizen inmates are not eligible for *early* CPDO if they have been convicted of either an A-I felony offense (other than an A-I felony controlled substance offense), or a violent felony offense. See Executive Law 259-i(2)(d).

Under the new guidelines, noncitizen inmates will not be eligible for early or regular CPDO consideration unless a final order of deportation has been issued against them by an immigration judge, and the inmates have waived or exhausted their right to appeal. Inmates must also serve at least one half of their minimum prison term before they will be eligible for early CPDO. In addition, an inmate will not be placed on the Parole Board calendar for review until the sentencing judge, district attorney, and defense attorney have had an opportunity to respond to letters from the Parole Board requesting their recommendations relative to the inmate's possible release for deportation.

An inmate convicted of an A-I felony controlled substance offense will not be calendared for Board consideration of early parole until responses to these letters have been received. An inmate convicted of an A-II felony or lesser offense may be calendared without receipt of these letters, but only after 10 days have elapsed following the 60-day period allotted for responses. In addition, if the inmate has been convicted of an A-I or A-II felony offense, Parole Division staff must ascertain from appropriate and involved law

enforcement agencies (such as the DEA, FBI, ATF) their position with respect to the inmate's possible release.

A copy of the Division of Parole's Policy and Procedures Manual item on the CPDO program is available from the Backup Center.

### NYSDA Files Another *Amicus Curiae* Brief Challenging Retroactive Application of New Immigration Laws

NYSDA has filed another *amicus curiae* brief before the United States Court of Appeals for the Second Circuit challenging the federal government's retroactive application of the 1996 immigration laws to deport lawful permanent resident immigrants convicted of crimes committed before the new laws took effect. The cases at issue are *Pottinger v Reno*, *Maria v McElroy*, *Azcona v Reno*, and *Juin Yi Yu v Reno*. (*Amicus* brief filed Mar. 16, 2000). The brief was submitted on behalf also of the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the New York State Association of Criminal Defense Lawyers (NYSACDL), and The Legal Aid Society of the City of New York (LAS).

In these cases, the federal government is appealing a group of district court habeas corpus decisions and orders issued by US District Judge Jack Weinstein finding that a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricting lawful permanent resident eligibility for deportation relief should not be applied to deportation cases based on pre-AEDPA criminal conduct and convictions. See *Pottinger v Reno*, 51 FSupp2d 349 (EDNY 1999) and *Maria v McElroy*, 68 FSupp2d 206 (EDNY 1999), reported in September. (See *Backup Center REPORT*, Vol. XIV, No. 7, p. 6.)

Earlier, NYSDA, along with LAS and NYSACDL, filed an *amicus* brief in another, similar group of cases dealing primarily with the elimination of deportation relief in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), rather than in AEDPA. *Calcano-Martinez v Reno*, *Madrid v Reno*, and *Khan v Reno* (*amicus* brief filed Nov. 12, 1999). (See *Backup Center REPORT*, Vol. XIV, No. 9, p. 4.)

NYSDA's *amicus* briefs argue that the government's retroactive application of the restriction or elimination of the relief from deportation known as the 212(c) waiver in AEDPA and IIRIRA is impermissible under the traditional presumption against retroactivity of a new civil statute. The briefs describe how many immigrant defendants relied on the availability of relief from deportation when pleading guilty to deportable offenses prior to enactment of AEDPA and IIRIRA, but go on to point out that Supreme Court case law does not require a showing of reliance if the government's application of the new laws changes the legal consequences of past conduct.

Several federal circuit courts in other parts of the country have recently issued favorable rulings in challenges to the government's retroactive application of the AEDPA/

\* **Manuel D. Vargas** is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. As noted in the article, Manny has just completed an update of the Project's manual, Representing Noncitizen Criminal Defendants in New York State. If you have questions about immigration issues in a criminal case, you can call the Project on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.

IIRIRA restriction or elimination of the 212(c) waiver in both pre-4/1/97 deportation cases and post-4/1/97 removal cases. *Tasios v Reno*, 2000 WL 150710 (4th Cir, 2/28/00)(deportation case); *Alanis-Bustamante v Reno*, 2000 WL 58311 (11th Cir, 1/25/00)(removal case); *Magana-Pizano v INS*, 200 F3d 603 (9th Cir, 12/27/99)(deportation case); and *Wallace v Reno*, 194 F3d 279 (1st Cir, 10/26/99)(deportation cases); see also *Pena-Rosario v Reno*, 2000 WL 150710 (EDNY, 2/8/00)(removal cases). For further information regarding the claims raised in these cases and other defenses to removal in criminal charge cases, see NYSDA's newly updated Removal Defense Checklist in Criminal Charge Cases. The Checklist is available from the Criminal Defense Immigration Project page on NYSDA's web site ([www.nysda.org](http://www.nysda.org)) or from the Backup Center.

### **2nd Edition of Immigration Manual for New York Defense Lawyers Now Available**

NYSDA has completed updating of its practice manual entitled *Representing Noncitizen Criminal Defendants in New York State*. The first edition was published in 1998. In the two intervening years, there have been significant developments in federal immigration law and practice, as well as in state criminal law and practice, and in relevant legal professional standards, that affect the defense of noncitizen criminal defendants in New York State. These developments, now incorporated into the second edition of the manual, include the following:

Some New York federal and state courts grant **sentence reductions** to avoid dispositions being deemed "aggravated felonies."

The New York State Division of Parole reactivates the **early parole for deportation** program under new, stricter standards.

The Congress and the Attorney General provide **new forms of relief from removal** under the immigration laws for certain noncitizens, e.g., certain Haitians, Hondurans, Kosovars, Liberians, and Nicaraguans, and individuals fearing torture in their country of removal.

The American Bar Association issues **new professional standards** regarding defense counsel's duty to advise noncitizen defendants regarding immigration consequences of guilty pleas.

New York **youthful offender dispositions** may now be deemed "convictions" for deportation purposes.

Guilty pleas precedent to New York **drug treatment diversion** programs may now be deemed "convictions" for deportation purposes, even if later vacated.

Certain New York Vehicle and Traffic Law offenses that include an element of **driving while under the influence** of alcohol or a drug may now more likely be deemed "aggravated felonies" or "crimes involving moral turpitude."

Certain New York **sex offenses involving a minor** are now more likely to be deemed "aggravated felonies."

Certain New York **misdemeanors** are now more likely to be deemed "aggravated felonies."

The New York Legislature amends the New York Penal Law to add new **stalking** offenses, which will likely trigger adverse immigration consequences for noncitizens.

The Board of Immigration Appeals (BIA) and federal courts offer new guidance on what **accessory and preparatory offenses** might avoid adverse immigration consequences.

The BIA and federal courts offer new guidance on what offenses might be deemed "**particularly serious crimes**" barring relief from removal for individuals pursuing asylum or withholding of removal under the immigration laws.

The Immigration and Naturalization Service (INS) implements new policy of **mandatory detention** of certain noncitizens upon their release from criminal custody.

The INS reports **increased deportation numbers**.

In addition, and in response to user comments, the second edition includes the following new features:

- New "**aggravated felony**" practice aids.
- New section on seeking **post-judgment relief** to avoid adverse immigration consequences.
- New section on the immigration effect of a **plea of not responsible by reason of mental disease or defect**.
- Reproduction of statutory provision on **mandatory detention**.
- Information on useful, **new immigration resources**.

*Representing Noncitizen Criminal Defendants in New York State, Second Edition* may be ordered from the Backup Center. Call (518)465-3524. ⚖

### **Pro Bono Counsel Needed For Death Row Prisoners**

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

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

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

## United States Supreme Court

**Search and Seizure** SEA; 335(10 [g (i)]) (75)  
**(Arrest/Scene of the Crime [Probable Cause (Furtive Conduct)]) (Stop and Frisk)**

**Illinois v Wardlow, No. 98-1036, 1/12/00, 120 SCt 673**

The respondent fled upon seeing police vehicles converge on an area known for heavy narcotics trafficking. When the officers caught the respondent they stopped him, performed a protective pat down search for weapons, and found a handgun. He was convicted on a gun charge. The Illinois Supreme Court reversed finding no reasonable suspicion for the stop.

**Holding:** The officers' actions did not violate the 4th Amendment. An officer who has a reasonable, articulable suspicion that criminal activity is afoot may conduct a brief, investigatory stop. *Terry v Ohio*, 392 US 1 (1968). An individual's presence in a "high crime area," standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity, but a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Adams v Williams*, 407 US 143, 147-148 (1972). In this case it was the respondent's unprovoked flight that aroused the officers' suspicion. Nervous, evasive behavior is another pertinent factor in determining reasonable suspicion, and headlong flight is the consummate act of evasion. While flight is not necessarily indicative of ongoing criminal activity, *Terry* recognized that officers can detain individuals to resolve ambiguities in their conduct, and thus accepted the risk that officers may stop innocent people. If they do not learn facts rising to the level of probable cause, an individual must be allowed to go. But in this case the officers found that the respondent had a gun and arrested him for violating a state law. Judgment reversed.

**Concurrence in part, dissent in part:** [Stevens, J] Any *per se* rule allowing or disallowing detention of someone who flees is rightly rejected. The testimony of the officer here did not establish reasonable suspicion justifying the stop.

**Constitutional Law (General)**

CON; 82(20)

**Federal Law (General)**

FDL; 166(20)

**Reno v Condon, No. 98-1464, 1/12/00, 120 SCt 666**

State departments of motor vehicles (DMVs) require drivers and automobile owners, as a condition of obtaining a driver's license or registering an automobile, to provide personal information, which may include name, address, telephone number, vehicle description, Social Security number, medical information, and photograph. Congress, finding that many states, in turn, sold this personal information to individuals and businesses, enacted the Driver's Privacy Protection Act (DPPA), which restricts the state's ability to disclose someone's personal information without their consent. South Carolina filed suit alleging that the DPPA violates the 10th and 11th Amendments to the Constitution. The District Court granted summary judgment to the state and the 4th Circuit affirmed.

**Holding:** The DPPA is a proper exercise of Congress's authority to regulate interstate commerce under the Commerce Clause. US Const, Art I, §8 cl 3. The motor vehicle information historically sold by states is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to customize solicitations of drivers. The information is also used by various public and private entities for matters related to interstate motoring. Because drivers' personal, identifying information is, in this context, an article of commerce, congressional regulation is proper. *US v Lopez*, 514 US 549, 558-559 (1995). The DPPA does not impermissibly require states to regulate their own citizens, but rather regulates the states as owners of databases, and is permissible. See *South Carolina v Baker*, 485 US 505 (1988). Judgment reversed.

**Counsel (Right to Self-Representation)**

COU; 95(35)

**Martinez v Court of Appeal of California, No. 98-7809, 1/12/00, 120 SCt 684**

The petitioner was convicted of embezzlement. He filed a timely notice of appeal, a motion to represent himself, and a waiver of counsel. The California Court of Appeal denied his application to represent himself. The state Supreme Court denied a writ of mandate.

**Holding:** The 6th Amendment does not include a right to appeal, nor provide a basis for a right to self-representation on appeal. If any right to self-representation on appeal is to be found, it must be based on autonomy principles grounded in the Due Process clause. Under prevailing practices, the risk of disloyalty by a court-appointed attorney, or the suspicion of such disloyalty (*Faretta v California*, 422 US 806 [1975]), is not sufficient to warrant the conclusion that a constitutional right of self-representation is necessary to fair appellate procedures. States are clearly within their

## US Supreme Court *continued*

discretion to find that the government's interest in ensuring the integrity and efficiency of the appellate process outweigh an invasion of the appellant's interest in self representation. Judgment affirmed.

**Concurrences:** [Kennedy, J] There is no need to cast doubt on *Faretta* to resolve this case. [Breyer, J] Judges closer to the "firing line" have expressed dismay about *Faretta* but there is no empirical research on which to base a determination of whether self-representation furthers or inhibits the constitutional guarantee of fairness. [Scalia, J] *Faretta* was correctly decided, even if self-representation works to a defendant's disadvantage. It is not applicable here because there is no constitutional right to appeal.

## New York State Court of Appeals

**Sentencing (Concurrent/  
Consecutive) (Resentencing)** **SEN; 345(10) (70.5)**

**People v DeValle, No. 199, 1/11/00**

The defendant pled guilty to robbery and was sentenced to 2 to 4 years in prison, to run concurrently with an undischarged portion of an earlier sentence. The Department of Correctional Services notified the trial court that the defendant's sentence must run consecutively with his prior sentence. The court on its own motion calendared the case for resentencing. At resentencing defense counsel stated that the defendant wanted neither to withdraw his plea nor to be resentenced. The defendant was resentenced to a consecutive term and the Appellate Division affirmed.

**Holding:** *People v Williams* (87 NY2d 1014, 1015) held that "the trial court had the inherent power to correct an illegal sentence" over defense objection where the corrected sentence was within the range initially stated by the court. Here, for the court to correct the sentence it had to impose a more severe sentence than originally promised. Where a court has made a sentencing promise and was unable to fulfill it, the defendant has a right to withdraw a guilty plea and to be restored to pre-plea status. This defendant did not seek to withdraw his guilty plea and did not demonstrate on the record that he detrimentally relied on the illegal sentence in a way that could not be rectified by restoring him to his pre-plea status if he so desired. Order affirmed.

**Discovery (Matters Discoverable)** **DSC; 110(20)**

**Grand Jury (General)** **GRJ; 180(3)**

**Matter of Attorney General of New York v Firetog,  
No. 3, 2/24/00**

Charges against the defendants stemmed from their alleged theft of funds from nursing home patients and at-

tempts to defraud the Medicaid system. Following arraignment, defense counsel orally challenged the sufficiency of evidence before the grand jury. The appellant trial judge made an off-the-record preliminary assessment that sufficient evidence existed to support the indictments. Eventually the court directed the prosecution to release the grand jury minutes to defense counsel. The prosecution sought a writ of prohibition to block the order. The Appellate Division concluded that Criminal Procedure Law 210.30(3) did not permit release of grand jury minutes as an aid to counsel in preparation of a written motion to dismiss or reduce an indictment.

**Holding:** CPL 210.30(5) provides that "[I]n any case, the court must place on the record its ruling upon the motion to inspect." That the justice did not place his assessment concerning the sufficiency of the evidence on record shows that it was not a final determination. The statutory language, along with the actions of the parties and the justice, document an understanding that the initial assessment did not divest the court of authorization to release grand jury minutes to the defense. The argument that the court could not disclose the minutes in the absence of a written defense motion is unpreserved. Judgment reversed.

**Dissent:** [Smith, J] Because no written motion to dismiss or reduce the indictment was pending, no statutory authority existed to compel disclosure of the minutes. The argument that a written motion must exist was preserved in the Appellate Division.

**Double Jeopardy (Res Judicata)** **DBJ; 125(32)**

**Impeachment (Of Defendant  
[Including Sandoval])** **IMP; 192(35)**

**People v Evans, No. 9, 2/29/00**

The defendant was convicted at retrial of robbery and criminal possession of a weapon, following a hung jury in the first trial. He claimed on appeal that the law of the case doctrine operated to bar the second trial judge from making a new *Sandoval* ruling as to use of previous convictions, allowing the prosecution to ask whether the defendant had previously been convicted of three felonies and a misdemeanor. The Appellate Division affirmed.

**Holding:** An "evidentiary" type ruling will normally not be binding in a subsequent trial. *See People v Malizia*, 62 NY2d 755, 758. The law of the case doctrine does not contemplate that every trial ruling is binding on retrial. By asserting that the second judge had no discretion but to adhere to the earlier *Sandoval* ruling, the defendant seeks to impose the strict, legal application of claim and issue preclusion on the more flexible law of the case doctrine. Such a finding would inappropriately constrain a judge conducting a retrial by each of the previous evidentiary rulings, including those discretionary calls such as those dealing with leading questions, or the manner in which an exhibit is marked or shown

**NY Court of Appeals** *continued*

to a jury. *Sandoval* decisions involve a court’s exercise of discretion in controlling cross-examination and impeachment. Although made pretrial, these are “trial rulings,” a different matter than suppression procedures under CPL article 710 involving mixed questions of law and fact. See *People v Harrison*, 57 NY2d 470. There is no showing of an abuse of discretion. Order affirmed.

**Witnesses (Defendant as Witness) WIT; 390(12)**

**People v Duchesne, No. 10, 2/19/00**

The record does not support the defendant’s claim that the hearing court abused its discretion in balancing the applicable factors at the *Sandoval* hearing in the defendant’s second trial. The order of the Appellate Division is affirmed.

**First Department**

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

**Religious Freedom (General) RLG; 328(10)**

**People v Morgan, No. 2082, 1st Dept, 10/21/99, 697 NYS2d 259**

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

**Holding:** Given the totality of a prospective juror’s responses, the court properly exercised its discretion when it denied the defendant’s challenge for cause. The record does not substantiate the defendant’s position that the juror expressed an automatic belief in all sworn testimony. The court properly denied a request to release the sequestered jury and cease deliberations for three days to allow the defendant, a Muslim, to perform religious observances on Friday. The defendant thus validly waived his presence when the verdict was rendered. See *People v Williams*, 197 AD2d 401 *lv den* 82 NY2d 32. The court made arrangements for the defendant to pray on Friday; the incidental burden on his religious practice was justified by the state’s paramount and compelling interest in guaranteeing a fair trial. Judgment affirmed. (Supreme Ct, Bronx Co [Oliver, J])

**Counsel (Right to Self-Representation) (Standby and Substitute Counsel) COU; 95(35) (39)**

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

**People v Jackson, No. 2091, 1st Dept, 10/21/99, 697 NYS2d 255**

The defendant was convicted of burglary and assault after a jury trial where he represented himself.

**Holding:** The defendant was properly permitted to exercise his right to self-representation. The validity of his waiver of counsel was not undermined by the hearing court’s subsequent direction that the defendant undergo a CPL 730.30 examination. The examination resulted in a finding of competency, confirmed on consent, resolving any question of mental competency with respect to self-representation. *People v Schoolfield*, 196 AD2d 111, 116-117 *lv den* 83 NY2d 915. The court reaffirmed the defendant’s desire to represent himself prior to trial. The record shows the defendant was told about and understood the role of standby counsel. Judgment affirmed. (Supreme Ct, New York Co [Wittner, J])

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

**People v Phillips, No. 2101, 1st Dept, 10/21/99, 697 NYS2d 13**

The defendant was convicted of rape, sodomy and robbery.

**Holding:** The defendant did not notify the trial court that he was so hearing impaired as to require interpretive assistance and the record indicates that he responded cogently to the court’s inquiries on all matters. When defense counsel mentioned that the defendant was deaf in one ear, the court adjusted the seating arrangements to compensate. No need for further, *sua sponte*, provision of assistance was necessary. See *People v Robles*, 86 NY2d 763, 764. The trial court properly removed the defendant from the courtroom when he became disruptive, and therefore the defendant knowingly and intelligently waived his right to be present, since the court repeatedly invited him back, but warned that the trial would continue without him if he did not return. See CPL 260.20; *People v Parker*, 57 NY2d 136, 141. There was no showing that the disruptive actions were the product of the defendant’s hearing impairment. Judgment affirmed. (Supreme Ct, New York Co [Wetzel, J])

**Criminal Mischief (General) CMM; 99 (17)**

**Motor Vehicles (Auto Stripping) MVH; 260(2)**

**People v Robinson, No. 2111, 1st Dept, 10/26/99, 697 NYS2d 23**

The defendant was convicted of auto stripping, criminal mischief and petit larceny.

**Holding:** The defendant’s breaking of a car window while committing a petit larceny of the car’s contents constituted both fourth-degree criminal mischief (Penal Law 145.00[1]) and auto stripping under Penal Law 165.10(1), which applies when a person “removes or intentionally

## First Department *continued*

destroys or defaces any part of a vehicle.” See *People v Brown*, \_\_ AD2d \_\_, 683 NYS2d 846 *lv den* 93 NY2d 871. The statute is clear and unambiguous, and should be construed to give effect to the plain meaning of its words. Judgment affirmed. (Supreme Ct, New York Co [Donati, JJ])

### Evidence (Uncharged Crimes) **EVI; 155(132)**

#### **People v Walker, No. 2151, 1st Dept, 10/26/99, 697 NYS2d 592**

The defendant was convicted of second-degree murder.

**Holding:** The double jeopardy claims related to the use of the instant crime as an aggravating factor in a federal capital prosecution have been litigated in prior proceedings and cannot be re-litigated here. See *People v DiRaffaele*, 55 NY2d 234, 243. There was no previous prosecution within the meaning of Criminal Procedure Law 40.30. The failure of the trial court to extend an adverse inference charge to other lost tapes is unpreserved, and in any event the charge was adequate. The court properly exercised its discretion in admitting evidence that the defendant and the co-defendant committed other uncharged crimes while in possession of the identical weapon used in the instant crime. This evidence was highly relevant to the contested issue of identification. *People v Alvino*, 71 NY2d 233, 241-242. Suitable limits were placed on the evidence. Judgment affirmed. (Supreme Ct, New York Co [Torres, JJ])

### Search and Seizure (Arrest/ Scene of the Crime Searches [Time]) (General) **SEA; 335(10 [p]) (42)**

#### **In re Erik M., Nos. 1309-1310-1311, 1st Dept, 10/28/99, 697 NYS2d 35**

The appellant was adjudicated a juvenile delinquent for acts which, if committed by an adult, would constitute criminal possession of a controlled substance and criminal use of drug paraphernalia.

**Holding:** The search at issue, rooted in the investigation of the apparent suicide of a young woman, does not fall within the parameters of the exception permitting warrantless searches for administrative purposes. See *New York v Burger*, 482 US 691 (1987). Nor was there any exigency justifying a warrantless search since the police could easily have secured the apartment and obtained a warrant. The search did not fall within the parameters of a valid inventory search. See *Illinois v Lafayette*, 462 US 640 (1983). Suppression of the items found in the appellant’s dresser drawer is mandated because it cannot be demonstrated that the search fell within any recognized exception to the warrant require-

ment. Judgment reversed. (Family Ct, New York Co [Sosa-Lintner, JJ])

### Alibi (General) **ALI; 20(22)**

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

### Witnesses (Child) **WIT; 390(3)**

#### **People v Biavaschi, No. 1895, 1st Dept, 10/28/99, 697 NYS2d 53**

The defendant was convicted of rape.

**Holding:** Through the testimony of the complainant’s mother, as well as a psychologist and a mental health case worker, the prosecution presented clear and convincing evidence that extraordinary circumstances existed indicating that the complainant was a “vulnerable child witness” under CPL article 65 who would suffer severe mental or emotional harm if required to testify without the use of closed circuit television. CPL 65.20(9). See *People v Ramos*, 203 AD2d 599. The complainant was particularly young, had been threatened with physical violence and exhibited a great deal of fear when she saw the defendant. The court properly denied the defense request for an independent psychological examination of the complainant. CPL 65.20(6).

The court also properly denied the defendant’s application to present alibi evidence. No good cause was shown for failure to file timely notice, and the proposed testimony lacked probative value, seeking to establish the defendant’s whereabouts at a time and place consistent with also being at the crime scene. Neither the rules concerning rehabilitation of an impeached witness nor those regarding admissibility of all parts of the same testimony had any application to the defendant’s efforts to introduce his alleged statement to his grandmother. He did not testify, and his statement to the police was completely separate from the proffered one, which constituted impermissible hearsay. Judgment affirmed. (Supreme Ct, Bronx Co [Covington, JJ])

### Appeals and Writs (Record) **APP; 25(80)**

### Discovery (Prior Statements of Witnesses) **DSC; 110(26)**

### Juries and Jury Trials (Voir Dire) **JRY; 225(60)**

#### **People v Dennis, No. 1922, 1st Dept, 10/28/99, 697 NYS2d 599**

The defendant was convicted of murder. The court refused a defense request to record the *voir dire* pursuant to Judiciary Law 295. At the *Wade* and *Huntley* hearing, the court refused the defendant’s *Rosario* demand for the notes that the prosecution’s only witness was using to refresh his recollection.

**Holding:** Defense counsel is entitled to examine all of the witness’s written statements related to the subject matter

**First Department** *continued*

of the testimony. CPL 240.44(1). The prosecution did not meet its burden of demonstrating that undisclosed notes used to refresh the officer's recollection were duplicative of materials previously turned over to the defense. This is *per se* error, requiring reversal.

The court erred in failing to obey Judiciary Law 295 requiring all court proceedings to be recorded at either party's request. Prejudice to the defendant will be found where the record cannot be reconstructed, because the defendant will have no way to appeal the court's rulings. *People v Harrison*, 85 NY2d 794, 796. Here, it is known that objections were made but not what they were. Reconstruction is not possible where the trial occurred 11 years ago, the district attorney can not be found, and the judge and defense counsel have no memory of the trial, let alone specifics. Judgment reversed. (Supreme Ct, New York Co [Scott, J])

**Arrest (Warrantless)**

**ARR; 35(54)**

**Search and Seizure (Arrest/  
Scene of the Crime Searches  
[Probable Cause])**

**SEA; 335(10 [g])**

**People v Scipio, No. 1977, 1st Dept, 10/28/99,  
698 NYS2d 5**

The defendant was convicted of robbery.

**Holding:** In the defendant's moving papers in support of his *Dunaway* (*Dunaway v New York*, 442 US 200 [1979]) application, he sought suppression of an out-of-court identification and confession on the basis of a *Payton* (*Payton v New York*, 445 US 573, 1980) violation and lack of probable cause. At the hearing, both sides presented and argued the *Payton* and attenuation issue only. After the prosecution rested, defense counsel argued that it had always been his position that the evidence should be suppressed because the officers had no arrest warrant or search warrant to go into the defendant's apartment. No evidence was presented as to the basis for the defendant's arrest. The next day counsel notified the court that the defense was relying on both *Payton* and lack of probable cause. In light of the incomplete disposition by the court and apparent confusion on the part of the prosecutor and court with respect to the issue(s) tendered, there should be a probable cause hearing and, if necessary, a determination of whether the evidence sought to be suppressed was attenuated from any illegal detention. Appeal held in abeyance, matter remanded. (Supreme Ct, New York Co [Brandvein, J])

**Grand Jury (General)**

**GRJ; 180(3)**

**People v Sheffield, Nos. 2007-2008, 1st Dept,  
10/28/99, 697 NYS2d 269**

The court dismissed the indictment on the grounds that the grand jury minutes were legally insufficient.

**Holding:** In determining whether the evidence before a grand jury was legally sufficient to indict, a court must consider whether the evidence, viewed most favorably to the prosecution, if unexplained and uncontradicted – and deferring all questions as to the weight or quality of the evidence – would warrant conviction. *People v Swamp*, 84 NY2d 725, 730. The evidence was sufficient to establish that the defendant was legally charged with the care of the subject 11-year-old child because he was “responsible for the child's care at the relevant time” (Family Court Act 1012[g]) and “fail[ed] . . . to exercise reasonable diligence to prevent the detrimental consequences.” Penal Law 260.10[2]). The defendant had taken the child and her mother into his apartment, where they all sometimes shared a bed. The child had not left in months, though the mother went out, and the defendant had bought food for the child, who he referred to as his stepdaughter. The defendant was chargeable with exercising reasonable diligence in discharging the responsibility for the child, which he had assumed. Order reversed, indictment reinstated. (Supreme Ct, New York Co [Altman, J])

**Instructions to Jury (Burden of Proof)**

**ISJ; 205(20)**

**Sentencing (Fines)**

**SEN; 345(36)**

**People v Redd, No. 1784, 1st Dept, 11/4/99,  
698 NYS2d 214**

The defendant was convicted of robbery and sentenced as a persistent violent offender to 20 years and a \$5,000 fine.

**Holding:** The defendant's claim as to the court's response to the jury's note seeking a “laymen's” explanation of reasonable doubt was not preserved; the court responded reasonably by relying on its correct original charge which had been re-read to the jury once during deliberations. *See People v Malloy*, 55 NY2d 296 *cert den* 459 US 847. Judges are advised to adhere to the standard charge in 2 CJI (NY) 6:20 to prevent problems. The imposition of the fine was an improvident exercise of discretion in the circumstances here. Judgment modified. (Supreme Ct, New York Co [Rothwax, J])

**Concurrence:** [Saxe, J] The adoption and use of pattern instructions reflect the central policy of seeking to assure that all criminal defendants receive consistent treatment throughout the state and all convictions are based upon the same standard. Any re-phrasing is likely to be viewed on appeal as having altered the standard, especially as to reasonable doubt. *See Severance, Greene and Loftus, Criminology: Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J Crim L & Criminology 198, 199-200. Perhaps the pattern instructions should be modified to ensure jurors' comprehension of a single, clear-cut standard. *See eg Newman, Beyond “Reasonable Doubt,”* 68 NYU L Rev 979, 991.

---

## First Department *continued*

---

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

### Trial (Joinder/Severance of Counts and/or Parties) TRI; 375(20)

#### **People v Verrone, No. 1932, 1st Dept, 11/4/99, 698 NYS2d 8**

The defendant was originally indicted on three counts of sexual abuse and one count of criminal possession of a weapon. When the defendant failed to appear at court while the indictment was pending, the prosecutor filed a felony complaint charging bail jumping. After arraignment on the new charge, the defendant executed a waiver of indictment and agreed to be prosecuted by a superior court information (SCI) and agreed to consolidate the information with the pending indictment and plead guilty to bail jumping.

**Holding:** The consolidation of the SCI's bail jumping charge with the original indictment charges was clearly appropriate. It was done solely for purposes of the plea and at defendant's request. *Cf People v Contreras*, 191 AD2d 235; see also CPL 200.20(4). It was not precluded by the holding in *People v Boston* (75 NY2d 585) that any waiver must be made before the filing of an indictment. Because the claim of defective waiver of indictment is jurisdictional, it survived the defendant's waiver of his right to appeal his conviction. The waiver precludes consideration of whether the indictment and the SCI were improperly consolidated. *People v Rodriguez*, 238 AD2d 150 *lv den* 90 NY2d 897. Judgment affirmed. (Supreme Ct, Bronx Co [Donnino, JJ])

---

### Aliens (General) ALE; 21(30)

### Appeals and Writs (Mandamus) APP; 25(55)

#### **Walker v Pataki, No. 2265, 1st Dept, 11/09/99, 698 NYS2d 624**

The petitioners, imprisoned foreign nationals, sought declaratory, injunctive, and mandamus relief based upon an alleged violation of Vienna Convention on Consular Relations article 36 (21 UST. 77, TIAS. No. 6821), which provides for notification of a foreign national's consulate upon that person's arrest. The petition was dismissed for lack of a justiciable controversy.

**Holding:** A mandamus directing the respondents to enforce the treaty and an injunction prohibiting the respondents from continuing their practices could not be granted where the petitioners did not appear to seek post-conviction relief for themselves. Even if the petitioners were seeking post-conviction relief, the treaty did not require that such relief be entertained outside the context of the Criminal Procedure Law. *Cf Breard v Greene*, 523 US 371 (1998). Absent a dispute, declaratory relief is unavailable. The respondents

do not dispute that foreign nationals are entitled to notification. Judgment affirmed. (Supreme Ct, New York Co [Ramos, JJ])

---

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

### Juries and Jury Trials (Challenges) (Competence) JRY; 225(10) (15)

### Competency to Stand Trial (General) CST; 69.4(10)

#### **People v Sanabria, No. 2266, 1st Dept, 11/9/99, 698 NYS2d 622**

The defendant was convicted, after trial, of robbery, grand larceny, and other crimes.

**Holding:** The defendant matched the limited description provided by a named citizen informant and was the only person, other than employees, found inside the store where other individuals on the street had told the officer the perpetrator would be. Because the officer had reasonable suspicion, the suppression motion was properly denied. See *People v Dickerson*, 238 AD2d 147 *lv den* 90 NY2d 857. The showup, where the defendant was displayed to witnesses in handcuffs coming out of a police car, and the officer's asking the witnesses if the defendant was the accused, were not unduly suggestive. *People v Duuvon*, 77 NY2d 541. The trial court properly exercised its discretion to deny a request for replacement of a juror whom defense counsel had identified as sleeping during his summation, where counsel did not request that the court question the juror, who had said the courtroom lights hurt her eyes. The defendant's motion before sentencing for a psychiatric examination of his capacity to stand trial was properly denied. The statutory provisions of Criminal Procedure Law article 730 do not apply to retrospective determinations, and the court rendered its determination of competency after a full hearing. Judgment affirmed. (Supreme Ct, Bronx Co [Alvarado, JJ])

---

### Forfeiture (General) FFT; 174(10)

#### **Grinberg v Safir, No. 2272, 1st Dept, 11/9/99, 698 NYS2d 218**

The respondents seized the petitioner's automobile after his arrest for driving while intoxicated. Thereafter, the respondents commenced a civil forfeiture proceeding. The trial court denied the petitioner's challenges to the above actions and dismissed the petitioner's article 78 petition.

**Holding:** New York City Administrative Code 14-140 authorizes forfeiture, and is not preempted by the Vehicle and Traffic Law. Forfeiture did not constitute an affront to the separation of powers doctrine. Nor did it constitute an excessive fine. Federal due process principles did not require

**First Department** *continued*

a pre-seizure notice or hearing where the operator of a seized vehicle was intoxicated. *See, Calero-Toledo v Pearson Yacht Leasing, Co.*, 416 US 663 (1974). Judgment affirmed. (Supreme Ct, New York Co [Stallman, JJ])

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

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

**Britt v The State of New York, No. 1246, 1st Dept, 11/16/99, 699 NYS2d 323**

The claimant entered a guilty plea to attempted rape in satisfaction of the charge of first-degree rape. The plea was later vacated and the indictment dismissed. He then brought suit against the state for wrongful conviction, and the state unsuccessfully moved for summary judgment.

**Holding:** The claimant failed to meet the statutory criteria to maintain a claim for unjust conviction. He did not establish coercion on the part of the court. The guilty plea was merely part of a strategy to delay trial. Court of Claims Act (CCA) 8-b(4)(b). The trial court's recitation of the potential sentence faced upon conviction following trial was not coercive. This case is distinguished from *People v Sun Min* (249 AD2d 130), as the court here did not say the claimant would receive the maximum sentence if he went to trial. The claimant failed to show ineffective assistance of counsel at the plea, which in any event is not a predicate for a claim under the Unjust Conviction and Imprisonment Act. CCA 8-b(3). The claim that the court coerced a plea by failing to provide substitute counsel is a patent attempt to circumvent the statutory preclusion of recovery based on ineffective assistance. If the prosecution could not establish the claimant's guilt in the absence of the complaining witness, neither has the claimant shown that he would be able to demonstrate his innocence for purposes of satisfying the statutory prerequisite to suit. CCA 8-b(3)(b)(ii), (4)(a). Judgment reversed. (Court of Claims, New York Co [Marin, JJ])

**Trial (Public Trial)** **TRI; 375(50)**

**People v Smith, No. 1850, 1st Dept, 11/16/99, 698 NYS2d 850**

The defendant was convicted of two counts of sale of a controlled substance following a joint trial with his co-defendant. During the testimony of an undercover officer the trial judge closed the courtroom. Counsel for the co-defendant stated that his client's aunts should be permitted to be present while the officer was on the stand. After the court denied the application, the defendant's attorney stated that he wanted to join in the request.

**Holding:** The closure of the courtroom to the co-defendant's aunts was based upon an insufficient showing of necessity and a new trial was ordered for the co-defendant. *People v Manning*, \_\_ AD2d \_\_, 682 NYS2d 855. The defendant urged that the denial of his application similarly warranted reversal. However, having failed to specify whom he wished to be present during the undercover officer's testimony, the defendant deprived the court of the opportunity to assess the potential danger that might be posed to the officer's safety. *People v Nieves*, 90 NY2d 426, 431. Judgment affirmed. (Supreme Ct, New York Co [Torres, JJ])

**Lesser and Included Offenses (General)** **IOF; 240(7)**

**People v Mauleon, Nos. 2286-2286A, 1st Dept, 11/16/99, 698 NYS2d 467**

**Holding:** A jury convicted the defendant both of first- and second-degree kidnapping. The defendant entered guilty pleas to murder and a second charge of first-degree kidnapping. He was sentenced as a second felony offender. Ample evidence supported the elements of abduction and intent to terrorize required for first-degree kidnapping. The verdict was not against the weight of the evidence. The defendant failed to provide an adequate record showing he was deprived of the right to be present at sidebar discussions. *People v Kinchen*, 60 NY2d 772, 774. The conviction for second-degree kidnapping must be dismissed as a lesser included offense under first-degree kidnapping. (Supreme Ct, Bronx Co [Sheindlin, JJ])

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

**Dismissal (General)** **DSM; 113(17)**

**People v Rivera, No. 1825, 1st Dept, 11/18/99, 700 NYS2d 102**

The defendant's motion to dismiss six homicide-related counts was granted on grounds that neither the defendant's statements nor his possession of the murder weapon established him as a participant in a murder. The lower court rejected the prosecutor's contention that the defendant was liable as a lookout, finding that the defendant had been down the block and did nothing in furtherance of any alleged acts committed, and thus could not have been liable as an accessory.

**Holding:** The lower court's dismissal rested upon its own assessment of the inference to be drawn from the defendant's statements. The lower court improperly trespassed upon a grand jury's role to determine the proper inferences to be drawn from a defendant's conduct. *People v Jennings*, 69 NY2d 103. The prosecution need not demonstrate that the defendant was a competent lookout, but merely that he acted with the requisite intention to aid the principal's crimi-

---

**First Department** *continued*

nal undertaking. *People v Roldan*, 211 AD2d 366 *affd* 88 NY2d 826. Judgment reversed. (Supreme Ct, Bronx Co [Cohen, JJ])

---

**Search and Seizure (Electronic Searches) SEA; 335(30)****People v Schery, No. 1896, 1st Dept, 11/18/99,  
259 AD2d 226**

Pursuant to a search warrant the defendant's conversations over his cell phone were monitored. The Special Narcotics Prosecutor deputized Spanish-speaking employees of an outside agency to monitor and intercept the calls related to the investigation. The defendant unsuccessfully sought to suppress the evidence obtained because these employees were not "law enforcement officers" or "members" of the Office of the Special Narcotics Prosecutor authorized to execute the warrant pursuant to Criminal Procedure Law (CPL) 700.35(1). He was convicted by guilty plea of drug possession.

**Holding:** The deputized special investigators were closely supervised by agents of the Drug Enforcement Task Force as well as by prosecutors, and worked at their direction. They were both law enforcement officers and members of the Office of the Special Narcotics Prosecutor within the meaning of the statute. *Cf* 18 USC 2518(5). The absence of specific language concerning outside contractors, similar to that found in federal law since 1986, does not conclusively support the contention that the legislature's failure to provide for such contractors warrants suppression where they are used. The legislature did not limit the "public servants" allowed to serve as law enforcement officers, restrict prosecutors' authority to appoint special investigators, or change the definition of a police officer as an investigator employed by a district attorney's office. CPL 1.20(34)(g). Judgment affirmed. (Supreme Ct, New York Co [Snyder, JJ])

---

**Misconduct (Prosecution) MIS; 250(15)****Witnesses (Credibility) (General) WIT; 390(10) (22)****People v Young, No. 2360, 1st Dept, 11/18/99,  
698 NYS2d 643**

**Holding:** The court properly denied the defendant's motion for a mistrial alleging undue prejudice from the prosecutor's failure to present proof regarding one count of the indictment mentioned by the prosecutor in opening remarks. The record supported the court's finding of no bad faith on the part of the prosecutor, and the court's curative instructions to consider only the charges and evidence submitted, without speculation or conjecture as to other charges, assured that defendant was not unduly prejudiced by the prosecutor's brief mention of the one count. *People v Melendez*, 178 AD2d 366 *lv den* 79 NY2d 950. Permitting a

prosecution witness to be recalled to tell the jury that she had been nervous or fearful due to the presence of an unknown spectator, causing her to give conflicting testimony on a point covered extensively in direct and cross examination was an appropriate exercise of discretion. *See People v Branch*, 83 NY2d 663, 666-667. The jury was instructed not to infer any inappropriate conduct on the part of any spectator or the defendant. *See People v Vasquez*, 204 AD2d 114 *lv den* 84 NY2d 911. Judgment affirmed. (Supreme Ct, Bronx Co [Boyle, JJ])

---

**Counsel (Standby and Substitute Counsel) COU; 95(39)****People v Estwick, No. 2403, 1st Dept, 11/23/99,  
698 NYS2d 668**

The defendant was convicted of murder and criminal possession of a weapon and sentenced to consecutive terms.

**Holding:** The trial court properly denied the defendant's requests for substitution of assigned counsel, since the defendant did not establish good cause for the substitution. *See People v Sides*, 75 NY2d 822. Other than disagreeing with his counsel's sound advice to plead guilty, the defendant's complaints consisted of conclusory allegations of inadequate communication. *See People v Square*, \_\_ AD2d \_\_, 692 NYS2d 321. Counsel's comment to the judge, outside the jury's presence, about the absence of a valid defense, was not contrary to the defendant's interests given its context. *See People v Rowe*, \_\_ AD2d \_\_, 685 NYS2d 688 *lv den* 93 NY2d 902. The defendant's groundless lack of confidence in, and hostility toward, his lawyer, who zealously defended him at trial without further complaint, did not require substitution. Judgment affirmed. (Supreme Ct, Bronx Co [Globerman, J])

---

**Double Jeopardy (Lesser Included and Related Offenses) DBJ; 125(15)****Witnesses (Defendant as Witness) WIT; 390(12)****People v Perry, No. 2474, 1st Dept, 11/30/99,  
700 NYS2d 107**

**Holding:** The defendant was not prevented by either the trial court or counsel from exercising his right to testify, notwithstanding evidence of some disagreement between the defendant and his counsel regarding trial strategy. Counsel dissuaded, not foreclosed, testimony by the defendant. *See Brown v Artuz*, \_\_ F3d \_\_, 8/6/97 1997 US App LEXIS 34018 *cert den* 522 US 1128. Where the prosecution was not required to link the intent element to a specific person, the court's instructions helped the defendant by applying the term "police officer" to one specific person in the group of three officers at which the defendant fired. There was no unfair marshaling of the evidence. The defendant was not prejudiced by the timing of the prosecution's disclosure of a potential prosecution witness's statement, as it was disclosed prior to trial and was thus clearly timely under Crimi-

**First Department** *continued*

nal Procedure Law 240.45(1)(a). See *Brady v Maryland*, 373 US 83 (1963). A criminal use of a firearm count must be dismissed because the defendant's possession of the same pistol sustained his conviction of first-degree robbery. See *People v Brown*, 67 NY2d 555, 560-561 *cert den* 479 US 1093. Judgment affirmed. (Supreme Ct, New York Co [Figueroa, JJ])

<b>Forensics (General)</b>	<b>FRN; 173(10)</b>
<b>Identification (General)</b>	<b>IDE; 190(17)</b>
<b>Witnesses (Experts)</b>	<b>WIT; 390(20)</b>

**People v Hall, Nos. 2510 and 2511, 1st Dept, 11/30/99, 700 NYS2d 105**

**Holding:** The polymerase-chain-reaction (PCR) method of DNA testing has been generally accepted by the courts as reliable, so that the trial court properly admitted such evidence without first conducting a hearing. *People v Morales*, 227 AD2d 648 *lv den* 89 NY2d 926. Any objections regarding the reliability of the statistical methods used to estimate how many people in the population share the DNA profile developed by the PCR method went to the weight of the evidence, a matter for the jury. *People v Wesley*, 83 NY2d 417. The court properly exercised its discretion in admitting evidence that one defendant was seen in possession of a gun resembling the one used in the charged offense; such testimony was relevant to establish identity and its probative value outweighed any prejudicial effect, which was in any event avoided by the court's limiting instructions. *People v Del Vermo*, 192 NY 470, 478-482. Judgments affirmed. (Supreme Ct, Bronx Co [Globerman, JJ])

**Third Department**

<b>Guilty Pleas (Withdrawal)</b>	<b>GYP; 181(65)</b>
<b>Sentencing (Restitution)</b>	<b>SEN; 345(71)</b>

**People v La Fave, No. 10907, 3rd Dept, 10/28/99, 698 NYS2d 733**

The defendant entered a counseled plea of guilty to first-degree criminal contempt. At sentencing, he stated that he was not guilty of the charge and sought to withdraw his plea. Counsel sought to withdraw from representation due to disagreements concerning the handling of the case. The trial court denied both and sentenced the defendant.

**Holding:** The trial court did not abuse its discretion in summarily denying withdrawal of the plea. The defendant was fully apprised of the consequences of his plea and knew and understood the rights he was giving up. See *People v Davis*, 250 AD2d 939, 941. He had unambiguously asserted

that his plea was voluntary and entered of his own free will; a subsequent protestation of innocence unsupported by any evidence is insufficient for vacatur of the plea. That the defendant did not allocute as to every element does not by itself render the allocution defective. Evidence supported the trial court's conclusion that there was no good cause for substitution of counsel.

The court did lack authority to order restitution for the costs of extraditing him from California. There was never a charge of bail jumping, and the defendant asserts without contradiction that he had already moved to California at the time of the indictment and did not know efforts were being made to produce him for arraignment. The extradition charges were not actual out-of-pocket losses caused by the offense, and the county was not a victim. Penal Law 60.27(1) and see 60.27(4)(a) and (b). Nor is CPL 570.56 authority for the restitution order. Judgment affirmed. (County Ct, St. Lawrence Co [Nicandri, JJ])

<b>Evidence (Motive) (Uncharged Crimes)</b>	<b>EVI; 155(87) (132)</b>
---	---------------------------

<b>Grand Jury (Procedure)</b>	<b>GRJ; 180(5)</b>
-------------------------------	--------------------

**People v Yagunoff, No. 10766, 3rd Dept, 11/24/99, 699 NYS2d 138**

The defendant was charged with endangering the welfare of a child. Upon withdrawal of the charge by the state, a prosecutor told the defendant and his attorney that felony sex abuse charges would be presented to the grand jury. Counsel contacted the district attorney's office and advised that since she would no longer be representing defendant, an adjournment of the grand jury proceedings would be needed to enable him to retain new counsel. After confirming the adjournment in writing, counsel was told orally and by letter that the adjournment would not be granted and that the grand jury would meet that day. The defendant did not testify and he was indicted.

**Holding:** Because the original charges were withdrawn, the prosecutor was not obligated to notify the defendant or his attorney of prospective grand jury proceedings or accord the defendant reasonable time to appear as a witness. See CPL 190.50[5][a]; compare *People v Moore*, 249 AD2d 575 *lv den* 92 NY2d 857.

After the prosecution filed notice of intent to offer prior alleged uncharged criminal, vicious, or immoral acts, introduction of photographs of children in various stages of nudity, found at the defendant's house, were properly admitted. They tended to prove the material issue of the defendant's sexual intent in touching the victims, disproving accident or legitimate intent. See *People v Mastropietro*, 232 AD2d 725 *lv den* 89 NY2d 1038. Judgment affirmed. (County Ct, Columbia Co [Leaman, JJ])

---

## Third Department *continued*

---

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

### Sex Offenses (General) (Juveniles) SEX; 350(4) (12)

#### **People v Doan, No. 11177, 3rd Dept, 11/24/99, 698 NYS2d 778**

The defendant, 22, began a sexual relationship with the alleged victim when she was 14 years old, resulting in the birth of a child. The defendant was indicted for the crime of rape. Following proceedings in Family Court which culminated in an order granting consent for the complainant to marry the defendant, he successfully asked the trial court to dismiss the indictment in the interest of justice.

**Holding:** It was not improper for the trial court to consider the recommendation of the complainant's law guardian who opined that the marriage was in the complainant's best interest. The trial court also considered the desires of the complainant and her mother, the birth of the parties' child, and the obstacle a felony conviction would present to the defendant and his new family. The court properly considered the statutory criteria needed for dismissal. See CPL 210.40. Although the trial court should not have considered religious and cultural factors not substantiated by this record, it cannot be said that the court abused its discretion in dismissing the indictment in view of the other evidence supporting the court's decision. See *People v Sosensko*, 210 AD2d 581. Judgment affirmed. (County Ct, Broome Co [Smith, J])

---

### Driving While Intoxicated (Evidence) (General) DWI; 130(15) (17)

### Probation and Conditional Discharge (Conditions and Terms) PRO; 305(5)

#### **People v Page, No. 11296, 3d Dept, 11/24/99, 698 NYS2d 774**

The police discovered the defendant unconscious behind the wheel of his automobile. After awakening him, and having him perform field sobriety tests which he failed, they arrested him. He was subsequently tried and convicted of driving while intoxicated and aggravated unlicensed operation of a motor vehicle. At sentencing the court imposed as a condition of probation that the defendant stay away from his former wife.

**Holding:** The fact that defendant was found early the next morning behind the steering wheel with the engine running, coupled with his statement to the police that he had intended to go home, was sufficient evidence to allow the jury to draw the fair inference that he started the engine intending to move the vehicle which constituted "opera-

tion" within the charged statutes. See *People v Marriott*, 37 AD2d 868.

The probationary sentence included a condition that the defendant not visit his ex-wife, who was in no way involved in this case, except as authorized by Family Court. This was designed to insure that the defendant lead a law-abiding life, and was a permissible exercise of discretion by the trial court under Penal Law 65.10. The statute grants courts the authority to place such conditions in a sentence of probation as the court "in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." Penal Law 65.10(1). Judgment affirmed. (County Ct, Broome Co [Mathews, J])

---

### Speedy Trial (Cause for Delay)

SPX; 355(12)

#### **People v Grey, Nos. 76551A and 76551B, 3rd Dept, 11/24/99, 259 AD2d 246**

An investigation of a June 1993 burglary revealed that fingerprints found at the scene matched those of the defendant, but he was not arrested until June 1995 because he could not be located. At the conclusion of a jury trial, he was convicted of burglary, grand larceny, and criminal mischief. The defendant appealed, arguing, among other things, ineffective assistance of counsel based upon his lawyer's failure to move to dismiss the indictment on speedy trial grounds. The Appellate Division remitted the matter to address the speedy trial issue. The trial court dismissed the indictment.

**Holding:** The police actions after it was determined that the defendant had gone to Arizona, where local deputies failed to locate him (warrant entered in NYSPIN; warrant listed on a report available to all Schenectady officers; the defendant's name placed on a "hotsheet;" and the local jail periodically checked for the defendant), were reasonable and constituted due diligence, notwithstanding the fact that greater efforts could have been undertaken. *People v Marrin*, 187 AD2d 284, 286 *lv den* 81 NY2d 843. The trial verdict was not against the weight of the evidence, as there was testimony from which the jury could conclude that the defendant's fingerprints could only have been left at the scene at the time of the crime. Order reversed, judgment affirmed. (County Ct, Schenectady Co [Sheridan, J])

---

### Guilty Pleas (General)

GYP; 181(25)

### Search and Seizure (Private Persons)

SEA; 335(60)

#### **People v Murray, No. 10647, 3rd Dept, 12/02/99, 700 NYS2d 240**

The defendant was convicted of sale and possession of a controlled substance. He was arrested pursuant to an arrest warrant on premises belonging to a third party. Cocaine was seized incident to the arrest; there was no search warrant.

**Third Department** *continued*

**Holding:** The location was found by the judge to be the defendant's residence as well as the other party's. The parties had resided together at a previous location, and it was acknowledged that the defendant had stayed overnight once or twice and that his clothing and personal effects were in the new apartment. The police had an arrest warrant which empowered them to enter the defendant's residence to effect his arrest. A search warrant was not also necessary just because the defendant's home was also that of a third person. *See US v Lovelock*, 170 F3d 339, 345 *cert den* \_\_US \_\_, 120 SCt 134. To plead guilty to the entire indictment without any sentencing guarantee was not a manifestation of an unintelligent plea where the record shows the court painstakingly advised the defendant and ascertained that the proper tests of understanding and lack of coercion were met. Judgment affirmed. (County Ct, Columbia Co [Leaman, JJ])

**Evidence (General)** **EVI; 155(60)**

**Impeachment (General)** **IMP; 192(15)**

**People v Mink, No. 11179, 3rd Dept, 12/2/99, 699 NYS2d 742**

The defendant was convicted of sexual abuse.

**Holding:** The defense sought to present testimony from the complainant's former boyfriend to the effect that after the incident, and before contacting the police, the complainant said she was looking for financial compensation from the defendant (who had obtained a large award in a civil trial) and wanted her boyfriend's help in getting the money. Generally, extrinsic evidence on a collateral matter may not be introduced solely to impeach credibility. *People v Alvino*, 71 NY2d 233, 247-248. That rule is not applied where the issue to which the evidence relates is a material one that the jury must decide. *See People v Knight*, 80 NY2d 845, 847. The statement about financial compensation could have impeached the complainant's credibility with respect to a material issue, *ie* whether the defendant did subject the complainant to sexual contact by forcible compulsion. The error was not harmless where the jury, during its deliberations, requested readbacks of the testimony of the complainant and two witnesses who were nearby during the incident. Judgment reversed. (County Ct, Columbia Co [Leaman, JJ])

**Guilty Pleas (Withdrawal)** **GYP; 181(65)**

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

**People v Lozovsky, Nos. 10950 and 11140, 3rd Dept, 12/23/99, 702 NYS2d 127**

The defendant was indicted for two counts of first-degree burglary and pled guilty to a single count of second-

degree burglary. Prior to sentencing, the defendant claimed the prosecutor had promised that if the defendant cooperated with the prosecution, such cooperation would be afforded appropriate consideration, *ie* permitting the withdrawal of the defendant's guilty plea and entry of a plea to a reduced count at a reduced sentence. The trial court denied the defendant's request to enforce such promise in sentencing, and denied his motion to vacate his conviction.

**Holding:** It was incumbent upon the defendant to enter any promises made to him on the record prior to or at the time of his plea. *People v Anonymous*, \_\_ AD2d \_\_, 692 NYS2d 485, 487 *lv den* 93 NY2d 1013. In addition, the promise claimed here was too vague and ambiguous to support a claim for specific performance. *See People v Reyes*, 167 AD2d 920, 920-921 *lv den* 77 NY2d 842. Judgment affirmed. (County Ct, Broome Co [Smith JJ])

**Grand Jury (Procedure)**

**GRI; 180(5)**

**People v Butterfield, No. 10115, 3rd Dept, 12/30/99, 702 NYS2d 140**

The defendant was convicted of driving while intoxicated and aggravated unlicensed operation of motor vehicle, and requested that the grand jury hear testimony of the defendant's designated witness. The record contains conflicting evidence as to when the district attorney received the notice. The grand jury was not told of the request, and an indictment was filed against the defendant. The defendant unsuccessfully sought dismissal on the ground that the proceeding was defective due to denial of his request; the trial court found the request had been untimely. The defendant was convicted as charged.

**Holding:** The statute (Criminal Procedure Law [CPL] 190.50[6]) does not specify any time frame within which a request for the grand jury to hear a designated witness must be made. The grand jury in this case may, in the exercise of its discretion, have chosen not to call the defendant's witness. This has no bearing upon whether the defendant's right to have the grand jury consider his request was denied. Held, that a defense request under 190.50(6) "is timely if delivered or communicated to the prosecutor at any time prior to the presentment of the case to the Grand Jury." It is impossible to conclude that there was no possibility that this defendant was prejudiced by the denial of an opportunity to present testimony, and consequently, the indictment must be dismissed as defective under CPL 210.35 (5). Judgment reversed. (County Ct, St. Lawrence Co [Nicandri, JJ])

**Counsel (Competence/Effective Assistance/Adequacy)**

**COU; 95(15)**

**People v Norfleet, No. 11426, 3rd Dept, 12/30/99**

## Third Department *continued*

**Holding:** The defendant allegedly broke into a woman's home and attacked her. He was convicted of burglary, attempted rape, sexual abuse, and petit larceny. The only plausible defense strategy was to offer evidence of the defendant's intoxication in an attempt to negate the element of intent. Defense counsel's failure to pursue any identifiable defense strategy, including his failure to offer available evidence of defendant's intoxication and seek an intoxication charge, transcended mere losing tactics and constituted true ineffectiveness. See *People v Baldi*, 54 NY2d 137, 146. Defense counsel failed to seek the submission of any lesser included offenses, and made a closing statement which articulated no plausible defense theory. There were no tactical purposes underlying those actions; defense counsel failed to provide meaningful representation. Judgment reversed. (County Ct, Albany Co [Rosen, J])

**Accusatory Instruments (Sufficiency) ACI; 11(15)**

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

**People v Parrotte, No. 11472, 3rd Dept, 12/30/99,  
702 NYS2d 137**

The defendant was indicted for first-degree assault, first-degree reckless endangerment, and endangering the welfare of a child. The defendant sought reduction of the charges and, eventually they were lowered to second-degree assault and second-degree reckless endangerment.

**Holding:** The prosecution's appeal from the original order reducing only one count is superceded by the order issued upon reconsideration, and is dismissed. Compressing a three-month-old infant's chest hard enough to fracture at least 20 ribs is conduct which exposes that child to an imminent risk of death, and is so wanton as to display indifference to human life. Such proof, viewed most favorably to the prosecution and unexplained and uncontradicted, would warrant conviction for first-degree reckless endangerment. The medical evidence indicated that the infant's injuries were not life threatening, nor was there proof that the injuries met the tests of Penal Law 10.00 (10). The rib fractures were in various stages of healing and no medical treatment beyond hospital observation and the administration of Tylenol was required. The evidence is insufficient to sustain a charge of first-degree assault. Order modified, reversing the reduction of the second count. (County Ct, Clinton Co [Ryan, J])

**Dissent:** [Mugglin, J] The evidence does not support either of the charges in question. ♪

## Job Opportunities *continued from page 5*

include medical and mental health care, conditions of confinement, prison discipline, excessive force, and sentence correction. PLS seeks to be a well-balanced, diverse organization; Spanish-speaking staff are especially needed. Minorities are encouraged to apply. Benefits include free health insurance, substantial leave time and flexible leave policies. Send resume, writing sample and 3 references with phone numbers to: Cheryl Maxwell, Managing Attorney, Prisoners' Legal Services of New York, 121 Bridge Street, Suite 202, Plattsburgh, NY 12901

PLS also seeks **Paralegals** for the Buffalo and Poughkeepsie offices to handle a wide variety of cases under attorney supervision. Good writing and interpersonal skills required, commitment to public interest work preferred. Send resume and three references to: Arthur J. Giacalone, Managing Attorney, Prisoners' Legal Services of New York, 107 Delaware Avenue, Suite 1360, Buffalo, NY 14202 or Joan Faulkner, Managing Attorney, Prisoners' Legal Services of New York, 205 South Street, Suite 205, Poughkeepsie, NY 12601

The National Coalition to Abolish the Death Penalty seeks a **Development Director** with entrepreneurial instinct to grow the organization. Background in major gift and grant research/writing/reporting, database management, and 3 yrs experience required. Proficiency with MoneyMaker a plus. Salary \$32,000-\$37,000, opportunities for performance bonus and excellent benefits. Application deadline 4/15/00. Send resume and cover letter (no calls please): Executive Director, NCADP, 1436 U Street NW, Suite 104, Washington DC 20009. fax (202)387-5590; e-mail [shawkins@ncadp.org](mailto:shawkins@ncadp.org). NCADP also seeks a **Development Associate**. Duties include data entry of daily gifts, donor acknowledgments and research, managing grant calendar, production of special mailings, filing and assistance with other aspects of fund raising. Proficiency with MoneyMaker a plus. 2 years experience. Salary \$21,000-\$23,000 and excellent benefits. Deadline 4/15/00. Send resume and cover letter to address above.

The Brennan Center for Justice at NYU School of Law seeks a **Program Director**,

**Criminal Justice Program** to plan and manage all activities of an ambitious new program to explore three themes: The Right to Effective Assistance of Counsel, Fair Enforcement of the Criminal Law, and Crime and Punishment. Duties will include hiring, supervising, and managing staff in consultation with the Academic Director, fund raising, developing and managing budgets for the Program and discrete projects, and public relations. Excellent writing and analytical skills, imagination, versatility, meticulousness, and organizational skills essential. JD and 8+ years in criminal justice required, with experience in at least two of the following: community organizing, litigation, or public education. Management and public speaking experience, entrepreneurial spirit, ability to motivate others strongly preferred. Salary CWE, excellent benefits. EEO, AA, actively recruiting women, people of color, persons with disabilities, and lesbians and gay men. Contact: The Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas, 5th Floor, New York NY 10013. tel (212)998-6730; fax (212)995-4550; web site [www.brennancenter.org](http://www.brennancenter.org) ♪

# Yes! I want to support NYSDA.

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

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

I have enclosed a tax-deductible contribution:  \$500  \$250  \$100  \$50  Other \$\_\_\_\_\_

Name\_\_\_\_\_ Firm/Office\_\_\_\_\_

Address\_\_\_\_\_ City\_\_\_\_\_ State\_\_\_\_\_ Zip\_\_\_\_\_

Home Address\_\_\_\_\_ City\_\_\_\_\_ State\_\_\_\_\_ Zip\_\_\_\_\_

County\_\_\_\_\_ Phone (Office)\_\_\_\_\_ (Fax)\_\_\_\_\_ (Home)\_\_\_\_\_

E-mail Address (Office)\_\_\_\_\_ E-mail Address (Home)\_\_\_\_\_

Please indicate if you are:  Assigned Counsel  Public Defender  Private Attorney  
 Legal Aid Attorney  Law Student  Concerned Citizen

(Attorneys and law students please fill out) Law School\_\_\_\_\_ Degree\_\_\_\_\_

Year of graduation:\_\_\_\_\_ Year admitted to practice\_\_\_\_\_ State(s) \_\_\_\_\_

Checks are payable to the **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

**New York State Defenders Association, Inc.**  
194 Washington Avenue, Suite 500  
Albany, NY 12210-2314

Non-Profit Organization  
U.S. Postage  
**PAID**  
Albany, NY  
Permit No. 590