NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XVI Number 5 July-December 2001

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Defender News

Public Defense Pounded by Budget Crisis and New Challenges

Despite Layoffs, Backup Center Struggles to Maintain Services

With no agreement reached by state leaders on allocating funds in the supplemental budget passed on Oct. 25, NYSDA's Backup Center laid off several staff members on Nov. 16. The legislature is scheduled to return to Albany in December. NYSDA remains hopeful that it will secure funding at that time. The legislature's action then will determine whether the Backup Center will lay off only one more person or many others. (See "From My Vantage Point," p. 3.) The Association appreciates the support of its members and others who have been responding to its call for donations, renewal of membership at increased dues rates, and help in locating and securing other funds.

Due to the ongoing state budget impasse, many Backup Center services, including publication of the *REPORT*, have been curtailed for months. In an effort to provide current information to public defense attorneys and others in the interim, the web site at www.nysda.org continues to be regularly updated.

Urgent Work Needed in the Wake of 9/11

The Association joined others in sorrow for the victims of the Sept. 11 terrorist acts against the Twin Towers, the Pentagon, and the plane that crashed in Pennsylvania. Almost simultaneously, NYSDA faced the need to analyze and respond to proposed and completed state and national government responses to the 9/11 events. The Special Reports section of the Defense News page on the Association's web site includes a segment entitled IMPACT OF WORLD TRADE CENTER DISASTER ON PUBLIC DEFENSE. There, defense lawyers and concerned persons can find links to and brief descriptions of a variety of federal and state legislation, regulations, executive orders, and court decisions. Arrests and detentions under these new measures are already mounting, and public defense teams across New York are struggling under the double burden of decreased revenue and increased work.

☞ Inside: Legislative Review 2001

18-B Rates Stagnate, Judges' Role Debated

News reports indicate that hopes are faint for any raise in assigned counsel fees this session, but Chief Judge Judith Kaye recently indicated that it remains a judiciary priority. (*New York Law Journal*, 11/7/01.) However, the Office of Court Administration continues to support the Chief Administrator's new rule permitting the *sua sponte* review and modification of trial court compensation orders under County Law 722-B. (*See Backup Center REPORT*, Vol XVI, #4.) That position is opposed by the Association of Justices of the Supreme Court of the State of New York, which has offered *amicus curiae* support in the consolidated cases of three lawyers attacking the rule in the 1st Department. (*New York Law Journal*, 9/25/01.)

A motion is also pending on behalf of NYSDA, NYSACDL and NACDL seeking leave to file an *amici curiae* brief in the same matter, *Levenson, et al v Lippman, et al.* A similar motion and brief will be filed in a like proceeding in the 4th Department by December. The briefs set forth constitutional and statutory barriers to the rule founded in the principles of separation of powers and statutory interpretation. Copies of the briefs are available from the Backup Center.

League to Push for Independent Public Defense Commission

An assigned counsel rate increase is not the only defense-relevant legislative issue that has been stalled since 9/11 (see "Legislative Review" p. 4). In one bit of good news,

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Defender News *continued*

the League of Women Voters of New York State has decided to make the need for an independent statewide public defense commission one of its four legislative priorities for the upcoming year, according to Lenore Banks, the League's Liaison to NYSDA.

Former LAS Head Murray Dies

Archibald R. Murray, who was The Legal Aid Society's Executive Director and Attorney-in-Chief for 19 years and then became Chair of its Board from 1994 to 1998, died of a heart attack in September at the age of 68. He was a member of NYSDA's board for over 10 years, and gave the Keynote Address at the Awards Banquet for NYSDA's Annual Meeting in 1992. Murray was the first black President of the New York State Bar Association and a leader in many other organizations. He was Commissioner of the Division of Criminal Justice Services from 1972 to 1974. NYSDA joins his many other colleagues in mourning him, and extends sympathy to his family.

Former CDO Deputy Becomes Federal Judge

Former First Deputy Capital Defender Randolph F. Treece has been elevated to the federal bench. He is the first African American to serve in the Northern District judiciary, where he is a US Magistrate Judge. He left the Capital Defender Office in 1999, after three and a half years, to serve as general counsel for State Comptroller H. Carl McCall. ⚖

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Conferences & Seminars

Sponsor:	New York State Association of Criminal Defense Lawyers
Theme:	Anti-Terrorism Law Update
Date:	December 8, 2001
Place:	Syracuse, NY
Contact:	Patricia Marcus: tel (212) 532-4434; e-mail nysacdl@aol.com; web site www.nysacdl.org

Sponsor:	**New York State Defenders Association**
Theme:	**Criminal Defense Update 2001**
Date:	**December 8, 2001**
Place:	**Rochester, NY**
Contact:	**NYSDA: tel (518) 465-3524; fax (518) 465-3249; web site www.nysda.org**

Sponsor:	New York State Association of Criminal Defense Lawyers
Theme:	Criminal Law Update
Date:	December 15, 2001
Place:	Albany, NY
Contact:	Patricia Marcus: tel (212) 532-4434; e-mail nysacdl@aol.com; web site www.nysacdl.org

Sponsor:	National Association of Criminal Defense Lawyers
Theme:	Advanced Criminal Law Seminar: Emerging Trends, Novel Defenses
Dates:	January 27-February 2, 2002
Place:	Aspen, CO
Contact:	NACDL: (202)872-8600; web site www.criminaljustice.org

Sponsor:	New York Association of Drug Treatment Court Professionals
Theme:	3rd Annual Conference and Exhibit—Back to the Future: Charting the Course in New York State
Dates:	March 6-8, 2002
Place:	Saratoga Springs, NY
Contact:	e-mail jsmith@pricedaniel.com; web site: www.nyadcp.org/conference.htm

Sponsor:	California Attorneys for Criminal Justice/California Public Defenders Association
Theme:	Capital Case Defense Seminar—Team Defense: Beating the Drum for Justice
Dates:	February 15-18, 2002
Place:	Monterey, CA
Contact:	CACJ: web site www.cacj.org

Sponsor:	National Legal Aid & Defender Association
Theme:	Life in the Balance (Death Penalty Training)
Dates:	March 9-12, 2002
Place:	Kansas City, MO
Contact:	Aimee Gabel at NLADA: tel (202) 452-0620, ext. 214; e-mail a.gabel@nlada.org; web site www.nlada.org ⚖

*From My Vantage Point**

By Jonathan E. Gradess

Keeping NYSDA Open in a Changed World

The world has changed.

Our leaders have used our collective September sadness and grief as a launching pad for an outright attack on the constitutional and moral values we cherish and they swore to protect. Our nation's fear has invited the hate genie once again from its bottled moorings and a new anti-immigrant, anti-client, anti-defense lawyer sentiment is brimming over the top of the war cauldron. Racial profiling has become the mode of current investigation; the INS refuses to disclose the location of non-citizen clients; the Department of Justice indicates it will no longer report the numbers of people taken into custody; more people are in detention than at any time since World War II; and 5000 unrepresented students are about to be called to answer for themselves because of the color of their skin, their name, or their nationality.

Meanwhile the Bureau of Prisons unilaterally has eliminated the 400-year-old principle of preserving against government eavesdropping the sanctity of the relationship between attorney and client. We face the spectre of clients being sent to foreign countries for detention and trial under a Military Order of the President. That order permits the death penalty and life imprisonment to be imposed by military officers appointed by the Secretary of Defense, who is also to write the rules of procedure for the pretrial, trial and post-trial phases of these tribunals. The President has the exclusive say about who is subject to the order and will have the final say over an individual's conviction and sentence unless that too is delegated to the Secretary of Defense for decision.

New York has passed sweeping anti-terrorism legislation so broad in scope that it subjects 16-year-olds who pull false fire alarms to prosecution as D violent felons. The next scheduled round of debate—here in Albany in December—is expected to advance a bioterrorism agenda. Meanwhile the shrinking budget negotiations and spiraling economy have left our office, other defender programs, 18B reform, pay equity with prosecutors, loan forgiveness, and the recommendation for a Public Defense Commission in the dust. Aid to Prosecution has nevertheless been extended to all counties and the State Police budget may even be increased. As prison intake has slowed and convictions have fallen, correctional officers are being deployed as security at the Empire State Plaza. Thus while state and federal legislation increases the exposure of public defense clients to unprecedented procedures and punishments, defenders across New York face the prospect of budget cuts or inadequate or non-existent program restorations.

There is no question that our world has changed, but many things happening now have long been desired by some in power. In the face of measures that erode civil liberties, our job will remain one of protecting our clients from the broad overreach of a system that continues to need and want scapegoats, that provides resources to law enforcement and prosecution far out of balance with those for public defense, and does all these things at the expense of, and in the name of, ordered liberty.

The Backup Center and our Association have not passed through the past eight months unscathed. Our closed intake, reduced program, and uncertainty have been costly to us and to public defense clients. Bittersweet is the news that we dodged a bullet Friday, November 16th; we have been able to hold open our doors but only at the expense of layoffs.

As we await an anticipated December distribution of the amounts available from the Supplemental Budget passed in late October, we have had to make cuts in each department of the Backup Center. Our four recent layoffs, plus three people lost since August, come from our Research Unit (2), Immigration Project (1), automation team (1) and support staff (2). We will also lay off an additional staff attorney in December. By then our program—smaller by a third—will be different and so will our relationship with clients, members, counties and the State government.

For all the years we have been open and funded by the State to administer the Backup Center, we have supported defense lawyers and county defense programs with research services, inexpensive training, free software and computer technical support, lower prices for materials, and below market (or free) rates for studies, assistance and service. Primarily state-funded, we have carried out a state function–resource support to assure the right to competent defense counsel.

This year—as the world changed—we found ourselves organizationally threatened and quite nearly out of business. While we now believe that next month we will be back, smaller, we know things will have to be different. How exactly this all will manifest itself we will explore together with you, our board, and the clients we serve. From what our members and defenders are telling us, we know it is vital that our services to them and to clients never again face this kind of jeopardy. One thing is clear: in a world that has changed, we need to keep our doors open, wide open. This we intend to do. ⚖

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

Legislative Review 2001

By Al O'Connor*

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Introduction

The 2001 Regular Session of the New York State Legislature began with the real promise of Rockefeller Drug Law reform and the first pay raise for 18-B lawyers in sixteen years. But early hopes for positive change in the area of criminal justice were slowly eclipsed by the inevitable budget battle that developed between the Legislature and Governor. Governor George Pataki's refusal to engage in budget negotiations this year raised fears of a repeat of 1998, when he unexpectedly vetoed nearly $1 billion of appropriations approved by the Senate and Assembly. This August, the Legislature sought to break the standoff by passing a Spartan " 'baseline' budget," which, it was hoped, would cause so much fiscal pain that it would force the Governor to participate in three-way negotiations on a supplemental budget. Then, of course, the cataclysmic events of Sept. 11th forced a change in everyone's priorities. The Legislature convened in an Extraordinary Session on Sept. 17th to quickly pass an anti-terrorism bill, and the budget was finally laid to rest in October with only small additions to the stripped-down "baseline budget." As a result of these extraordinary events, and for the time being, Rockefeller Drug Law reform and an increase in 18-B rates remain seemingly out of reach. There are reports that the Legislature will reconvene in December and may take up these long-neglected issues.

In addition to the anti-terrorism bills passed on Sept. 17th, some of the more significant criminal justice legislation this year included the elimination of mandatory sequestration in criminal trials, and a drastic expansion of the "Son of Sam Law." The Legislature also passed its usual share of minor and technical bills. Summarized below are the bills affecting public defense work that have either been signed into law by Governor Pataki, or have passed both houses and will be forwarded to him for his approval or veto. The complete text of all bills and chapter laws can be found on the New York State Senate and Assembly web sites (www.senate.state.ny.us and www.assembly.state.ny.us). These sites can also be accessed on the Research Links page of NYSDA's web site (www.nysda.org).

* ***Al O'Connor*** *is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work.*

New Offenses & Offense Level Upgrades

Chap. 300 (S.70002) (Anti-Terrorism Act of 2001).
Effective: September 17, 2001

Less than a week after the Sept. 11th terrorist attack on the World Trade Center, the Legislature convened in an Extraordinary Session to pass the Anti-Terrorism Act of 2001. The Act establishes four new substantive penal law offenses: act of terrorism, soliciting or providing support for an act of terrorism, making a terroristic threat, and hindering prosecution of terrorism. It also includes the first amendment to New York's death penalty statute since capital punishment was reinstated on Sept. 1, 1995.

Crime of terrorism—Penal Law § 490.25

A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.

Definitions—Penal Law § 490.05 (1)

1. "Act of terrorism":
   (a) For purposes of this article means an act or acts constituting a specified offense as defined in subdivision three of this section for which a person may be convicted in the criminal courts of this state pursuant to article twenty of the criminal procedure law, or an act or acts constituting an offense in any other jurisdiction within or outside the territorial boundaries of the United States which contains all of the essential elements of a specified offense, that is intended to:
      (i) intimidate or coerce a civilian population;
      (ii) influence the policy of a unit of government by intimidation or coercion; or
      (iii) affect the conduct of a unit of government by murder, assassination or kidnapping; or
   (b) for purposes of subparagraph (xiii) of paragraph (a) of subdivision one of section 125.27 of this chapter means activities that involve a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are intended to:
      (i) intimidate or coerce a civilian population;
      (ii) influence the policy of a unit of government by intimidation or coercion; or
      (iii) affect the conduct of a unit of government by murder, assassination or kidnapping.

Specified Offense—Penal Law § 490.05 (3)

3. "Specified offense" for purposes of this article means a class A felony offense other than an offense as defined in article two hundred twenty, a violent felony offense as defined in section 70.02, manslaughter in the second degree as defined in section 125.15, criminal tampering in the first degree as defined in section 145.20 of this chapter, and includes an attempt or conspiracy to commit any such offense.

Sentencing Provisions—Penal Law § 490.25 (2)

(a) When a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class B, C, D or E felony offense, the crime of terrorism shall be deemed a violent felony offense.

(b) When a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class C, D or E felony offense, the crime of terrorism shall be deemed to be one category higher than the specified offense the defendant committed, or one category higher than the offense level applicable to the defendant's conviction for an attempt or conspiracy to commit the offense, whichever is applicable.

(c) When a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class B felony offense, the crime of terrorism shall be deemed a class A-I felony offense and the sentence imposed upon conviction of such offense shall be in accordance with section 70.00 of this chapter.

(d) Notwithstanding any other provision of law, when a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class A-I felony offense, the sentence upon conviction of such offense shall be life imprisonment without parole; provided, however, that nothing herein shall preclude or prevent a sentence of death when the specified offense is murder in the first degree as defined in section 125.27 of this chapter.

Death Penalty Amendment—Penal Law § 125.27 (1) (xiii)

A person is guilty of murder in the first degree when:

(xiii) The victim was killed in furtherance of an act of terrorism, as defined in paragraph (b) of subdivision one of section 490.05 of this chapter. . .

Soliciting or providing support for an act of terrorism in the second degree—Penal Law § 490.10

A person commits soliciting or providing support for an act of terrorism in the second degree when, with intent that material support or resources will be used, in whole or in part, to plan, prepare, carry out or aid in either an act of terrorism or the concealment of, or an escape from, an act of terrorism, he or she raises, solicits, collects or provides material support or resources.

(Class D violent felony)

Soliciting or providing support for an act of terrorism in the first degree—Penal Law § 490.15

A person commits soliciting or providing support for an act of terrorism in the first degree when he or she commits the crime of soliciting or providing support for an act of terrorism in the second degree and the total value of material support or resources exceeds one thousand dollars.

(Class C violent felony)

Definitions—Penal Law § 490.05

2. "Material support or resources" means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.
4. "Renders criminal assistance" for purposes of sections 490.30 and 490.35 of this article shall have the same meaning as in section 205.50 of this chapter.

Making a terroristic threat—Penal Law § 490.20

1. A person is guilty of making a terroristic threat when with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense.
2. It shall be no defense to a prosecution pursuant to this section that the defendant did not have the intent or capability of committing the specified offense or that the threat was not made to a person who was a subject thereof.

(Class D violent felony)

Hindering prosecution of terrorism in the second degree—Penal Law § 490.30

A person is guilty of hindering prosecution of terrorism in the second degree when he or she renders criminal assistance to a person who has committed an act of terrorism, knowing or believing that such person engaged in conduct constituting an act of terrorism.

(Class C violent felony)

Hindering prosecution of terrorism in the first degree— Penal Law § 490.35

A person is guilty of hindering prosecution of terrorism in the first degree when he or she renders criminal assistance to a person who has committed an act of terrorism that resulted in the death of a person other than one of the participants, knowing or believing that such person engaged in conduct constituting an act of terrorism.

(Class B violent felony)

Chap. 244 (S.357-c) (Falsely Reporting an Incident — Placing a False Bomb). Effective: November 1, 2001

Adds a new subdivision (6) to Penal Law § 240.60 (Falsely reporting an incident in the first degree) concerning false reports of an impending explosion or release of a hazardous substance in a *sports stadium or arena, mass transportation facility or enclosed shopping mall.* As originally enacted, Chapter 244 established the crime as a Class E felony. However, the section was subsequently amended by Chapter 301 to reclassify the crime a Class D violent felony.

Establishes the new Penal Law offense of Placing a false bomb in a sports stadium or arena, mass transportation facility or enclosed shopping mall (Penal Law § 240.63 - as originally enacted a Class E felony but crime was reclassified a Class D violent felony by Chapter 301).

Chapter 301 (Falsely Reporting an Incident — Placing a False Bomb). Effective: September 17, 2001 / November 1, 2001

As part of the Extraordinary Session on September 17th in the wake of the World Trade Center attacks, the Legislature elevated the offenses levels of Falsely reporting an incident (Penal Law §§ 240.50, 240.55, 240.60) and Placing a false bomb (Penal Law §§ 240.61, 240.62, 240.63):

- Falsely reporting an incident in the third degree (Penal Law § 240.50): Elevated from a Class B to a Class A misdemeanor.
- Falsely reporting an incident in the second degree (Penal Law § 240.55): Elevated from a Class A misdemeanor to a Class E violent felony.
- Falsely reporting an incident in the first degree (Penal Law § 240.60): Elevated from a Class E felony to a Class D violent felony.
- Placing a false bomb in the second degree (Penal Law § 240.61): Elevated from a Class A misdemeanor to a Class E violent felony.
- Placing a false bomb in the first degree (Penal Law § 240.62): Elevated from a Class E felony to a Class D violent felony.
- Placing a false bomb in a sports stadium or arena, mass transportation facility or enclosed shopping mall (Penal Law § 240.63): Elevated from a Class E felony to a Class D violent felony.

Chapter 301 also includes substantive amendments to the elements of the following crimes:

Falsely reporting an incident in the second degree (Class E violent felony) — Adds a new subdivision:

4. Knowing the information reported, conveyed or circulated to be false or baseless and under circumstances in which it is likely public alarm or inconvenience will result, he or she initiates or circulates a report or warning of an alleged occurrence or an impending occurrence of a fire, an explosion, or the release of a hazardous substance upon any private premises.

Falsely reporting an incident in the first degree (Class D violent felony) — Amends subdivision 6 to additionally apply to false reports of a fire and false reports relating to "any public building or any public place."

Placing a false bomb in the first degree (Class D violent felony) — Amends section to apply to false bombs placed in "a public building or a public place."

Chap 42 (A.5305) (Judiciary Law — Providing a Juror with a gratuity). Effective: November 1, 2001

After the jury deadlocked at his 1999 trial on tax evasion charges, Abe Hirschfeld, offered each juror a tip of $2,500. In response to this incident, the Legislature has now established the new Class A misdemeanor of providing a juror with a gratuity:

Penal Law § 215.22 — Providing a Juror with a Gratuity

A person is guilty of providing a juror with a gratuity when he or she, having been a party in a concluded civil or criminal action or proceeding or having been a person with regard to whom a grand jury has taken action pursuant to any subdivision of section 190.60 of the criminal procedure law (or acting on behalf of such a party or such a person), directly or indirectly confers, offers to confer or agrees to confer upon a person whom he or she knows has served as a juror in such action or proceeding or on such grand jury any benefit with intent to reward such person for such service (Class A misdemeanor).

Chap. 224 (A.808) (Arson in the Fifth Degree). Effective: November 1, 2001

Establishes the new crime of Arson in the fifth degree, a Class A misdemeanor, which applies when a person intentionally damages property of another (without the owner's consent) by starting a fire or causing an explosion. While such conduct has always been punishable as criminal mischief, the new offense is intended to facilitate

closer monitoring of arsonists by insuring that criminal history reports reflect the true of the defendant's actions.

Penal Law § 150.01 — Arson in the Fifth Degree

A person is guilty of arson in the fifth degree when he or she intentionally damages property of another without consent of the owner by intentionally starting a fire or causing an explosion (Class A misdemeanor).

Penal Law

Chap. 385 (S.4233) (Aggravated Harassment in the Second Degree — Elements). Effective: November 1, 2001

Amends Penal Law § 240.30 to criminalize harassing communications made during the course of a telephone call that was not initiated by the defendant. The legislation was adopted to overrule such cases as *People v. Monroe*, 183 Misc.2d 374 (Crim. Ct. New York County 2000), where the court held that the language of the statute did not apply to threatening remarks made during the course of a telephone call initiated by the complainant.

Chap. ___ (S.5612) (Fireworks — Dangerous Fireworks — Excluded items). Effective: 60 days after Governor's signature

Amends Penal Law § 270 to exclude from the definition of "fireworks" and "dangerous fireworks" those party poppers, snappers, snakes, glow worms and sparklers that are in compliance with federal regulations.

Chapter 317 (Unlawful wearing of body vest). Effective: November 1, 2001

Penal Law § 270.20 makes it a Class E felony to wear a body vest during the commission of a violent felony in which the defendant possesses a firearm. Chapter 317 now adds rifles and shotguns to the list of weapons covered by the statute.

Chap. 395 (S.204a) (Loitering — school buses). Effective: November 1, 2001

Amends Penal Law § 240.35 (Loitering) to add school buses to the list of places covered by the statute.

Chap. ___ (S.5580) (Conditions of Probation and Conditional Discharge — Services for not-for-profit organizations). Effective: 60 days after Governor's signature

Amends Penal Law § 65.10 to provide that services for not-for-profit organizations ordered by a court to be performed by a defendant as a term and condition or probation or conditional discharge *"shall not result in the displacement of employed workers or in the impairment of existing contracts for services, nor shall the performance of any such services be required or permitted in any establishment involved in any labor strike or lockout."*

Criminal Procedure Law

Chap. 47 (S.5394) (Mandatory Sequestration Eliminated). Effective: May 30, 2001

In 1995, the Legislature amended CPL 310.10 to eliminate the requirement that deliberating juries be sequestered, except upon the trial of a Class A or B felony, or a Class C violent felony, an amendment that was routinely extended after its original expiration date in 1997. Chapter 47 abolishes mandatory sequestration across-the-board and makes the change permanent. From now on, judges will have discretion to permit deliberating juries to separate in all criminal trials in New York, including capital cases.

Chap. ___ (S2829) (Adjournment in Contemplation of Dismissal — Superior Court). Effective: November 1, 2002

Gives superior court judges authority to order an adjournment in contemplation of dismissal with the consent of the parties when the sole remaining count or counts of an indictment charge a misdemeanor offense (Adds CPL § 210.47).

Chap. 412 (S.2830) (Youthful Offender Records Available to Defendant). Effective: November 1, 2001

Amends CPL § 730.35 to make clear that confidential youthful offender records must be made available for inspection and copying by the person who was the defendant in the underlying proceeding.

Chap. ___ (S.2832) (Rendition of Verdict — Technical Amendment). Effective: Upon Governor's signature

Amends CPL § 310.40 to provide that a court may allow another member of the jury to report the verdict when the jury foreperson "refuses or is unable" to do so. The legislation is reportedly in response to an actual case where the jury foreperson refused to announce a verdict while the defendant's mother was present in the courtroom.

Chapter 384 (Domestic Violence — Orders of Protection — Statement of Reasons). Effective: November 1, 2001

Amends CPL § 530.12 and § 530.13 to require a judge presiding over a family offense matter to state on the record "the reasons for issuing or not issuing" an order of protection in any case where a temporary order of protection was issued.

Chapter 315 (S.3337) (Audio-Visual Court Appearances — Ontario County — Sunset Extended). Effective: September 19, 2001

Amends CPL § 182.20 to add Ontario County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed circuit television. Extends the sunset provision of CPL Article 182 to December 31, 2004.

Family Law Practice

Chap. 340 (S.5464a) (Family Court Orders of Protection — Determination by Referee). Effective: September 1, 2001

Amends the Judiciary Law to give Family Court judges authority to refer certain applications for orders of protection (including temporary orders of protection) brought after 5 p.m. to referees for determination. [New Judiciary Law § 212 (2)(n)]

Chap. 386 (A.4203) (Domestic Relations Law — Family Court Act — Uniform Child Custody Jurisdiction and Enforcement Act). Effective: April 28, 2002

Enacts, with minor changes to conform to New York law, the Uniform Child Custody Jurisdiction and Enforcement Act, which has been promulgated by the National Conference of Commissioners of Uniform State Laws and adopted by over twenty states. Chapter 386 replaces the Uniform Child Custody Jurisdiction Act, which had been codified in New York as Domestic Relations Law Article 5-A.

Chap. 236 (Domestic Relations Law — Family Court Act — Confidentiality of addresses in Family Court and matrimonial proceedings). Effective: September 4, 2001

Amends the Family Court Act (§ 154-b) and the Domestic Relations Law (new § 254) to provide additional authority for a court in a Family Court or matrimonial proceeding to order that information concerning the whereabouts of a party or child remain confidential where "disclosure of the address or other identifying information would pose an unreasonable risk to the health or safety of a party or the child."

Vehicle and Traffic Law

Chap. 69 (S.5400) (Vehicle and Traffic Law — Use of hand-held mobile phones prohibited). Effective: November 1 & December 1, 2001

Establishes a new traffic infraction involving the use of a hand-held mobile phone while a vehicle is in motion on a public highway; establishes a presumption that "an operator of a motor vehicle who holds a mobile telephone to, or in the immediate proximity of [,] his or her ear while such vehicle is in motion is presumed to be engaging in a call." (Traffic infraction carrying a maximum $100 fine)

Exclusions:

The new law does not apply to "(a) the use of a mobile telephone for the sole purpose of communicating with any of the following regarding an emergency situation: an emergency response operator; a hospital, physician's office or health clinic; an ambulance company or corps; a fire department, district or company; or a police department, (b) any of the following persons while in the performance of their official duties: a police officer or peace officer; a member of a fire department, district or company; or the operator of an authorized emergency vehicle as defined in section one hundred one of this chapter, or (c) the use of a hands-free mobile telephone." (VTL § 1225-c).

The law is effective on December 1, 2001, but beginning November 1st law enforcement officers may stop motorists for the purpose of issuing warnings.

Chap. ___ (A.235-b) (Vehicle and Traffic Law — Leaving the scene of an incident involving a non-motorized wheeled conveyance). Effective: November 1, 2002

Requires adult operators of non-motorized wheeled conveyances (e.g., bicycles, in-line skates, skateboards) to provide their name and exact address to any person who suffers physical injury or serious physical injury "due to" the operation of the conveyance, and to provide such information to the police at the scene or at the nearest police station. Leaving the scene of an incident involving a non-motorized wheeled conveyance is divided into two degrees. The second degree offense (a non-criminal violation) applies where the operator knows or has reason to know that the injured person has suffered physical injury; the first degree offense (Class B misdemeanor) applies where the operator knows or has reason to know that the injured person has suffered serious physical injury.

Chap. 406 (S.1992-A) (Vehicle and Traffic Law — Elimination of Conviction Stubs). Effective: January 29, 2002

Amends the Vehicle and Traffic Law to eliminate references to the driver's license "conviction stub," which has become antiquated because information about a motorists' prior infractions is now widely available through computerized DMV abstracts.

Crime Victims

Chap. 62 (S.5110a) ("Son of Sam Law" expanded). Effective: June 25, 2001

Chapter 62 greatly expands New York's "Son of Sam Law" (Executive Law § 632-a) Originally enacted to prevent notorious criminals from profiting through media exploitation of their crimes, the law now applies in a far wider array of circumstances. The new law permits crime victims to sue convicted criminal defendants for damages—despite expiration of the governing Statute of Limitations—whenever an inmate or defendant under supervision receives funds or property in excess of $10,000 from any source, except earned income or child support payments (*e.g.*, gifts, bequests, civil damage awards). The law sets up an elaborate system of notification to the Crime Victim's Board (CVB) whenever a defendant covered by the Act receives such funds; it also authorizes steep fines for persons or organizations who fail to notify the Board when required to do so. The CVB will notify all of the defendant's known crime victims that the he is no longer judgment-proof, paving the way for them to bring civil damage actions within three years of the CVB's notice. The CVB is authorized to seek provisional remedies on behalf of crime victims in order to avoid wasting of the defendant's assets (*e.g.*, attachment). Victims will be authorized to enforce any resulting judgments against all funds in excess of $1,000 in an inmate's prison trust account, and from up to 90% of compensatory damages (less attorney's fees) and 100% of punitive damages awarded to criminal defendants in civil suits (*e.g.*, brutality, medical malpractice actions).

Miscellaneous

Chap. 56 (Arts and Cultural Affairs Law — Ticket Scalping — Increased price mark-ups and "buffer zones"). Effective: November 18, 2001.

Amends the Arts and Cultural Affairs Law to increase the maximum ticket price mark-up on resale to $5 or 20% of the face value (up from $5 or 10%); increases the no scalping buffer zone around places of entertainment to 1500 feet (from 1000 feet); increases penalties for bribery involving the sale of tickets by box office employees.

Chap. ___ (S.3239a) (Revised Interstate Compact for Adult Offender Supervision — Executive Law § 259-m). Effective: Upon Governor's signature

Enacts the revised Uniform Interstate Compact for Adult Offender Supervision (Executive Law § 259-m) relating to the interstate supervision of parolees and probationers. Repeals existing interstate compact (also Executive Law § 259-m) upon passage of the revised compact by 35 signatory states.

Chap. ___ (S.4255) (Public Health Law — Controlled Substances). Effective: The first day of January following Governor's signature

In 2000, the Sexual Assault Reform Act amended Public Health Law § 3306 to add gamma hydroxybuyric acid, a so-called "date rape drug," to the list of Schedule 1 controlled substances. This bill includes certain substances having a structure substantially similar to gamma hydroxybutyric acid, or having a depressant effect on the central nervous system substantially similar to gamma hydroxybutyric acid, to the list of depressants listed as controlled substances under the Public Health Law.

Chap 355 (A.8723) (Subpoena Duces Tecum — Technical Amendment). Effective: January 1, 2002

Amends CPLR § 2301 to provide that a trial subpoena duces tecum shall include on its face a direction to the recipient that all papers or items delivered to the court in response to the subpoena shall be accompanied by a copy of the subpoena itself.

Sunset Clause Extended

Chap. 242 (A.8930) (Sunset Extended — Driver's License Suspension after Drug Conviction). Sunset Extended to October 1, 2002

In 1993, the Legislature passed a law requiring a 6-month suspension of the driver's license, or a 6-month delay in eligibility to receive a license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L.1993, ch. 533). The sunset clause of the law has been extended to October 1, 2002.

Chap. 72 (S.3613) (Sunset Extender — VTL — suspension of driver's license for failure to pay child support). Sunset Extended to June 30, 2003

Legislation was enacted in 1995 to mandate suspension of a parent's driver's license for failure to pay four or more months of child support (L. 1995, ch. 81). The sunset clause of this legislation has been extended from June 30, 2001 to June 30, 2003.

Chapter 86 (A.8939) (Sunset Extended — VTL — DWI Ignition Interlock Program). Sunset Extended to July 1, 2003

Extends the sunset clause of VTL § 1198, which established a pilot ignition interlock program in certain counties, to July 1, 2003.

Chapter 95 (S.5544) (Omnibus Sunset Extender to September 1, 2003)

Extends the sunset clauses of the following programs and laws from September 1, 2001 to September 1, 2003:

—Correction Law Article 22-A (§ 630 et seq.) — Parole release from a definite sentence

— Correction Law Article 26-A — SHOCK Incarceration Program
— Correction Law § 805 — Earned Eligibility Program
— Correction Law Article 26 (§ 851 et seq) — Temporary Release Programs
— Penal Law §§ 205.16, 205.17, 205.18, 205.19 — Absconding offenses
— Penal Law § 60.35 — No waiver of mandatory surcharge
— Executive Law § 259-r — Medical Parole
— Correction Law § 189 — $1 weekly incarceration fee
— Correction Law § 2 (18) — ASAT
— Executive Law § 259-a (9) — Parole supervision fee

Chap. 273 (S3337) (Sunset Extended — Closed-Circuit testimony of child witnesses). Sunset extended to September 1, 2002

Extends the sunset clause of CPL Article 65 relating to the closed-circuit testimony of certain child-witnesses to September 1, 2002.

Chapter 315 (S.3337) (Audio-Visual Court Appearances — Ontario County — Sunset Extended). Sunset extended to September 19, 2001

Amends CPL § 182.20 to add Ontario County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed circuit television. Extends the sunset provision of CPL Article 182 to December 31, 2004. ⚖

Job Opportunities

The Bronx Defenders, an innovative public defender office, seeks experienced, caring and aggressive Staff Attorneys/ Public Defenders to work collaboratively with other lawyers, social workers and investigators. Candidates should have at least two years criminal defense experience. New York Bar membership or eligibility for reciprocal admission preferred. People of color and bilingual (Spanish/English) strongly encouraged to apply. Send cover letter and resume to Robin Steinberg, Executive Director, Bronx Defenders, 890 Grant Avenue, Bronx, NY 10451.

The Office of the Federal Public Defender for the Middle and Western Districts of Louisiana seeks an Assistant Federal Public Defender. Required: ability to immediately undertake defense of major criminal cases in the US District Court (Western District LA) and 5th Circuit; law school graduate; active membership in good standing of the bar, any state or territory; substantial criminal trial experience; knowledge of federal criminal trial practice and federal sentencing guidelines; excellent research and writing skills and oral advocacy skills; experience in computer-assisted legal research; word processing capability; time management and administrative skills; and ability to understand and manage complex factual and legal issues. Travel is a requirement. No phone calls or faxes. EOE, women and minorities are encouraged to apply. Closing date: 12/15/01. Send resume, three references, and writing sample to: Rebecca L. Hudsmith, Federal Public Defender, 102 Versailles Boulevard, Suite 816, Lafayette, Louisiana 70501. ⚖

JOB LISTINGS ON THE WEB

Check Job Opportunities under NYSDA Resources at www.nysda.org for Job notices received after the *REPORT* deadline and Links to relevant permanent job listing sites

[In printed issues, Wizard of Id cartoon, by Parker and Hart, dated 6/11/01, reprinted with permission.]

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Civil Alternatives for Disposing of Criminal Proceedings of Defendants with Mental Disabilities

By Neil J. Rowe*

Although most defense attorneys are familiar with the mechanisms for invoking the relevant procedures in the Criminal Procedure Law (CPL) when a defendant is suffering from a mental disability, most attorneys are not familiar with the impact that a finding of mental disability in a criminal proceeding ultimately has on an individual's liberty and ability to access treatment once the criminal proceeding has concluded. Many times there are civil options available to the defendant pursuant to the Mental Hygiene Law (MHL) that may be appropriate to resolve the criminal proceeding, and which in the long term provide the defendant a more flexible, less restrictive, and better quality of care and treatment.

Fitness to Proceed — CPL Article 730

Article 730 of the CPL provides that any time the court is of the opinion that the defendant may be an incapacitated person, the court must order a psychiatric exam. By law, the Psychiatric Examiner selected may be a psychiatrist or psychologist, and the examination may be conducted at the place the defendant is held in custody, or at a hospital. If the defendant is not in custody, it may be conducted on an outpatient basis. Significantly, unless the defendant has been admitted to a hospital, these examiners invariably are either on the staff of, or retained by, the local (county or city) department of mental health. CPL 730.10(4); 730.20(1) and (2).

If the examiners are of the opinion that the defendant is incapacitated, the proceeding is founded on a local criminal court accusatory instrument, and the charge is other than a felony, a Final Order of Observation must be issued. If the charge is a felony, then a Temporary Order of Observation is issued, unless the District Attorney consents to a Final Order being issued. CPL 730.40(1).

The statute prescribes that both the Final and the Temporary Order can require the defendant to remain in the custody of the Commissioner of Mental Health or the Commissioner of Mental Retardation for a period not to exceed 90 days. The statute also dictates that when the court issues a Final Order, the local accusatory instrument is dismissed with prejudice. When the court issues a Temporary Order, the felony complaint remains open for the duration of the Order, and then must be dismissed upon certification that the defendant was in the custody of the Commissioner at the time the order expired. CPL 730.40(2).

If there is an indictment for a non-felony, then a Final Order of Observation would be issued, and the indictment dismissed. If the indictment is for a felony, then a Commitment Order is issued for a period of up to one year. CPL 730.50.

On its face, the resolution of such a proceeding appears to be that, in exchange for the defendant receiving treatment in a hospital for 90 days, the charges against the defendant are dismissed. However, those parts of CPL Article 730 that permitted the Commissioner of Mental Health and the Commissioner of Mental Retardation to retain a defendant in a hospital have been held to be unconstitutional, unless there is a separate finding that the defendant suffers from a mental illness requiring inpatient hospitalization. *Ritter v Surles*, 144 Misc2d 945, 545 NYS2d 962 (NY Sup. Ct. Westchester Co. 1988). As a result, the Office of Mental Health has instituted a policy that requires a defendant to be discharged within 72 hours unless he/she can be admitted pursuant to MHL Article 9. *See, Charles W. v Maul,* 214 F3d 350 (2d Cir., 2000). The Office of Mental Retardation and Developmental Disabilities has not adopted any published policy on this issue.

Despite the policy of the Office of Mental Health, admitting physicians, when reviewing a defendant placed into the custody of the Commissioner pursuant to Article 730, will err on the side of admitting the individual. Once someone is committed to a hospital pursuant to Article 730, their continued treatment is subject to an extensive process set forth by regulation, which is not applied to other civilly admitted patients. 14 New York Codes, Rules and Regulations (NYCRR) Part 540. Although the Mental Hygiene Legal Service has challenged the practice of extending these regulations to those individuals subsequently converted to a civil status under *Ritter*, *supra*, the practicality is that these individuals are treated using different protocols than other individuals civilly admitted to a hospital.

Another consideration is that a defendant committed pursuant to Article 730 will be admitted to a regional State hospital. This practice goes against the prevalent philosophy among mental health practitioners. There are significant advantages to having mental illness treated in local facilities, where the inpatient and outpatient services can be better coordinated to address the needs of the individual. As most communities now have at least one general hospital with a psychiatric ward, admission to the

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regional State hospital may deprive the defendant of more effective care and treatment.

Thus, in matters involving a local criminal court accusatory instrument, as well as non-felony indictments, the defense attorney should consider all the facts and related medical evidence. If the defense attorney concludes that the preferred disposition of the criminal charge is dismissal, and in conjunction, treatment of the defendant as an in-patient, defense counsel should consider the disadvantages of relying on Article 730 to achieve this result. The defense attorney should consider all dismissal options, for example a motion to dismiss in the interest of justice pursuant to CPL 210.40, in combination with one of the civil admission procedures in the MHL.

Assuming that issues of pre-trial incarceration and bail can be resolved, one of the simplest ways to seek in-patient hospitalization is through voluntary admission. This process, found at MHL 9.13 for Mental Illness and MHL 15.13 for Mental Retardation and Developmental Disabilities, can be initiated through a psychiatric emergency room, a local crises intervention service, or the defendant's personal physician or psychiatrist. Of significance is that under these sections of law the term "voluntary" is a misnomer. If a voluntary patient requests his/her release, the hospital can hold the patient up to 72 hours and seek a court order for continued retention. MHL 9.13(b), 15.13(b).

In the event that an individual does not meet the requirements for voluntary hospitalization, but is in need of in-patient care and treatment, then a number of other civil proceedings may be applicable. On application of a specified family member or public official listed in MHL 9.27 or 15.27, along with the certification of two physicians, an individual can be admitted involuntarily to an in-patient facility.

Another option for civil admission is the certification of the Director of Community Service (County Director of Mental Health). Under this option, an individual can be admitted for up to 72 hours upon the certification alone. Follow-up procedures are available to extend the time if necessary. MHL 9.37. Alternately, upon information from any licensed psychologist, psychiatrist, professional nurse, or the individual's family, the Director of Community Service can order an individual transported to an psychiatric emergency room for evaluation for admission. MHL 9.45. These sections regarding the Director of Community Service are of particular importance in criminal proceedings. As noted previously, the psychiatrists or psychologists appointed to complete an examination ordered pursuant to CPL 730.30 are typically either on the staff of or retained by the local Director of Mental Health. These same individuals have the authority and responsibility to assist in a civil admission, particularly when the civil admission would be more appropriate than a criminal commitment.

The MHL also has provisions for the court itself to initiate a civil admission. MHL 9.43(a) provides a procedure to bring an individual before a court, and then, if appropriate, order the individual transported to a psychiatric emergency room for examination and possible admission. Section 9.43(b) additionally gives the court the authority to dismiss criminal charges in specific situations.

Not Guilty by Reason of Mental Disease or defect — CPL 330.20

As with the determination of incapacity pursuant to CPL Article 730, a finding or plea of Not Guilty by Reason of Mental Disease or Defect may appear to simply substitute hospital time for prison time, while obtaining some valuable treatment for a mentally ill defendant. However, once a person has been committed after a finding or plea pursuant to CPL 330.20, the statute mandates ongoing court review of any decision involving the type of facility, access to furloughs, the length of treatment, and the conditions of treatment. Also, analogous to the regulations developed for Article 730, the treatment for a defendant committed to the custody of the Commissioner of Mental Health is subject to an extensive process set forth by separate regulation. 14 NYCRR Part 541. As a result, otherwise simple changes in an individual's treatment may take many months to process, resulting in longer hospitalizations.

After a defendant is found not responsible by reason of mental disease or defect, the court directs an order to the Commissioner of Mental Health or Mental Retardation and Developmental Disability requiring that the defendant submit to a psychiatric examination. The purpose of the exam is to determine if the defendant has a dangerous mental disorder, or, if the defendant does not, if the defendant is mentally ill. After the exam, the Commissioner reports back to the court, and at a hearing the court will make one of three findings, each leading to specified actions:

(a) If the court finds that the defendant has a dangerous mental disorder, it must issue an order of commitment of the defendant to a secure facility for the purpose of care and treatment.

(b) If the court finds that the defendant is mentally ill, it must issue an order of conditions and an order committing the defendant to the custody of the Commissioner, and these orders are deemed

made pursuant to the MHL, and subsequent retention and release of the defendant is governed by MHL Articles 9 and 15.

(c) If the court find that the defendant neither has a mental disorder nor is mentally ill, it must discharge him either unconditionally or subject to an order of conditions. CPL 330.20(7).

The first scenario above, (a), is the most restrictive hospitalization. Not only will the defendant initially be placed in the most secure unit, even if, eventually, the court sees fit to approve a transfer to a less restrictive unit where civilly admitted patients are treated, the defendant will always be subject to different treatment protocols than a civilly admitted patient. The second scenario above, (b), gives the appearance of being civil in nature. However, there is no restriction on what can be included in the order of conditions, and the order of conditions remains in place until affirmatively terminated by the court, even if the time period prescribed by the order has lapsed. *See Matter of Jill* "ZZ," 83 NY2d 133, 608 NYS2d 161 (1994); *Matter of Lloyd "Z."*, 575 NYS2d 327 (2d Dept. 1991). Furthermore, the court can renew an order of conditions on a simple showing of "good cause." CPL 330.20(1)(o). Only in the third scenario above, (c), can the defendant be completely free from the court's ongoing oversight, and even then it is likely that a court would issue an initial order of conditions. If the court does order conditions, the defendant remains under the supervision of the court for an indefinite amount of time.

In matters where the defendant's mental condition at the time of the commission of a criminal act is at issue, the defense attorney should consider all the facts and related medical evidence. The defense attorney should clearly distinguish the medical evidence on the defendant's mental condition at the time of the criminal act from the medical evidence that goes to the defendant's present mental condition. The fact that a defendant presently suffers from a mental illness that requires hospitalization does not establish that the defendant is not guilty by reason of mental disease or defect.

Similarly, hospitalization in an in-patient psychiatric facility should not be viewed as a less restrictive setting than a correctional facility. A disposition under CPL 330.20 could potentially keep the defendant confined forever, and if released, keep the person's daily activity under the court's control for life. In cases where, in actuality, it is the defendant's present mental condition that is at issue, the better alternative may be to dispose of the criminal charges by plea, with a definitive sentence. The defendant's present mental condition can be addressed by use of the civil voluntary or involuntary admission procedures described previously for inpatient hospitalization. If ongoing monitoring of the defendant's treatment by the court is thought to be necessary, defense counsel should also suggest that traditional probation programs be considered.

More recently, the legislature has created a similar court monitoring of civil patients. MHL 9.60. On petition of family, a qualified psychiatrist, a probation officer, or other specified person, a court may order Assisted Outpatient Treatment in accordance with a properly formulated treatment plan. The court may tailor the order to the specific concerns of all involved, and the orders can be renewed for ongoing one-year periods. A significant difference from the criminal process in this regard is that the civil outpatient order expires on its own terms if not renewed, and thus, once the psychiatrist overseeing the individual's treatment determines that court assistance in the treatment is no longer of value, then the psychiatrist need not re-petition the court. [Ed. Note: For current information or developments regarding "Kendra's Law," see the "Mental Illness" page of the "Hot Topics" section of NYSDA's web site www.nysda.org.]

In situations where disposition of criminal charges results in confinement in a correctional institution, inpatient mental health treatment within the correctional system is also available. For individuals sentenced to state prison, the Commissioner of Corrections may petition the court to order a defendant it has imprisoned to be transferred to an inpatient mental health unit. Correction Law 402, 439. For individuals confined to jails and local correctional facilities, the local mental health director has authority to order an individual transferred to an inpatient psychiatric hospital. Correction Law 508.

Conclusion

Provisions of the CPL have been enacted to address issues related to the competency of a defendant to face criminal charges, as well as to any mental disability of the defendant at the time a criminal act was committed. These provisions, however, were not intended to, nor are they well suited to, address equitable considerations of a defendant obtaining care and treatment for a mental disability in lieu of facing criminal charges.

In cases where the resolution of a charge turns on the defendant's ability to obtain care and treatment of a mental disability, defense counsel should explore the use of traditional criminal dispositions in combination with the civil provisions of the MHL. Not only does the combination permit development of a treatment plan better tailored to the needs of the defendant, but it also may avoid unintended consequences, such as long hospitalizations in locations distant from the defendant's family, physicians, and community. ⚖

Defense-Relevant Immigration News

By Manuel D. Vargas*

US Enacts New Regulation and Legislation Expanding INS Authority to Detain Noncitizens after 9/11

Within a week of the Sept. 11 attacks on the World Trade Center and the Pentagon, the US Immigration and Naturalization Service (INS) amended its regulations. It has expanded the amount of time the INS has to bring formal charges against a noncitizen arrested by the agency without warrant, and to make a determination regarding whether to continue custody or to release on bond or recognizance. The interim rule, deemed effective as of Sept. 17, changes the former 24-hour rule to a 48-hour rule. It provides the agency discretion to detain a noncitizen, without notice of charges or custody determination, for an additional "reasonable" period of time "in the event of an emergency or other extraordinary circumstance." 66 Federal Register 48334-48335 (9/20/01).

Subsequently, the US Attorney General sought legislation to expand their statutory authority to detain noncitizens suspected by the federal government of terrorist activities. In response, Congress passed and, on Oct. 26, President Bush signed into law, the USA PATRIOT Act ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001"). The law contains provisions that expand the definition of terrorism for the purposes of inadmissibility and removal, provides for mandatory detention of noncitizens who the Attorney General suspects have engaged in terrorist activity, and limits judicial review. On the somewhat positive side for immigrants, the law limits to seven days the federal government's authority to detain without providing notice of the immigration or criminal charges. It also includes some provisions that will preserve immigration benefits for immigrant members of the families of victims of the Sept. 11 terrorist attacks and others impacted by the attack. Pub. L. No. 107-56, 115 Stat. 272.

On Dec. 1, NYSDA Immigrant Defense Project Director Manny Vargas will participate in a New York State Association of Criminal Defense Lawyers trainer in New York City. The training, for defense lawyers, will address immigration and other issues faced by noncitizen clients detained by law enforcement authorities since Sept. 11. [Ed. Note: Updated information on immigration and related civil liberties issues post 9/11 can be found on the "Defense News" and "Defense Immigration Project" pages of the NYDA web site, www.nysda.org.]

2nd Circuit Holds DWI Offense Not a "Crime of Violence" Constituting an Aggravated Felony for Immigration Purposes

On July 20, the US Court of Appeals for the 2nd Circuit held that a felony driving while intoxicated (DWI) conviction under New York Vehicle and Traffic Law 1192(3) does not amount to a "crime of violence" under 18 USC 16(b) for purposes of defining an "aggravated felony" for immigration purposes under 8 USC 1101(a)(43)(F). *Dalton v Ashcroft*, 257 F3d 200 (2d Cir. 2001). With this decision, the 2nd Circuit joins the 5th, 7th, and 9th Circuits in effectively overruling contrary determinations of the Board of Immigration Appeals (BIA) on similar DWI offenses in other states. However, defense lawyers should be aware that for cases arising in the remaining circuits (including cases of New York immigrants detained by the INS and placed in proceedings in these other circuits), the Board's determination still governs. *See Matter of Puente-Salazar*, Interim Decision #3412 (BIA 1999) (held that a felony offense of driving while intoxicated under Texas law is a conviction of a crime of violence and, where a prison sentence of one year or longer is imposed, is therefore an aggravated felony for immigration law purposes), see *Backup Center REPORT,* Vol. XIV, #9.

Defense lawyers should also be aware that some DWI offenses, or offenses involving a DWI element, may be considered to fall under the separate deportability and inadmissibility grounds for crimes involving moral turpitude. *Compare Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999) (BIA held that an Arizona offense of aggravated driving under the influence is a crime involving moral turpitude because it requires a showing that the offender drove knowing that his or her license to drive had been suspended, cancelled, revoked or refused) (*see Backup Center REPORT,* Vol. XV, #1) with *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (BIA found that an aggravated driving under the influence conviction under section 28-697(A)(2) of the Arizona Revised Statutes, defined as a third conviction for driving under the influence, did not constitute a crime involving moral turpitude for immigration purposes) (*see Backup Center REPORT,* Vol. XVI, #4). Thus, for example, a New York VTL 1192 conviction of

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simple DWI will probably not be considered a crime involving moral turpitude even where preceded by other DWI convictions. However, a VTL 511 conviction of aggravated unlicensed operation of a vehicle, which includes a "knowing" element as well as a DWI element, *see, e.g.,* NY VTL 511(3), may be considered a moral turpitude offense.

US Sentencing Commission Reduces for Some the Sentence Enhancement Applied to Those Convicted of Unlawfully Entering the US After Being Deported Following Conviction of an Aggravated Felony

Effective Nov. 1, the US Sentencing Commission modified the 16-level enhancement contained in Sentencing Guideline 2L1.2 for unlawful entry into the United States following deportation after conviction of an aggravated felony. *See* 66 Fed Reg 30512 (2001). The purpose of the amendment is to address the inequity of applying this enhancement across-the-board given the wide range of offenses covered by the immigration law definition of "aggravated felony." The Commission recognized that, under the prior guideline, "a defendant who previously was convicted of murder, for example, receives the same 16-level enhancement as a defendant previously convicted of simple assault." USSG, App. C, Amend. 632, Reason for Amendment.

The new guideline provides for graduated enhancements, from 4 to 16 levels, based on the seriousness of the prior conviction. The 16-level enhancement will now apply where the prior conviction is for certain offenses, most significantly drug trafficking offenses where the sentence imposed exceeded 13 months, crimes of violence, and firearms offenses. A 12-level enhancement will apply to other felony drug trafficking offenses where the sentence imposed was 13 months or less. All other aggravated felonies under the immigration law definition will receive an 8-level enhancement. Finally, prior convictions for any other felony, or for three or more misdemeanors that are crimes of violence or drug trafficking offenses, are subject to a 4-level increase.

NYSDA's Immigrant Defense Project to Provide Legal Support to Immigrants Placed in Removal Proceedings Based on Criminal Charges

NYSDA's Immigrant Defense Project has commenced a new initiative to provide or obtain legal support for immigrants placed in removal proceedings based on conviction or accusation of a crime. The Immigrant Defense Project was formerly the Criminal Defense Immigration Project. It adopted its new name to reflect the new focus not only on the legal issues faced by immigrants in criminal proceedings, but also on the legal issues faced by immigrants in the removal proceedings that may take place following completion of the criminal proceedings. The new initiative will include *amicus curiae* briefing and other legal support in cases involving challenges to overly broad interpretations of the deportation laws by federal immigration law enforcement authorities. It will also include expanded efforts to obtain *pro bono* legal representation for immigrants whose deportation cases raise legal issues whose resolution in an individual case may affect whole classes of immigrants other than that particular individual. The Project encourages *REPORT* readers to contact the Project at (212) 367-9104 regarding cases raising important legal issues involving the interplay between criminal and immigration laws.

Updated Removal Defense Checklist in Criminal Charge Cases available on NYSDA web site

The Immigrant Defense Project has updated its Removal Defense Checklist in Criminal Charge Cases to include many new relevant legal developments and court decisions of the past year that might be useful for immigrants currently facing deportation based on criminal convictions. The checklist provides a fairly exhaustive list of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing noncitizens placed in removal proceedings based on criminal charges. To access and/or download this resource material (now updated through Sept. 1, 2001), visit NYSDA's web site at www.nysda.org and click on Immigrant Defense Project Resources.

Training Continues

In addition to the Dec. 1 training noted above, Immigrant Defense Project Director Manny Vargas will participate on Dec. 10, 2001 in a panel presentation on advanced criminal and deportation issues. Sponsored by the American Immigration Lawyers Association, New York City Chapter, it will be held at the New York Marriott Marquis Hotel in New York City.

During October and November, Mr. Vargas participated in trainers or public forums with: the National Association of Women Judges, the Office of the Attorney General, State of New York, US Court of Appeals for the 2nd Circuit, Association of the Bar of the City of New York, Civil Rights Committee, Prison Families of New York/Osborne Association, and the Federal Defender Clinic, New York University School of Law. ⚖

Book Reviews

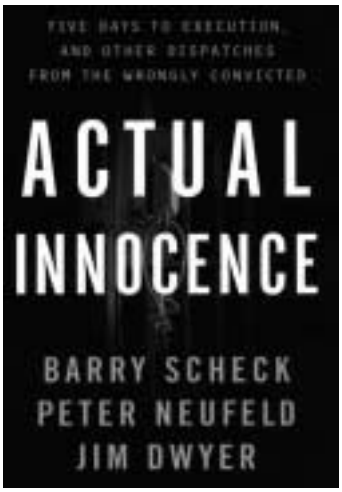
Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted

By Barry Scheck, Peter Neufeld, Jim Dwyer
Doubleday, 2000. 289 pp.

By Barbara DeMille*

We set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.

—Harold Clarke, Chief Justice of the Georgia Supreme Court



In 1983, Kary Mullis had the idea, for which ten years later he would be awarded a Nobel Prize in chemistry, for the polymerase chain reaction (PCR), which would revolutionize the ability of scientists to obtain sufficient DNA for testing from a sparse or degraded sample. Thus, by the late 1980s, the results of the DNA testing of evidence in criminal cases became an established standard of proof. Previously, although DNA testing had been recognized and utilized, it had been hampered in many instances by the lack of a sufficient sample or a sample considered too degraded or contaminated to use. With this advance in scientific "proof" of either guilt or innocence came a revolution in standards of conviction that stretched from the courtroom to those already convicted and to some as close to execution as a holding cell on death row.

Barry Scheck and Peter Neufeld, originators of the Innocence Project based at the Benjamin N. Cardozo School of Law at Yeshiva University, and Jim Dwyer, Pulitzer Prize winning columnist for the *New York Daily News*, have produced an account of their *pro bono* endeavors since 1992, based largely on the recognized ability of DNA testing to provide much more reliable proof for either exoneration or conviction than was previously available. Their book, recounting their successes in overturning unlawful convictions via the proofs available with DNA, primarily deals with appalling case histories: a litany of prior travesties accepted by the courts in their process of pursuing "justice."

These are the convictions, many of them in capital cases, based largely on faulty eyewitness identification, the junk science of hair experts, the fraudulent testimony of laboratory technicians, the business of bargaining with others' "confessions" for sentencing leniency by the jailhouse snitch, and at times, prosecutorial misconduct. In one of the most egregious snitch cases, Leslie Vernon White, within thirty-six days of incarceration in Los Angeles, gave "evidence" of three murders and one burglary. It is "unlikely," the authors claim, "that the archbishop of Los Angeles heard as many confessions as [he] claimed to have heard."

This is a book meant to reach a lay public. While not a direct attack on our system of justice, the many accounts of the release of those convicted after being exonerated by DNA tests raise questions about the many still in prison, some on death row, without access to such proofs. For the defense lawyer, the many and various travesties of justice, intentional or not, will no doubt not come as a surprise.

What Neufeld and Scheck have done, besides freeing many unjustly imprisoned, is to bring the entire issue of accepted prosecutorial methods of proving guilt into sharp relief—with all of its imperfections. What I miss in their story is a more detailed account of how the Innocence Project operates. William McFeely in his *Proximity to Death* gave a nearly a day-to-day account of Stephen Bright and others working at The Southern Center for Human Rights to save those unjustly convicted from execution. It would have been highly interesting—and useful–for these authors to include at least a chapter describing the exact procedures that their staff followed as they, as the authors term it, "cajoled, schmoozed, and used publicity" to secure crucial DNA testings for the indigent "unlawfully convicted," quite often against judicial and prosecutorial opposition.

The authors provide statistics, charts, tables, a bibliography, and two appendixes, one listing needed court and investigative reforms. A particularly pertinent reform recounted in detail is a Canadian one, instituted after an exceptional wrongful conviction, and ensuing scandal, based on testimony of a jailhouse snitch. Since then, strict requirements for the court's acceptance of such testimony have been instigated in order to ensure its reliability, including prior review by a select panel of prosecutors able to find suitable corroboration.

All in all, this is a fascinating book and hard to put down, reading as it does as a chronicle of vindication for serious miscarriages of the law. The many faulty but legally and culturally accepted procedures and assumptions, as well as police and prosecutorial missteps, which pro-

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duced these original convictions should give us all serious pause. Although the central purpose is not an attack on the death penalty as such, it is the most convincing argument against the death penalty I've found. For as Scheck and Neufeld vividly illustrate with each of their DNA exonerations, it becomes more and more evident that our "justice" is arbitrary and quite often based on not much more than how much justice you can afford.

Inside Out: Continuing to Cage Your Rage

By Murray C. Cullen, PhD. and Michael Bradley, PhD.
American Correctional Association (2001)
90 pages; $12.50

By Alice P. Green*

More than 600,000 people will be released from state and federal prisons this year. Most of them will return to the communities from which they came. With many of these individuals returning to a relatively small number of communities and recidivism rates documented at more than 60 percent, public safety concerns are being raised anew. For urban dwellers, especially, a high recidivism rate translates into thousands of new felonies and serious misdemeanors, many of which will be violent in nature. The situation has given rise to growing interest in managing prisoner reentry so that fewer crimes are committed by this population.

The American Correctional Association has responded by publishing two workbooks to help prisoners and those released from prison to manage their anger. The first workbook, titled *Cage Your Rage,* is described by the authors as a diary whose goal is to start prisoners thinking about how they could change their behavior so that they could have a better life. It was designed to be used by individuals on their own or as a member of a treatment group or counseling program.

It is the second workbook, titled *Inside Out: Continuing to Cage your Rage*, that is discussed here. Although we know that the two authors, Murray C. Cullen and Michael Bradley, are PhDs, we, unfortunately, are not given any information about their professional disciplines (or anything else about them for that matter).

Unlike the first book, *Inside Out* is described by the authors as a self-help book that requires the user to work at managing his anger so that he can take more control over his life. There is an acknowledgment that the book is directed towards men because they have shown themselves to be the more aggressive gender.

To prepare the user for the required work of *Inside Out*, the first chapter is a summary review of the first book, *Cage Your Rage.* That summary dwells on the ABCs of anger—arousal events, personal beliefs about the situation, and consequences of one's actions. In this chapter the reader is introduced to the authors' attempt at hard-hitting language; it comes across as stilted professional jargon. For example, the reader is told to be honest:

> "Dishonesty contributed to your acting out with violent behavior. So, be honest! It is a hard habit to start, but once you are honest, behaving honestly will come more easily." (p. 8)

The *Inside Out* program begins in earnest in the second chapter where the authors attempt to get the prisoner to contemplate what freedom means and how he must work at avoiding going back to prison or jail. The authors' language borders on condescension. The user is urged to, "Stop whining. Who said life was fair?" (p. 25)

The book primarily consists of a number of scenarios and written exercises designed to capture the user's feelings, thoughts, and likely responses to the situations provided. They are presented from the theoretical perspective that there are primary emotional reactions that drive one's thoughts and behaviors. Those emotions include shock, surprise, confusion, insecurity, shame, vulnerability, and powerlessness. They are followed by secondary emotions such as jealousy, anger, outrage, hate and resentfulness, any one of which can lead to trouble. The goal is for prisoners to understand the primary emotions and act on them because they lead to honesty and put an individual in a better position to handle a situation appropriately.
Much of the book is devoted to a series of scenarios and exercises that prompt the user to record his thoughts, feelings, and probable responses based on his understanding of primary and secondary emotions.

Although the concepts that are put forward in the book could be of great use to the targeted population, there are serious problems in the way the material is presented. The authors seem almost totally oblivious to their audience. While many prisoners are bright, articulate and well-educated, the majority only read at an eighth grade level or below and have poor writing skills. In addition, most of the nation's prisoners are poor, with two thirds of them belonging to ethnic minority groups.

The book's user is expected to be able to grasp a number of psychological concepts and understand professional jargon that is foreign to most of us. While primary and

(continued on page 55)

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

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

United States Supreme Court

Habeas Corpus (Federal) **HAB; 182.5(15)**

Duncan v Walker, No. 00-121, 6/18/01, 533 US 167

The respondent's first federal habeas corpus petition under 28 USC 2254 was dismissed without prejudice for failing to exhaust state remedies. A second petition was dismissed for not being filed within a "reasonable time" from the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The 2nd Circuit Court of Appeals reversed, finding that the first petition tolled the time limit and fell within the scope of the "State post-conviction or other collateral review" exception under 28 USC 2244(d)(2).

Holding: The term "State" in 2244(d)(2) did not apply to the phrase "other collateral review." The respondent's first federal *habeas* petition did not toll the filing deadline under the AEDPA. Congress expressly distinguished state from federal remedies in similar statutory provisions. *Bates v United States,* 522 US 23, 29-30 (1997). The purpose of the 2244(d)(1) 1-year period was to assure finality of state court judgments. *See gen Calderon v Thompson,* 523 US 538, 555-556 (1998). Judgment reversed.

Concurrence: [Stevens, J] "[E]quitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations for unexhausted federal habeas petitions."

Dissent: [Breyer, J] The intent of the statute was to provide petitioners a chance for federal review. A natural reading of the language distinguished "State post-conviction" from "other collateral review." In view of the specific references to state proceedings in another tolling provision, this language was ambiguous. *Custis v United States,* 511 US 485, 492 (1994); 28 USC 2263(b)(2).

Police (Misconduct) **POL; 287(32)**

Search and Seizure (Warrantless Searches [Unreasonable Force]) **SEA; 335(80[p])**

Saucier v Katz, No. 99-1977, 6/18/01, 533 US 194

The respondent, a demonstrator at an army base, approached the area where the Vice President was going to speak, removed a banner and was about to place it on a fence when military police intercepted him. They shoved him into a van; he landed on the floor. He sued, alleging that the petitioner used excessive use of force in violation of the 4th Amendment. The petitioners' motion for summary judgment was denied, the court finding that a material fact existed concerning the excessive force claim. The 9th Circuit Court of Appeals affirmed, finding that the inquiry into qualified immunity was the same as an inquiry on the merits.

Holding: The analysis of qualified immunity and excessive force claims are distinct. The respondent's lawsuit hinged on whether the petitioner had qualified immunity from liability. If the trial court found that a constitutional right had been violated on the facts alleged, then it was required to decide whether the right was clearly established. *Anderson v Creighton,* 483 US 635 (1987). Generally, the use of excessive force by law enforcement violates the 4th Amendment. The more specific question is whether it would be clear to reasonable officers that their conduct was unlawful in that situation. *Graham v Connor*, 490 US 386 (1989). The 9th Circuit undermined the qualified immunity analysis. *Harlow v Fitzgerald,* 457 US 800, 818 (1982). The petitioner's actions were reasonable under 4th Amendment standards. The petitioner was entitled to qualified immunity, and the suit should have been dismissed. Judgment reversed.

Habeas Corpus (Federal) **HAB; 182.5(15)**

Tyler v Cain, No. 00-5961, 6/28/01, 533 US __, 121 SCt 2478

The petitioner filed a second federal *habeas corpus* application after the decision in *Cage v Louisiana*, 498 US 39 (1990), which held that a jury instruction was unconstitutional if it misdescribed the burden of proof. The application was denied. On appeal, the court noted the petitioner's failure to show that any Supreme Court decision made *Cage* retroactively applicable to cases on collateral review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 USC 2244(b)(2)(A).

Holding: *Cage* was not automatically retroactive to cases on collateral review. A "new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court." The invitation to make *Cage* retroactive on this occasion is declined. Judgment affirmed.

Dissent: [Breyer, J] *Cage* was retroactive under *Teague v Lane*, 489 US 288 (1989). The Court previously held that a violation of *Cage* was not harmless error. *Sullivan v Louisiana*, 508 US 275 (1993). A misleading jury instruction on the burden of proof was a fundamental violation of a basic protection, the jury verdict. The application of *Cage* in *Sullivan* met the requirements of *Teague* for retroactivity.

New York State Court of Appeals

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

People v Smart, No. 51, 4/26/01, 96 NY2d 793, 726 NYS2d 343

After defense counsel referred to the complainant as a "bully" and "terrorist," the prosecutor elicited testimony that defense counsel had formerly employed the complainant as a bodyguard. Out of the jury's hearing, counsel indicated he had not, but that the complainant had been part of a group that once accompanied counsel to the courthouse. The defendant contended that the trial court's failure to conduct a sufficient inquiry about this prior contact resulted in a violation of the right to effective assistance of counsel under *People v Gomberg*, 38 NY2d 307.

Holding: "Even assuming the prior acquaintance rose to a level implicating the conflict of interest concerns addressed in *Gomberg* and its progeny, defendant failed to meet his burden of establishing that 'the conduct of his defense was in fact affected by the operation of the conflict of interest' (*People v Alicea*, 61 NY2d 23, 31 . . .)" Defense counsel mounted a vigorous defense, and the court instructed the jury to disregard any evidence of the prior relationship. Courts should, however, take care to conduct sufficient inquiry about prior relationships, and parties should bring any such prior relationship to the court's attention as soon as they are discovered. Judgment affirmed.

Probation and Conditional Discharge (Conditions and Terms) (Revocation) **PRO; 305(5) (30)**

Sentencing (Restitution) **SEN; 345(71)**

People v Amorosi, No. 58, 4/26/01, 96 NY2d 180, 726 NYS2d 339

The defendant was convicted of petit larceny for stealing more than $6,500 from his employer. The town justice sentenced the defendant to three years probation. As a condition of probation, the court ordered him to make restitution within two and one-half years. At the probation violation hearing the probation officer testified that the defendant had failed to pay any restitution, instead maintaining that he was wrongly accused. The defendant then offered to pay $4,000 and to pay the balance within a year. After being reprimanded by the judge, he offered to pay all the money within "a few days." The court found the defendant had violated his probation and sentenced him to one year in jail. The defendant argued that he had been wrongly denied the substantive and procedural protections contained in Criminal Procedure Law 420.10(3) through (5). County Court affirmed.

Holding: Criminal Procedure Law 420.10(3) and (4) were not applicable. The defendant was not jailed while obligated to make restitution, but willfully refused to make restitution when given time to do so. *See People v Pestone*, 269 AD2d 546. He did not seek resentencing or claim an inability to pay under CPL 420.10(5), and admitted he could pay "'in a few days.'" Judgment affirmed.

Constitutional Law (General) **CON; 82(20)**

Due Process (Vagueness) **DUP; 135(35)**

Matter of Travis S, No. 50, 5/1/01, 96 NY2d 818, 728 NYS2d 411

The appellant juvenile was charged with false personation (Penal Law 190.23) and other acts that would constitute crime. He challenged the false personation statute as unconstitutionally void for vagueness and argued that it failed "to spell out the meaning of the requirement that people be informed of the 'consequences' of lying to the police."

Holding: A statute is presumed valid. *People v Foley*, 94 NY2d 668, 677 *cert den* 121 S Ct 181. "[B]y informing appellant that an additional charge would be brought against him if he gave false information" the officer fulfilled the plain meaning of the statute's requirement that a person be made aware that "giving false pedigree information subjects a person to criminal liability." The statute is not subject to arbitrary enforcement. Judgment affirmed.

Accomplices (Corroboration) **ACC; 10(20)**

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

People v Besser, No. 67, 5/1/01, 96 NY2d 136, 726 NYS2d 48

The defendants were convicted of enterprise corruption. Penal Law 460.20. The Appellate Division affirmed. The defendants contended that accomplice corroboration (Criminal Procedure Law 60.22[1]) "was required for each pattern criminal act that supported a finding of guilt under the enterprise corruption statute" and that the jury should have been so charged.

Holding: The enterprise corruption statute was created "to address the particular and cumulative harm posed by persons who band together in complex criminal organizations." Special procedures were created to apply to such prosecutions, including a two-step jury process in which the jury first considers individual pattern acts, and only after finding at least three can consider enterprise corruption. *See* L 1986, ch 516. No change was made to the accomplice corroboration rule. The pattern acts here were not charged as separate offenses. "[T]he jury was properly charged that the testimony of the accomplices need not

NY Court of Appeals *continued*

be corroborated for each pattern act but was sufficiently corroborated if the jury determined that some independent evidence tended to connect defendants to the offense of enterprise corruption." Judgment affirmed.

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

Juveniles (General) (Parental Liability) (Parental Rights) **JUV; 230(55) (85) (90)**

Matter of Dutchess County Department of Social Services o/b/o Day v Day, No. 34, 5/3/01, 96 NY2d 149, 726 NYS2d 54

The petitioner sought reimbursement from the parents of a minor child for funds spent on the child's behalf while she was in residential care. The Hearing Examiner calculated the basic child support obligation of each parent based on the Child Support Standards Act (CSSA). The Examiner found it appropriate to deviate from the statutory amount based on a number of factors, reducing the support amounts that the parents were ordered to pay. The petitioner objected, stating that the Hearing Examiner improperly deviated from the CSSA standard. The court reasoned that Family Court Act 415 governed where the child was in residential care, and that even under the CSSA, the orders were reasonable. The Appellate Division affirmed.

Holding: The deviation of the Hearing Examiner was appropriate. Sections 413 (CSSA) and 415 of the Family Court Act both address the support that relatives must provide. Support obligations in public assistance cases must be calculated in accordance with CSSA standards, which is not limited to customary support cases. Section 415 retains a role, making it clear that parental duty is not abrogated by payment of public assistance to a child. The Hearing Examiner applied relevant statutory factors like the need of the parents to maintain a home for the child, and appropriately determined the amount that should be paid by the parents. Order affirmed.

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

Lesser and Included Offenses (Instructions) **LOF; 240(10)**

People v Green, No. 49, 5/3/01, 96 NY2d 195, 726 NYS2d 357

The defendant was charged with the misdemeanor of driving while intoxicated. The judge charged the jury on the lesser-included offense of driving while impaired. The jury acquitted the defendant of driving while intoxicated but was unable to reach a verdict on driving while impaired. Prior to retrial on the lesser offense, the prosecutor filed a new information charging driving while impaired. The defendant objected to being prosecuted on two separate accusatory instruments and raised a double jeopardy objection to retrial on the lesser charge. The judge denied the double jeopardy motion and directed retrial on the original accusatory instrument, dismissing the second accusatory instrument on the prosecutor's motion. The defendant was convicted at a bench trial of driving while impaired. The Appellate Term reversed, holding that a new accusatory instrument was required because the defendant had been acquitted on the sole charge contained in the original accusatory instrument, which therefore could not support further proceedings.

Holding: A new accusatory instrument is not necessary to commence a retrial on a lesser-included charge when a prior jury was unable to reach a verdict on that charge. According to Criminal Procedure Law 310.70[2]), "following the rendition of a partial verdict . . . , a defendant may be retried for any submitted offense upon which the jury was unable to agree." Order reversed, matter remitted to Appellate Term for consideration of the facts.

Grand Jury (Procedure) **GRJ; 180(5)**

People v Sawyer, No. 70, 5/3/01, 96 NY2d 815, 727 NYS2d 381

Holding: The defendant's contention that he was not afforded "'a reasonable time to exercise his right to appear as a witness before the Grand Jury '. . . because the District Attorney gave him only one and one-half days notice of the presentment date'" is without merit. CPL 190.50(5)(a) mandates no specific time period for notice. The courts below found the defendant had a meaningful opportunity to consult with counsel and prepare for possible testimony, which the record supports. The statute gives defendants a reasonable time to consult with counsel and decide whether to testify at the grand jury. "Reasonableness" is a flexible standard which must be applied to the particular facts of each case. As such, the inquiry involves a mixed question of law and fact, so that determinations are unreviewable by the Court of Appeals if supported by the record. In this case, the defendant was "represented by counsel when he received oral and written notice of the presentment and conferred with his attorney on at least three occasions during the two days that preceded the presentment date." Counsel received the felony complaint and an eyewitness's statement, and saw the crime scene, before the grand jury proceedings. The request for a delay was supported only by a claim that the defendant was tired and had not received certain discovery to which he was not yet entitled. Judgment affirmed.

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

Witnesses (Police) **WIT; 390(40)**

NY Court of Appeals *continued*

People v Jones, No. 54, 5/8/01, 96 NY2d 213, 726 NYS2d 608

The defendant was arrested and charged with the sale and possession of crack-cocaine in Brooklyn. At trial the prosecution requested a hearing to determine if the courtroom could be closed during the testimony of an undercover officer. *People v Hinton*, 31 NY2d 71 *cert den* 410 US 911. At the hearing it was established that throughout her career the officer made about 250 drug purchases and had testified nine times at trial. She had been transferred to Manhattan, but had some ongoing Brooklyn matters for which "she took precautions . . . to protect her undercover status." Additionally, she had "about 10 'lost subjects' . . . who had not yet been arrested" and had been threatened in the past. The codefendant was still at large and subject to a bench warrant. The court concluded that complete closure of the courtroom was not warranted, and posted a court officer outside the courtroom door during the officer's testimony. The court officer was to allow admission of attorneys and all family members of defendant, and to interview all other people seeking entry about their identity and their interest in coming to court. The court said that, if necessary, it would recess proceedings to determine if an individual should be admitted. The Appellate Division affirmed.

Holding: Use of a less demanding standard when considering a limited closure request is rejected. The mere possibility that the safety of undercover officers might be compromised by open-court testimony does not justify abridgement of the constitutional right to a public trial. *People v Ramos*, 90 NY2d 490 *cert den* 522 US 1002; *see also, People v Martinez*, 82 NY2d 436, 443. Under the facts here, all four prongs of *Waller v Georgia* (467 US 39 [1983]) were satisfied; the restriction of public access to the courtroom did not violate the right to a public trial. Judgment affirmed.

[**Editor's note:** Ramifications of the following case were discussed in a Defense Practice Tips article in the *REPORT*, Vol. XVI, #4.]

Identification (Expert Testimony) (Lineups) (Show-ups) **IDE; 190(5) (30) (40)**

People v Lee, No. 57, 5/8/01, 96 NY2d 157, 726 NYS2d 361

The complainant said he was four or five feet from the defendant and exchanged words with him during the brief gunpoint theft of the complainant's car in Manhattan. The defendant was arrested two months later while driving the car. Six months later the detective assigned to the robbery learned of the defendant's possession of the car. The complainant identified the defendant from a photographic array, and, ten days later, in a lineup, as the person who stole his car. At a pretrial hearing, the defendant moved to introduce at trial a psychological expert's testimony to explain "the factors that may influence the perception and memory of a witness and affect the reliability of identification testimony." The defendant argued that "the passage of time between the crime and the identification, the trauma of robbery and the lack of correlation between confidence and accuracy of identifications were issues for an expert to explain." The trial court denied the defendant's request, which was renewed at trial. The Appellate Division affirmed.

Holding: This type of "expert testimony is not inadmissable per se." Psychological studies about the accuracy of identification cannot be said to be within a typical juror's ken. *See People v Cronin*, 60 NY2d 430, 433. The decision whether to admit this evidence rests in the court's sound discretion. Since the defendant's renewed request was made during the prosecution's case, "the court was in a position to weigh the request against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence." The court knew the circumstances under which the complainant observed the defendant. There was corroborating testimony, the defendant's possession of the stolen car. Given the particular facts and circumstances, the judge's denial of the defendant's motion to introduce expert testimony was not an abuse of discretion. Judgment affirmed.

Article 78 Proceedings (General) **ART; 41(10)**

Sentencing (Credit for Time Served) **SEN; 345(15)**

Matter of Bottom, No. 66, 5/8/01, 96 NY2d 870, 730 NYS2d 767

On February 25, 1972, the petitioner was sentenced in California to a term of one year to life. On December 5, 1972, he was extradited to New York. He was convicted of murder and sentenced to 25 years to life. He remained in New York until he was returned to California on May 19, 1975 to complete his sentence there, and was paroled from that sentence on September 19, 1977. The petitioner was in the New York City Department of Correction for 58 days before he was transferred to the state Department of Correctional Services to continue serving the New York sentence. He was given 58 days of jail time credit. On December 1, 1998, the petitioner wrote to the City Commission of Correction requesting a recalculation of his jail credit to reflect the two and one-half years he spent in custody between 1972 and 1975 awaiting his trial in New York. The Commissioner never responded, and the petitioner commenced an Article 78 Proceeding in February, 1999 seeking a recalculation of his jail time credit. The City Commissioner did not respond. The Appellate

NY Court of Appeals *continued*

Division dismissed the petitioner's article 78, holding that the four month period in which to commence such proceeding began to run in 1977 when the petitioner was returned from California.

Holding: The calculation of credit under Correction Law 600-a and Penal Law 70.30(3) involves "a continuing, nondiscretionary, ministerial obligation." *See Matter of Browne v NYS Board of Parole*, 10 NY2d 116, 121-122. The proceeding must be commenced within four months of a respondent's refusal to perform its duty. This proceeding was timely commenced in February, 1999, since the petitioner never received a response to his December 1, 1998 letter requesting the recalculation of his jail time credit. Order reversed.

Due Process (Vagueness) **DUP; 135(35)**

People v Rubin, No. 60, 5/10/01, 96 NY2d 548

The defendant, principal owner and operator of a home health care agency, was charged with defrauding the State of New York for overbilling Medicaid. He contended that the public charge provision of the Medicaid reimbursement regulation, 18 NYCRR 505.14(h)(7)(ii)(a)(I), was unconstitutionally vague as applied to him. He was convicted of second-degree grand larceny and six counts of first-degree offering a false instrument for filing. The Appellate Division reversed as to several counts.

Holding: The "public charge provision" is not void for vagueness as applied to the defendant. The regulation is facially valid. *See Ulster Home Care v Vacco*, __ NY2d __ (decided contemporaneously). Evidence at trial established that the defendant created a scheme to conceal his billing Medicaid at the rate of $15.25 per hour while charging a public rate of $12. He had been notified in writing by the Department of Social Services that the public charge regulation restricted Medicaid payment for personal care services to the rate charged to the general public. Judgment modified, convictions reinstated, care remitted for consideration of facts and issues raised but not determined.

Trial (Mistrial) **TRI; 375(30)**

People v Collins, No. 88, 6/5/01, 96 NY2d 837, 729 NYS2d 433

Holding: The trial court did not abuse its discretion by denying the defendant's motion for a mistrial. *See People v Robinson*, 93 NY2d 986, 987-988. The defendant's contention, "that the trial court erred in denying his motion for a mistrial after a 'stipulation' was read to the jury stating that the defendant was incarcerated from February 19, 1992, to the date of his trial about two and a half years later," fails on this record. His contentions that the trial court erred by denying his motion for severance and the *Allen* charge are without merit. *Allen v United States*, 164 US 492 (1896). Judgment affirmed.

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

Witnesses (Cross Examination) **WIT; 390(11)**

People v Anonymous, No. 114 SSM 4, 6/5/01, 96 NY2d 839, 729 NYS2d 434

Holding: The motivation of the defendant's alibi witness to fabricate testimony was not collateral, so the court did not abuse its discretion by permitting cross-examination of the witness and admitting testimony refuting the witness's claims. With regard to improper prosecution comments during summation, the remarks cannot be condoned, but the defendant failed to preserve the issue. Order affirmed.

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

Criminal Law and Procedure (General) **CLP; 98.8(10)**

People v Ali, No. 117 SSM 5, 6/7/01, 96 NY2d 840, 729 NYS2d 434

Holding: The defendant failed to timely move to withdraw his guilty plea under CPL 220.60(3), so his claim that it should be vacated was not preserved for review. The Appellate Division erroneously found that a question of law had been preserved. Order reversed, case remitted "to allow that court to exercise its broader review power."

Evidence (General) (Prejudicial) **EVI; 155(60) (106)**

People v Primo, No. 77, 6/12/01, 96 NY2d 351, 728 NYS2d 735

The defendant was convicted of attempted murder based on the complainant's identification of him as the shooter. The defendant acknowledged that he was at the crime scene and that he and the complainant had argued, but denied the shooting. The prosecutor turned over to the defense a ballistics report linking the bullets recovered from the scene to a gun used by a man named Maurice Booker over two months later in an unrelated assault. The trial court conditionally granted the prosecution's motion to preclude the defense from using the report, but said that it would allow the report into evidence if the defense could show that Booker was present at the shooting. During cross-examination of the prosecution's two key witnesses, defense counsel established that Maurice Booker was standing in the doorway of the deli at the time of the shooting. However, the court ruled the report not

NY Court of Appeals *continued*

admissible. The Appellate Division affirmed, holding that "the defense failed to show a 'clear link' between the third party and the crime in question."

Holding: The "clear link" standard apparently comes from the 1881 case of *People v Greenfield* (85 NY 75), but *Greenfield* said nothing to suggest it fashioned a new test for evidence of third-party culpability. The phrase "clear link" was first used in *People v Aulet*, 111 AD2d 822. It may be misread as suggesting a "special or exotic category of proof." The admissibility of third-party evidence should be reviewed under the general balancing analysis governing admissibility of all evidence. A court may exclude relevant evidence if its probative value is outweighed by the prospect of delay, prejudice, and confusion. See *People v Davis*, 43 NY2d 17, 27. The ballistics report linked a third person to the gun used to shoot the complainant. Coupled with proof that the third person was at the scene of the shooting, the report's probative value plainly outweighed the danger of delay, prejudice and confusion and it should not have been precluded. Order reversed, new trial ordered.

Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire) **JRY; 225(10) (50) (60)**

People v Arnold, No. 80, 6/12/01, 96 NY2d 358, 729 NYS2d 51

The defendant was convicted of stabbing his former girlfriend. During *voir dire*, defense counsel asked the jury panel if anyone felt this might be the kind of case that they should not sit on. A prospective juror with a bachelor's degree in sociology, who had minored in women's studies, answered, "yes." She had done "a lot of research" on domestic violence and battered women's syndrome. She added, "I have a problem with that." Defense counsel asked if during deliberation the juror would be "saying well, I minored in this in college, and I've done all of this research and in effect become another witness in the case, an expert if you will, on that area with the other jurors." The prospective juror agreed she thought this was a problem. The judge denied the defense challenge for cause. A peremptory challenge was utilized and the defense exhausted its peremptories. The Appellate Division reversed.

Holding: The court should not have seated the juror, whose statements cast serious doubt on her ability to serve, without obtaining a personal, unequivocal assurance that she could be fair. *See People v Johnson*, 94 NY2d 600. Collective acknowledgement by the whole panel that they would follow instructions was insufficient to constitution a unequivocal declaration of impartiality by the juror in question.

Further inquiry was required after the juror agreed that she might effectively become another expert witness. The trial court "should immediately have reminded, and cautioned, her that she was required to decide the case solely on the evidence presented," to avoid the problem addressed in *People v Maragh*, 94 NY2d 569. While the refusal to allow a challenge for cause based on that ground alone did not alone constitute reversible error, courts are cautioned to investigate and address potential jury misconduct problems as early as possible. Order affirmed.

Freedom of Information (General) **FOI; 177(20)**

Sex Offenses (General) **SEX; 350(4)**

Matter of Karlin v McMahon, No. 116, 6/12/01, 96 NY2d 842, 729 NYS2d 435

Holding: Civil Rights Law 50-b(2)(a) exempts from disclosure under Public Officers Law 87(2) documents that tend to identify the victim of a sex offense but allows disclosure of those documents to a person charged with the offense. This exception does not apply to the petitioner as he stands convicted after trial. *See Matter of Fappiano v NY City Police Dept.*, 95 NY2d 738.The police must make a particularized showing that the statutory exemption from disclosure pursuant to Civil Rights law 50-b applies to all records a petitioner seeks. The Supreme Court must determine if that burden was met here. Insofar as the records are exempt from disclosure, the police are not obligated to provide the records even though redaction might remove all the details tending to identify the victim. Order reversed, matter remitted

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

People v O'Hara, No. 78, 6/14/01, 96 NY2d 378, 729 NYS2d 396

The defendant, a frequent candidate for elective office, was convicted of crimes arising from the filing of an allegedly false voter registration form and voting in a district in which he allegedly did not reside. At a trial following a reversal and a hung jury, the defense objected to instructions about the definition of "residency" in Election Law 1-104(22).

Holding: An individual can maintain more than one bona fide residence, but cannot create an address solely for the purpose of circumventing residency requirements. Whether a particular residence complies with the requirements of the Election Law depends of whether the individual manifested "an intent, coupled with physical presence 'without any aura of sham.'" *Matter of Gallagher v Dinkins*, 41 AD2d 946, 947 *affd* 32 NY2d 839. The court did not ask the jury to decide which residence was appropriate for voter registration, but said that if the proof estab-

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lished that the defendant had two residences he could pick one as long as the one he chose was indeed a residence. The argument that the Election Law and caselaw (*Matter of Ferguson v McNab*, 60 NY2d 598, 600) are incompatible was not preserved. Order affirmed.

Dissent: [Rosenblatt, J] The dual residency authorized by *Ferguson* cannot logically be read with the narrow statutory definition. The jury charge failed to synthesize the two. Other cases have involved civil election appeals. If politically-charged disputes and questions of residency are to be resolved in the criminal arena, the definition of residence should be plainly fixed and easily understood, which was not the case here.

Death Penalty (Cost) (Right to Counsel) **DEP; 100(35) (140)**

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

Matter of NYS Assoc. of Criminal Defense Lawyers, No. 82, 6/14/01, 96 NY2d 512, 730 NYS2d 477

In September 1997, the Court of Appeals directed the screening panels in each judicial department to reexamine counsel fees in death penalty cases. Three of the screening panels agreed to reduce assigned capital counsel fees in accordance with the Administrative Board of the Courts's recommendation. The deadlocked First Department panel could not agree or recommend the reduction (from $175 per hour to $100 until the prosecution decided whether to seek death, and $125 thereafter). On December 16, 1998, the Court approved the recommended reductions and ordered them applicable to all departments. The New York State Association of Criminal Defense Lawyers challenged the reduction as to the First Department.

Holding: The Legislature delegated the ultimate administrative rule-making authority regarding capital fees to the Court of Appeals and not to the Appellate Division screening panels. The reduction here was not arbitrary and capricious, nor did it jeopardize the legislative intent to provide adequate court-appointed counsel to capital defendants. The reduced fees were still higher than what was being paid in "at least 36 of the other 37 states" at the time of the reduction. The rate set by the Court was the equivalent of the maximum Federal rate and exceeded the average rate of compensation. There are no caps and funds are available for expert and investigative services. Order affirmed.

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) (Consent) (Motions to Suppress) **SEA; 335(15[k]) (20) (45)**

People v McIntosh, No. 81, 6/28/01, 96 NY2d 521, 730 NYS2d 265

At about 3:30 a.m., an Albany County Sheriff's Department investigator boarded a bus that had arrived from New York City. Wearing civilian clothing with his police badge prominently displayed on his coat and accompanied by two officers, the investigator asked all passengers to produce bus tickets and identification. He began examining those items for each passenger and noticed the defendant, seated next to a female companion push a black object between them. The investigator obtained the defendant's consent to search one of his bags and found a digital scale. When the defendant and his companion were asked to stand, the investigator saw a black jacket on the defendant's seat. Over two ounces of cocaine were found in the jacket pocket.

Holding: The police conduct in this case violated *People v DeBour*, 40 NY2d 210 and its progeny. *DeBour* scrutiny was triggered when the investigator initially boarded the bus and asked all passengers to produce their tickets and identification. In order to justify such a request, the police must have a particularized, objective, credible reason. Something so general as knowledge that an entire city is a known source of drugs is not sufficient. It is crucial that there be a nexus to conduct, that the police were aware of or observed conduct which provided a particularized reason to request information. The defendant's movement of a black object did not legitimize the earlier request. Order reversed, plea vacated, motion to suppress is granted, and indictment dismissed.

Concurrence: [Smith, J] The police conduct violated the defendant's common law and constitutional rights under the state and federal constitutions.

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

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

Cantalino v Danner, No. 98, 6/28/01, 96 NY2d 391, 729 NYS2d 405

The plaintiff's husband and his girlfriend, the defendant, were in the police department. Having purported to get a divorce overseas and marry the defendant, the husband failed to comply with orders in a Kings County divorce proceeding. Both the defendant and the Police Department thwarted several service attempts. Nail and mail service was ordered. When the plaintiff, with a process server, went to her husband's home with nails and a hammer, the defendant came to the door and an

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altercation ensued. The defendant called the police, and several charges were brought against the plaintiff, who spent the night in jail. The defendant was released with a desk appearance ticket. The plaintiff brought a malicious prosecution action after the charges were dismissed.

Holding: The court improperly dismissed the plaintiff's complaint. To recover for malicious prosecution, plaintiffs must prove, among other things, that the criminal proceeding was terminated in their favor. The charges against this plaintiff were dismissed in the interest of justice, because she was lacked the requisite intent and she was authorized to nail the papers to her husband's door, making the prosecution groundless. This meets the test of *Smith-Hunter v Harvey*, 95 NY2d 191. No per se rule that dismissal in the interest of justice can never constitute a favorable termination for malicious prosecution purposes was established by *Ward v Silverberg* (85 NY2d 993). Order reversed, the plaintiff's claim reinstated.

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

People v Cruz, Nos. 110, 111, 6/28/01, 96 NY2d 857, 730 NYS2d 29

The defendants were convicted of first-degree criminal trespass, third-degree criminal possession of a weapon and seventh-degree criminal possession of a controlled substance. "Their arguments that the trial court should have given a 'moral certainty' charge, that the indictment was multiplicitous (*see People v Sykes*, 22 NY2d 159), and Cruz's challenge to the legal sufficiency of the evidence regarding the length of the shotgun barrel are unpreserved for our review." Orders affirmed.

Article 78 Proceedings (General) **ART; 41(10)**

Freedom of Information (General) **FOI; 177(20)**

Matter of Rattley, No. 100, 7/2/01, 96 NY2d 873, 730 NYS2d 768

Appellant New York Police Department successfully moved to dismiss as moot an Article 78 proceeding brought to enforce a Freedom of Information Law (FOIL) request. The appellant submitted an affirmation stating that "'despite a thorough and diligent search,' certain documents could not be found," and that except for lab reports, the petitioner had "been provided with all documents responsive to his requests . . . in control and custody of the Police Department. . . ." The Appellate Division reversed.

Holding: "When an agency is unable to locate documents properly requested under FOIL, Public Officer's Law 89(3) requires the agency to 'certify that it does not have possession of [a requested] record or that such record cannot be found after diligent search.'" That the appellant's attorney averred to this without having direct knowledge of the search does not spoil the certification. The law does not specify a manner in which certification must be made. The appellant satisfied the requirement by asserting that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it failed to find. *Gould v New York City Police Dept.* 89 NY2d 267, 279. Contrary opinions are not to be followed. *See eg Matter of Key v Hynes*, 205 AD2d 779. Order reversed, Supreme Court order reinstated.

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

Ethics (Defense) **ETH; 150(5)**

Perjury (General) **PER; 280(17)**

People v DePallo, No. 102, 7/2/01, 96 NY2d 437, 729 NYS2d 649

Holding: Counsel did not violate the attorney/client relationship, nor was the defendant denied effective assistance of counsel, when his attorney told the court of the defendant's perjury during trial. Counsel properly sought to persuade his client not to testify falsely and, when unsuccessful, revealed it to the court. *See* 22 NYCRR 1200.33. If counsel had been confronted with this problem outside of trial, withdrawal from representation may have been an appropriate response. *See Nix v Whiteside*, 475 US 157, 173 (1986). Substitution of counsel during trial would do little to resolve the problem and might have facilitated any planned fraud. *See People v Salquerro*, 107 Misc2d 155, 157-158 *affd* 92 AD2d 1091 *lv den* 59 NY2d 977. The defendant's right to be present during a material stage of trial was not violated by counsel's private meeting with the judge about the defendant's testimony. The right does not extend to circumstances involving matters of law or procedure that have no potential for meaningful input from a defendant. *See People v Roman*, 88 NY2d 18, 27 *rearg den* 88 NY2d 920. Order affirmed.

Death Penalty (General) (Guilt Phase) **DEP; 100(80) (85)**

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

People v Edwards, No. 92, 7/5/01, 96 NY2d 445, 729 NYS2d 410

The defendant pled guilty to first-degree murder in exchange for the prosecution's withdrawal of notice of intent to seek the death penalty. After the plea was accepted, but before sentencing, *Matter of Hynes v Tomei* (92 NY2d 613 *cert den* 527 US 1015) was decided. It held

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that entry of guilty pleas to first-degree murder are prohibited while a notice of intent to seek the death penalty is pending, because such pleas placed an impermissible burden on capital defendants' 5th and 6th amendment rights. The defendant moved to withdraw his guilty plea claiming that *Hynes* invalidated it. The lower court denied the motion. The Appellate Division reversed.

Holding: The defendant's plea was not rendered invalid by *Hynes*. "'Absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v United States*, 397 US 742, 757 (1970). Even if the defendant's guilty plea to first-degree murder was the only means by which he avoided the risk of a death sentence, it did not, alone, violate the 5th or 6th amendments. Order reversed.

Dissent: [Smith, J] The plea was invalid under *Hynes.*

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

Lesser and Included Offenses (Instructions) **LOF; 240(10)**

People v Helliger, No. 103, 7/5/01, 96 NY2d 462, 729 NYS2d 654

The defendant was indicted for second-degree murder and first-degree manslaughter. The court also submitted to the jury instructions on second-degree manslaughter and criminally negligent homicide as lesser included offenses. The court, refusing to follow the "acquit-first" format of *People v Boettcher*, 69 NY2d 174, instructed the jury to consider the charges in the alternative. The jury could only achieve unanimity on the lower counts. The court accepted a "partial verdict" finding the defendant guilty of criminally negligent homicide. The prosecution's motion for retrial on the remaining counts was denied, as was an article 78 proceeding brought on the same grounds. On appeal, the Appellate Division said that the court had erred in its instructions but that retrial was barred.

Holding: The lower court erred in refusing to give the mandatory "acquit-first" jury instruction in place of the "unable-to-agree" instruction. However, the error is not remediable. Criminally negligent homicide was a lesser-included offense of first-degree manslaughter. *See People v Holloway*, 262 AD2d 500. A guilty verdict of a lesser-included offense is deemed an acquittal of every greater offense submitted. CPL 300.50(4). Retrial is barred under the rule of double jeopardy. The prosecution's invitation to overrule *People v Robinson*, 145 AD2d 184 *affd* 75 NY2d 879 is declined. "We are unwilling to upset established precedent in order to cure a refusal to recognize a case that our trial courts have appropriately applied for 14 years." Order affirmed.

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

Lesser and Included Offenses (Instructions) **LOF; 240(10)**

People v Fuller, No. 104, 7/5/01, 96 NY2d 881, 730 NYS2d 773

The defendant was charged on a four-count indictment, of which counts three and four were for second-degree assault. Determining that the prosecution failed to prove count four, the judge submitted a lesser included charge of third-degree assault on that count as well as the count three second-degree assault charge. The judge's later charge to the jury, without objection by the prosecution, was essentially that count four was a lesser included offense of count three. The jury could not reach a verdict on second-degree assault but found the defendant guilty of third-degree. A partial verdict was accepted by the judge without objection. The defendant was retried and convicted of second-degree assault. The Appellate Division affirmed.

Holding: The defendant's retrial was prohibited under the principles of double jeopardy. His failure to request that the court charge the assault offenses in the alternative is not a bar to raising the safeguards of CPL 300.40(3)(b) and 300.50(4) on appeal. *See People v Lee*, 39 NY2d 388, 390. He was deemed acquitted of second-degree assault when the jury failed to reach a verdict as to that charge but convicted him of the lesser included offense of third-degree. Order reversed, count dismissed.

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

People v Burris, No. 120, 7/5/01, 96 NY2d 884, 730 NYS2d 784

Holding: "On review of submissions pursuant to section 500.4 of the Rules, order affirmed. Defendant' contentions have not been preserved for this Court's review."

[Decision below: *People v Burris*, 275 AD2d 793, concerning the propriety of the prosecutor's practice of running background checks on prospective jurors as to prior arrests and convictions—*See Backup Center REPORT,* Vol XV, #10.]

Due Process (General) **DUP; 135(7)**

Speedy Trial (Cause for Delay) **SPX; 355(12)**

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People v Vernace, No. 86, 7/10/01, 96 NY2d 886, 730 NYS2d 778

Holding: No fine distinctions are drawn between due process and speedy trial standards when dealing with delays in prosecution. A determination made in good faith to delay prosecution for sufficient reasons does not deprive a defendant of due process even though there may be some prejudice to that defendant. *See People v Singer,* 44 NY2d 241, 253. The delay here is extensive but the other relevant factors (*see People v Taranovich*, 37 NY2d 442, 445) favor the prosecution. The Appellate Division's inference of witness fear was supported by the record, putting the good cause issue beyond further review. As to the nature of the underlying charge, two bar owners were killed when the defendant's cohort allegedly got angry about a spilled drink. There was practically no pretrial incarceration. The defense was not impaired by the delay, as the defendant has enjoyed significant freedom and the delay made the prosecution's case more difficult to prove. Order affirmed.

Dissent: [Levine, J] Where there has been a prolonged delay, the court imposes a burden on the prosecution to establish good cause. *See People v Lesiuck*, 81 NY2d 485, 490. An unjustified, protracted pre-indictment delay in prosecution, even one far shorter than fourteen years, is a deprivation of a defendant's state constitutional right to due process, without requiring a showing of actual prejudice. No reason was given for not seeking to indict the defendant, whose identity was known, at the same time as his codefendants in 1982.

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

Motions (Suppression) **MOT; 255(40)**

People v Scipio, No. 1977, 1st Dept, 3/20/01, 722 NYS2d 133, 281 AD2d 257

The defendant was convicted of first-degree robbery and sentenced as a second violent felony offender. He had been arrested for two robberies unrelated to those charged in the indictment. The instant proceedings had been held in abeyance, while the matter of whether the initial arrest was supported by probable cause was remanded for consideration. The defendant argued that the order of remand impermissibly afforded the prosecution a second opportunity to show probable cause (the prosecution had failed to do so at the original suppression hearing).

Holding: The failure to dispose of the probable cause issue at the original hearing was attributable to confusion on the part of both the prosecutor and the court. The finding of probable cause (on remand) is confirmed. Assuming a *Payton* violation (*Payton v New York*, 445 US 573 [1980]), the lineup identifications of the defendant and his confession were sufficiently attenuated from the taint of any illegality, making suppression unwarranted. Judgment affirmed. (Supreme Ct, New York Co [Brandveen, J])

Bail and Recognizance (General) **BAR; 55(27)**

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

McKinnon v International Fidelity Insurance Co, No. 3561, 1st Dept, 3/20/01, 722 NYS2d 139, 281 AD2d 283

The defendant's motion for class certification pursuant to CPLR 901 and 902 was denied for failure to show questions of law or fact common to the class predominating over any questions affecting only individual members. The underlying action alleged that the defendants engaged in a pattern of charging fees for bail bonds in excess of the statutory maximum.

Holding: The alleged wrongs were individual in nature or subject to individual defenses. To determine whether the alleged overcharges occurred, the court would have to inquire into each transaction: "substantiation of the claims herein will require individualized proof. . . ." *See Banks v Carroll & Graf Publishers Inc.*, 267 AD2d 68. Order affirmed. (Supreme Ct, New York Co [Cozier, J])

Motions (Suppression) **MOT; 255(40)**

People v Velez, No. 2001, 1st Dept, 3/22/01, 722 NYS2d 374, 281 AD2d 311

The defendant was convicted of first-degree robbery, and sentenced as a second violent felony offender. The court summarily denied that portion of his motion seeking to suppress items he had thrown to the ground.

Holding: The defendant's guilty plea did not waive appellate review of the court's order. The court's summary denial was proper as the defendant had failed to allege sufficient facts to establish standing to challenge admissibility of the discarded items. Further, he failed to causally connect the discarding of the items to the alleged illegal police conduct. *See People v Arroya*, 268 AD2d 287; *People v Omaro*, 201 AD2d 324, 325. Allegations couched in vague and hypothetical language did not raise a factual issue requiring a hearing. Judgment affirmed. (Supreme Ct, New York Co [Scherer, J])

Discovery (Witnesses) **DSC; 110(35)**

Witnesses (General) **WIT; 390(22)**

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People v Ancrum, No. 3589, 1st Dept, 3/22/01, 722 NYS2d 152, 281 AD2d 295

The defendant was convicted of first-degree manslaughter and sentenced as a persistent felony offender.

Holding: A motion to suppress identification evidence was properly denied on the grounds that none of the procedures were suggestive and that they involved confirmatory identifications by persons familiar with the defendant. The challenged portions of the prosecutor's summation involved reasonable inferences from the evidence and appropriate responses to the defense summation. *See People v Overlee*, 236 AD2d 133 *lv den* 91 NY2d 976. The protective order allowing the prosecution to withhold the identity of two witnesses until after *voir dire* was not improper. The court conducted a sufficient inquiry and properly determined that there was a substantial basis for the witnesses' fear of having their identities disclosed. *See People v Rhodes*, 154 AD2d 279 *lv den* 75 NY2d 816. The order was justified by valid security concerns. The witnesses' names and addresses were provided in time for defense pre-testimony investigation, and the defendant did not show a need for earlier disclosure. Judgment affirmed. (Supreme Ct, Bronx Co [Tonetti, J at hearing; Boyle, J at trial and sentence])

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

Speedy Trial (Cause for Delay) **SPX; 255(12)**

People v McLeod, No. 1937, 1st Dept, 3/27/01, 722 NYS2d 507, 281 AD2d 325

At jury selection, the court noted *sua sponte* that the prosecutor had exercised seven consecutive peremptory challenges against black prospective jurors. Defense counsel suggested that the proffered explanations were pretextual. The court allowed two of the peremptory challenges (to a juror with a sister in rehab and to a social worker), but did not rule on the reasons given in support of the other five (teacher, former social worker, spouse of social worker, no eye contact, and "just didn't feel like picking her . . ."), directing without objection that they remain as venirepersons while the court waited to see if the pattern continued. The prosecutor withdrew his challenges to the last three prospective jurors. Later, the court held without objection that by withdrawing these challenges, the prosecutor had obviated any pattern of racially-motivated challenges.

Holding: In the absence of a "particularized objection" to the adequacy of the remedial measures adopted by the court, the issue is not preserved for appellate review. The judge has flexibility in conducting a *Batson* (*Batson v Kentucky*, 476 US 79 [1986]) inquiry. Even after the 3rd step of the *Batson* protocol is completed, inquiry is obviated by a determination that no facts and circumstances sufficient to raise an inference of discrimination are shown. *See People v Durant*, 250 AD2d 698, 699 *lv den* 92 NY 879.

As to speedy trial, a large cast on the apprehending officer's arm constituted a sufficiently restricting injury to qualify the witness as "medically unable to testify." *See People v Celestino*, 201 AD2d 91, 95; *see* CPL 30.30(4)(g). Order affirmed. (Supreme Ct, Bronx Co [Sheindlin, J on motion, Silverman, J at trial and sentence]

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

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

People v Rivers, No. 3647, 1st Dept, 3/27/01, 722 NYS2d 520, 281 AD2d 342

The defendant was convicted of second-degree assault.

Holding: The court allowed prosecution peremptory challenges that were objected to under *Batson v Kentucky* (476 US 79 [1986]), and disallowed a defense peremptory, After making its final *Batson* ruling, the court offered to declare a mistrial and start jury selection over. The defendant's rejection of this offer constituted waiver of his claims. *See People v Albert*, 85 NY2d 851. In any event, none of the claims warranted reversal. The record supported the court's finding, entitled to great deference, that the prosecutor provided gender-neutral non-pretextual reasons for the peremptory challenges in question. *People v Hernadez*, 75 NY2d 350 *affd* 500 US 352. The jury could reasonably have concluded that both impairment of physical condition and substantial pain resulted from stab wounds requiring stitches, constituting sufficient evidence of physical injury. *See People v Tejeda*, 78 NY2d 936. Judgment affirmed. (Supreme Ct, Bronx Co [Bamberger, J])

Defenses (Intoxication) (Notice of Defense) **DEF; 105(35) (43.5)**

People v Rivers, No. 3665, 1st Dept, 3/29/01, 723 NYS2d 14, 281 AD2d 348

Holding: The court properly granted a motion to preclude the defendant from testifying that his state of mind had been affected by the use of interferon (liver medication), rendering him unaware of what he was doing. The defendant did not give timely notice of his intent to proffer psychiatric evidence pursuant to CPL 250.10. The argument that the evidence regarding the effect of interferon went to state of mind was rejected as the defendant did testify as to his state of mind. He was only precluded from testifying as to how the use of interferon affected his mental condition, a type of evidence that the prosecution was entitled to counter, after advance notice, by obtaining the services of an expert such as a psychopharmacologist.

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See People v Almonor, 93 NY2d 571. If the interferon proof was offered as an intoxication defense (*see* Penal Law 15.25), the same reasoning would preclude the evidence for lack of notice. The interest of justice would not have been served by allowing late filing of notice, as the prosecution would have been prejudiced by lack of available medical evidence to support or refute the claims, requiring an eve-of-trial examination. The defendant did not demonstrate good cause for failure to file the notice, as he had ample time and gave no reason other than a refusal to authorize a psychiatric exam on the issue of intent. Judgment affirmed. (Supreme Ct, New York Co [Beal, J])

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

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

People v Wilkonson, No. 3686, 1st Dept, 3/29/01, 724 NYS2d 18, 281 AD2d 373

The defendant was convicted of second- and third-degree criminal possession of a weapon and third- and fourth-degree criminal possession of a controlled substance.

Holding: The submission to the jury of a kidnapping count did not warrant reversal. In the face of serious reservations about the sufficiency of the circumstantial evidence of kidnapping due to the prosecution's inability to produce an identifying witness, the court properly elected to reserve decision until after verdict. This preferred course of action was authorized by statute and preserved the prosecution's right to appeal. *See* CPL 290.10(1), *People v Key*, 45 NY2d 111, 120. The defendant did not show prejudice as a result of having the jury deliberate on the kidnapping count (acquitting the defendant), particularly since the jury had already heard evidence relating to that count.

The theory submitted to the jury on second-degree possession of a weapon was not the theory under which the defendant was indicted. The change resulted in the unconstitutional conviction for a crime on which the defendant was not indicted. In sentencing the defendant on the two weapons possession convictions, the court improperly took into account the kidnapping charge. *See People v Varlack*, 259 AD2d 392 *lv den* 93 NY2d 1029. This unpreserved issue is reviewed in the interest of justice. Judgment modified, conviction of third-degree possession of a weapon vacated count dismissed, case remanded for re-sentencing, and otherwise affirmed (Supreme Ct, New York Co [Beeler, J, at hearing, Atlas, J, at trial and sentence])

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

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

Property Clerk, NYC Police Dept v Hyung, No. 3412NC, 1st Dept, 4/5/01, 724 NYS2d 580, 282 AD2d 221

In forfeiture proceedings against the defendant vehicle owners, the court denied motions by appellant finance companies for leave to intervene and for injunctions prohibiting the plaintiffs from releasing the vehicles to the defendants.

Holding: The appellants' security interests will not be adversely affected by any judgments against the defendants. Given the likely delay that would attend consideration of the appellant's rights against the defendants, no useful advantage would be gained by intervention. *See* CPLR 1012(a)(3), 1013. The appellants have no present possessory right in the vehicles, and their remedy, upon resolution of the actions by forfeiture, is receipt of proceeds from any forfeiture sale, and action against the defendants for any deficiency. In the event there is no forfeiture, they can sue for return of the vehicles or other relief. Orders affirmed. (Supreme Ct, New York Co [Gangel-Jacob, Weissberg, and Gans, JJ])

Admissions (Miranda Advice) (Voluntariness) **ADM; 15(25) (35)**

Juveniles (Delinquency) (General) **JUV; 230(15) (55)**

In re Rennette B., Nos. 2726-2726A, 1st Dept, 4/10/01, 723 NYS2d 31, 281 AD2d 78

Responding to a call, police found the 15-year-old respondent lying in a bedroom with her dead newborn infant. Except for asking how she felt, first-response officers did not question her and she was not restrained. A detective arrived, found no overt signs of homicide, and asked the respondent, in the presence of her aunt, what happened. He let the respondent provide a narrative, and but for one request for a clarification, did not interject questions. He did not provide *Miranda* warnings. The interview took place in a room away from the other law enforcement personnel present, many of whom were technical personnel. Family Court suppressed the statement and dismissed the presentment agency's juvenile delinquency petition arising from the baby's death.

Holding: The record did not support the conclusion that the respondent was subjected to custodial interrogation in violation of *Miranda*. The respondent's own family sought help and the nature of the inquiry was generic. Briefly allowing someone to explain a situation does not convert questions into an interrogation where there may or may not have been a crime and the attempt is to clarify events rather than to elicit an inculpatory statement. *People v Fong*, 233 AD2d 115 *lv den* 89 NY2d 942. There was

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no showing that the respondent's "will to resist" was overcome by the police. *See People v Rodney P*. The size of the police presence in the apartment did not alone establish a custodial setting. The court wrongly discredited the detective's testimony based on minor, explained inconsistencies. Order reversed. (Family Ct, Bronx Co [Martinez, J])

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

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

People v Ginyard, No. 2834, 1st Dept, 4/10/01, 725 NYS2d 294, 282 AD2d 256

The defendant had been convicted of third-degree criminal possession of a controlled substance, and sentenced to an indeterminate term of 6 to 12 years.

Holding: In supplemental instructions given to the jury in the defendant's absence, the court counseled jurors to exchange all their views with each other and to look at, touch, feel, and read the evidence admitted in the case. These instructions were not ministerial, but "went to the very heart of the jury's work." *See People v Harris*, 76 NY2d 810, 813, Titone, J, dissenting. The defendant's right to be present during a critical stage of a trial was violated. *See* CPL 310.30; *People v Ciaccio*, 47 NY2d 431, 436-437. This was a fundamental error. Judgment reversed, new trial ordered. (Supreme Ct, Bronx Co [Torres, J])

Admissions (*Miranda* Advice) (Voluntariness) **ADM; 15(25) (35)**

Impeachment (of Defendant, including *Sandoval*) **IMP; 192(35)**

People v Palmer, No. 3653-3654, 1st Dept, 4/10/01, 725 NYS2d 293, 282 AD2d 256

The defendant was convicted of two counts of first-degree robbery, and sentenced as a second felony offender.

Holding: There was no basis on which to disturb the court's credibility determinations in denying a suppression motion. Credible evidence established that the defendant's initial, exculpatory statement was spontaneous, not the product of interrogation, and that his later confession was preceded by *Miranda* warnings, and was otherwise voluntary. When the defendant testified that he committed the robbery under duress and fear that his accomplice would kill him, an earlier *Sandoval* ruling did not preclude questioning relating to the involvement of the defendant and same accomplice in a prior robbery. Judgment affirmed. (Supreme Ct, Bronx Co [Bamberger, J])

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

People v James, No. 1856, 1st Dept, 4/12/01, 724 NYS2d 31, 282 AD2d 264

The defendant was convicted of second-degree attempted criminal possession of a weapon, and sentenced as a second violent felony offender.

Holding: There was no merit to the defendant's claim that, in response to defense counsel's *Batson* objection (*Batson v Kentucky*, 476 US 79 [1986]), the prosecutor failed to give any reason for excusing two of the five black female prospective jurors and gave pretextual reasons for challenging two others. Defense counsel's objection was addressed to only one prospective juror (a social worker and substance abuse counselor), and was treated by the court as such. Defense counsel never questioned the prosecutor's stated reason—a focus on occupations, including that of social worker—or the court's ruling. The case involved potential psychiatric evidence, making a major focus of *voir dire* potential jurors' familiarity with psychiatrists or psychologists. Any claim that the *Batson* objection was addressed to the other four prospective jurors (mentioned during defense counsel's argument to show the alleged race-based pattern of proscutorial challenges) was not preserved for review. Judgment affirmed. (Supreme Ct, New York Co [Sudolnik, J])

Dissent: [Tom, J] The record shows that the prosecutor exhibited a pattern of racially motivated challenges, and that a *Batson* challenge was made to all five black female prospective jurors. As the prosecutor neglected to provide explanations for two of the potential jurors, the court should reverse (*see People v Davis*, 253 AD2d 634) despite counsel's failure to except. *See People v Starks*, 234 AD2d 861.

Defenses (Justification) **DEF; 105(37)**

Instructions to Jury (General) (Theories of Prosecution and/or Defense) **ISJ; 205(35) (50)**

People v Gant, Nos. 2008, 1st Dept, 4/17/01, 725 NYS2d 299, 282 AD2d 298

The defendant was convicted of first-degree assault and fourth-degree possession of a weapon.

Holding: The complainant was found by the stairway near the defendant's apartment, the smell of alcohol on his breath, bleeding from being beaten with a blunt instrument during a confrontation with the defendant and the defendant's girlfriend. Prosecution witnesses said the defendant hit the complainant with an object outside the apartment. Charges against the girlfriend were dismissed at the close of the prosecution's case, and she testified that she hit the landlord with a pipe inside the apartment after he entered uninvited and attacked her and the defendant.

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After summation, the defendant asked for a charge of justification. The trial court erroneously denied the request, stating that self-defense had not been raised during trial, and that in any event, only the girlfriend had testified, and this did not go to the defendant's own state of mind. There was an evidentiary basis for an argument that an assault committed inside the apartment would have been justified by both tenants acting in self-defense. As evidence, considered most favorably to the defendant, reasonably supported a defense of justification, the court should have instructed on that defense. *People v Padgett*, 60 NY2d 142, 144-145. Such a charge is required even if the request comes after summation and the court's initial charge. *People v Kahn*, 68 NY2d 921. Denial of the instruction was reversible error. *People v Copeland*, 216 AD2d 55. Judgment reversed, sentences vacated, matter remanded for new trial. (Supreme Ct, New York Co [Torres, J])

Grand Jury (Procedure) (Witnesses) **GRJ; 180(5) (15)**

People v Johnson, No. 3603, 1st Dept, 4/17/01, 725 NYS2d 297, 282 AD2d 309

The defendant's indictment was dismissed on the ground that the integrity of grand jury proceedings had been impaired.

Holding: The prosecutor told the grand jury about an available witness who was present during the incident, and provided a summary of her anticipated testimony based on a sworn statement. The grand jury declined to call the witness. In a motion to inspect and dismiss the grand jury minutes, the defendant asked for a determination of whether the prosecutor's summary of the anticipated testimony was fair and accurate. The motion court said that it was not the fairness and accuracy of the summary, but the very giving of the summary, that was at issue, because while a brief description of the witness's expected testimony would be permissible, the possibility of creating prejudice increased with the level of detail provided. This reasoning was flawed and the result erroneous. The grand jury has "great discretion in determining what evidence it chooses to hear, and has the absolute right to reject a defendant's request that it hear the testimony of additional witnesses." See CPL 190.50 [3], [6]. To help the grand jury decide whether to hear a proposed witness, the prosecutor must necessarily offer some summary of the witness's expected testimony. Asserting that the prosecutor offered too many details cannot alone convert proper conduct into misconduct. Order reversed, motion to dismiss denied, indictment reinstated, matter remanded for further proceedings. (Supreme Ct, Bronx Co [Williams, J])

Impeachment (Of Defendant, including *Sandoval*) **IMP; 192(35)**

People v Brown, No. 3825, 1st Dept, 4/17/01, 726 NYS2d 1, 282 AD2d 312

The defendant was convicted of third-degree sale of a controlled substance and sentenced as a second felony offender. At a *Sandoval* hearing, prior defense counsel (who had spent several hours preparing his client) stated that the defendant intended to testify that he was present at the scene of the crime in order to buy drugs. At trial, the defendant testified that he was present for completely innocent purposes.

Holding: The record clearly establishes that the prior attorney was delineating the defendant's intended testimony and was not speaking hypothetically. The attorney was the authorized agent of the defendant and any representations made were binding upon the defendant whether or not he specifically authorized them. The court properly permitted the prosecutor to impeach the defendant with the pre-trial statements of prior counsel. *See People v Rivera*, 58 AD2d 147 *affd* 45 NY2d 989. Judgment affirmed. (Supreme Ct, New York Co [FitzGerald, J])

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

Motions (General) (Suppression) **MOT; 255(17) (40)**

People v Hirschfeld, No. 3886, 1st Dept, 4/19/01, 726 NYS2d 3, 282 AD2d 337

The defendant was convicted of second-degree solicitation.

Holding: The credible testimony of the intermediary, corroborated by circumstantial evidence and taped conversations between the defendant and his secretary, established the defendant's homicidal intent. A hearing had been granted on whether those prosecution-arranged tape-recorded conversations with the secretary should be suppressed because they were made while he was allegedly represented by counsel on the instant charges. *See People v West*, 81 NY2d 370. The court initially presiding over the matter properly determined that the defendant forfeited that hearing due to his "extraordinary" dilatory tactics, culminating in the retention of new counsel on the eve of the hearing with knowledge that the new counsel would be unavailable then. That court also properly found that the suppression motion was meritless. The court that ultimately presided over the matter properly exercised its discretion in applying the law of the case doctrine. The defendant was not prejudiced by the denial of the hearing, as the record establishes no basis for the assertion that he was represented on the instant charges at the time of the statement. *See People v Rosa*, 65 NY2d 380. The defendant's motion to represent himself was not

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unequivocal, and he expressed no further wish to act *pro se* after retaining new counsel. The prosecution was not required to prove the identity of the prospective assassin. *See People v Taylor,* 74 AD2d 177, 179 *lv den* 50 NY2d 1005. Judgment affirmed. (Supreme Ct, New York Co [Berkman, J, at initial denial of suppression hearing, Beal, J, at later denial of hearing, trial, and sentence])

Accomplices (General) **ACC; 10(22)**

Evidence (Burden of Proof) **EVI; 155(10)**

People v Hibbert, No. 3212, 1st Dept, 4/24/01, 725 NYS2d 305, 282 AD2d 365

Holding: The defendant was convicted of criminal sale of a controlled substance. It was alleged that he had acted in concert with another. Prerecorded buy money was recovered from him at a later time, but there was no evidence that he was working with the alleged accomplice, had any role in the sale, or was even aware of the buyer. "Accomplice liability requires, at a minimum, awareness of the proscribed conduct and some overt act in furtherance of such (*People v Hames*, 261 AD2d 193, *lv denied* 93 NY2d 1003; *People v Andrades*, 216 AD2d 42, *lv denied* 86 NY2d 789)." There was no evidence offered by the prosecution of either. Judgment reversed, conviction vacated, matter "remitted to the trial court for the purpose of entering an order in favor of the accused pursuant to CPL 160.50, not less than 30 days after service of this order upon the respondent, with leave during this 30 day period to respondent to move and seek any further stay of the implementation of CPL 160.50 as in the interest of justice is required." (Supreme Ct, Bronx Co, [Hayes, J])

Freedom of Information (General) **FOI; 177(20)**

Application of Newsday, Inc. v Empire State Development Corporation, No. 3700, 1st Dept, 5/3/01, 724 NYS2d 62, 283 AD2d 182

The petitioner, a newspaper publisher, sought under the Freedom of Information Law (FOIL) to obtain copies of subpoenas served upon the respondent by the New York County District Attorney's office. The respondent contended before the Individual Assignment System court that the subpoenas were exempt from disclosure under the FOIL because they were "court records." The court ordered disclosure.

Holding: That subpoenas are in the possession of an agency other than the District Attorney's office does not change the fact that they are exempt from the disclosure requirement, and their disclosure is not required. *See Daily News Publ. Co. v Office of Ct. Admin.*, 186 Misc 2d 424. Order reversed. (Supreme Ct, New York Co [Allen, J])

Search and Seizure (Search Warrants [Affidavits, Sufficiency of]) **SEA; 335(65[a])**

People v Rivera, No. 3562, 1st Dept, 5/8/01, 724 NYS2d 725, 283 AD2d 202

The defendant was arrested in his apartment, where contraband was seized pursuant to a search warrant. The defendant contended that the affidavit filed in support of the search warrant was insufficient to permit a finding of probable cause to issue the warrant because the reliability of the informant used was not established under New York's *Aguilar-Spinelli* "two prong" test for evaluating hearsay information from an undisclosed informant. *See Aguilar v Texas*, 378 US 108 (1964); *Spinelli v United States*, 393 US 410 (1969); *People v Griminger*, 71 NY2d 635, 639. The suppression court denied the defendant's motion without a hearing.

Holding: The prosecution concedes that the police failed to supply the suppression court with sufficient information to make a determination regarding the informant's reliability. That the informant was made available to the court for examination, without more, does not establish his or her reliability. *See People v Brown*, 40 NY2d 183, 187. Judgment reversed. (Supreme Ct, New York Co [Shea, J on suppression and speedy trial motions; Fried, J at plea and sentence])

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

People v Blanco, No. 4131, 1st Dept, 5/10/01, 724 NYS2d 836, 283 AD2d 217

The defendant was convicted of several offenses related to the possession and sale of a controlled substance.

Holding: The defense challenge to the omission of an instruction regarding the weight to be accorded a police officer's testimony is unpreserved for appeal and the court declines to review it in the interest of justice. The claim that the prosecutor made inappropriate remarks on summation is similarly unpreserved. If reviewed, one of the prosecutors' comments, likening defense counsel to a magician performing tricks, would be found improper. Reversal is not warranted in light of the prosecution and defense summations as a whole and the overwhelming evidence of guilt. *See People v Shears*, 184 AD2d 357 *lv den* 80 NY2d 909. The other challenged remarks of the prosecutor were fair comments on the evidence in response to arguments raised by the defense. *See People v Overlee*, 236 AD2d 133 *lv den* 91 NY2d 976. Judgment affirmed. (Supreme Ct, Bronx Co [Williams, J])

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Informants (General) **INF; 197(20)**

Search And Seizure (Arrest/ Scene of Crime Search [Probable Cause (Informants)]) (Stop and Frisk) (Weapons-Frisk) **SEA; 335(10[g(iii)]) (75) (85)**

People v Herold, No. 3257 1st Dept, 5/15/01, 726 NYS2d 65, 282 AD2d 1

Officers responding to a tip about a man with a gun outside a building saw the defendant, who fit the description. The officers found the defendant had a handgun and was wearing a bulletproof vest. He acknowledged, "I'm ready for combat."

Holding: New York follows the two-pronged *Aguilar-Spinelli* test for reliance on information from an informant. *See Aguilar v Texas*, 378 US 108 (1964); *Spinelli v United States*, 393 US 410 (1969). A lesser showing with respect to that test suffices here because the initial stop did not require probable cause, only reasonable suspicion. *See Alabama v White*, 496 US 325, 330 (1990). This case is distinguishable from *Florida v J.L.* (529 US 266 [2000]) which held that an anonymous tip that a person is carrying a gun, without more, is insufficient to justify a stop and frisk. Here the tip was not truly anonymous, though the informant gave no name, since it came from a specific apartment in the building at the reported location, confirmed when police were buzzed into the building from that apartment. This informant was similar to an identified citizen informant. *See People v Parris*, 83 NY2d 342, 350. Once the defendant was reluctant to respond to police commands, the officer acted properly by placing his hands on the wall. *See People v Oppedisano*, 176 AD2d 667 *lv den* 79 NY2d 1052. The officers could reasonably suspect he was armed, justifying a frisk, when he repeatedly turned his left side away. *See People v Dawson*, 243 AD2d 318, 320, 321 *lv den* 91 NY2d 890. Suppression of the defendant's statement was properly denied since no custodial interrogation occurred. *See People v Rivers*, 56 NY2d 476, 479-480. Judgment affirmed. (Supreme Ct, New York Co [Beeler, J])

Defenses (Agency) **DEF; 105(3)**

Narcotics (Defenses) **NAR; 265(8)**

People v Vasquez, No. 3442, 1st Dept, 5/15/01, 724 NYS2d 406, 283 AD2d 239

While engaging in conversation with an undercover officer, the defendant revealed knowledge of the drug culture. The officer gave the defendant money and asked him to buy drugs. The officer then asked for security and the defendant gave him his identification. The defendant was arrested, tried, and convicted of criminal sale of a controlled substance in the third degree.

Holding: The defendant's request for an agency charge should have been granted because a reasonable view of the evidence could support the inference that he was acting as an agent of the officer. *See People v Argibay*, 45 NY2d 45, 53-55 *cert den sub nom Hahn-Diguiseppe v New York*, 439 US 930. The defendant only asked the officer for a cigarette, did not hawk drugs nor solicit customers. No pre-recorded buy money or drugs were found on him when he was arrested. Order reversed and remanded. (Supreme Ct, New York Co [Irizarry, J])

Counsel (*Anders* Brief) **COU; 95(7)**

People v Alexander, No. 4070, 1st Dept, 5/15/01, 724 NYS2d 603, 283 AD2d 243

Holding: The application by assigned counsel to withdraw on the ground that the appeal is wholly frivolous (*People v Saunders*, 52 AD2d 833) "is granted to the extent of relieving counsel with compensation," and assigning new counsel. While counsel identifies at least seven issues that might arguably support the appeal, he concludes that they are all frivolous. No opinion on the merits of any possible issue is expressed, but the appeal is not so wholly frivolous as to warrant affirmance under *Anders v California* (386 US 738). Counsel relieved, new counsel assigned, time to re-perfect the appeal enlarged (Supreme Ct, New York Co [Atlas, J])

Conflict of Interest (General) **COI; 75(10)**

Counsel (Conflict of Interest) **COU; 95(10)**

People v Hunter, No. 4157, 1st Dept, 5/15/01, 724 NYS2d 604, 283 AD2d 248

Holding: The court properly denied the defendant's motion for mistrial and appointment of new counsel on grounds of conflict of interest. That the Legal Aid Society represented a defendant arrested in close temporal and spatial proximity to the defendant's time and place of arrest, both on drug-related charges, does not cause a conflict of interest. *See People v Perez*, 70 NY2d 773. Even if conflict existed, the defendant has not established that it adversely affected his attorney's performance. *See Cuyler v Sullivan*, 446 US 335 (1980). Counsel did pursue a line of defense concerning the other person, a marijuana seller to whom the defendant sought to attribute the sale with which the defendant was charged. Order affirmed. (Supreme Ct, Bronx Co [Stadtmauer, J])

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

People v Jones, No. 1880, 1st Dept, 5/17/01, 728 NYS2d 417, 284 AD2d 46

Holding: Analysis of *Batson* objections (*Batson v Kentucky*, 476 US 79 [1986]) requires a court to examine three issues. *See People v Childress*, 81 NY2d 263, 266. The trial court's failure to follow this procedure requires appellate determination as to each issue. The defense did not make a prima facie showing that an objected-to peremptory challenge to a black juror was based on race. The trial court skipped this question and ruled that the prosecution's peremptories had non-racial grounds. The defense failed to show, as to the objected-to challenge or the series of challenges, that there had been intentional discrimination. The defense also failed, by not disputing that a challenge to an earlier juror was based on a different vocational background from that of an accepted black juror, to articulate a claim. *Batson* objections require preservation. CPL 470.05[2]. *See eg People v De Los Angeles*, 270 Ad2d 196, 198 *lv den* 95 NY2d 889. A vague *Batson* objection at trial cannot be cured by a belatedly-specific claim on appeal. Implicit rejection of a claim that the reason given for a challenge was pretextural is entitled to great deference. *See People v Reyes*, 274 AD2d 323 *lv den* 95 NY2d 870. Judgment affirmed. (Supreme Ct, New York Co [Cropper, J])

Evidence (Circumstantial Evidence) EVI; 155(25)

Narcotics (Evidence) (Instructions) NAR; 265(20) (33)

People v Samuels, Nos. 1116, 1117, 1st Dept, 5/22/01, 726 NYS2d 71, 282 AD2d 102

The defendants were convicted of criminal sale of a controlled substance as the result of a "buy and bust" operation. An undercover officer sought to buy drugs, proffered $20, but refused to smoke a crack pipe as a condition to receiving drugs.

Holding: The contention that there was insufficient evidence under *People v Mike* (92 NY2d 996) to support these convictions because no drugs were recovered is rejected. Proof may consist of circumstantial as well as direct evidence, and there is no basis for limiting that proof to a particular genre of evidence. The evidence, including that an officer was asked to smoke crack, that the defendants' conduct had the characteristics of a street-level drug transaction, and that the location had a reputation for drugs, was sufficient to allow an inference that the defendants had the ability to carry out a sale.

The court did not specifically instruct the jury that it could only convict the defendants if it found that they had both the intent and the ability to make the sale.

The court did read the statutory definition of "sell," which includes an offer to sell, and explained the required intent. The instruction in *People v Mullen* (152 AD2d 260) did not provide more guidance. From the whole instruction given here, the jury would gather "'the correct rules which should be applied in arriving at decision.'" *See People v Ladd*, 89 NY2d 893, 895. Judgment affirmed. (Supreme Ct, New York Co [Visitacion-Lewis, J])

Dissent: [Rosenberger, J] The matter of a *bona fide* offer to sell is not simply a matter of credibility and is not fully subsumed in the standard charge on intent.

Evidence (Business Records) (Hearsay) EVI; 155(15) (75)

People v Cruz, No. 3813, 5/22/01, 728 NYS2d 1, 283 AD2d 295

The defendant was convicted of three counts of criminal possession of stolen property involving credit cards and one count of petit larceny.

Holding: The owner of the cards had no duty to make the report concerning their loss, so the trial court improperly admitted that bank record under the business records exception to the hearsay rule. The defendant's conviction on the stolen property counts was based on this inadmissible hearsay and must be reversed. *See People v Edmonds*, 251 AD2d 197 *lv den* 92 NY2d 924. The error cannot be considered harmless since there is no other admissible evidence to prove the essential element that the cards were stolen. Judgment modified, and otherwise affirmed. (Supreme Ct, New York Co [Goodman, J])

Arrest (Probable Cause) ARR; 35(35)

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

Motions (Suppression) MOT; 255(40)

People v Robinson, No. 3494, 1st Dept, 5/24/01, 728 NYS2d 421, 282 AD2d 75

The defendant was convicted of robbery and attempted robbery. He moved to suppress physical and lineup identification evidence as the fruits of an illegal arrest.

Holding: The prosecution concedes that the police detained the defendant without probable cause to arrest. The police handcuffed the defendant, transported him to a precinct, and placed him in a holding cell, then placed him in a lineup in which two complainants identified him three hours after the original stop. Handcuffing someone and placing them in a police car for transport has repeatedly been held to constitute an arrest. *See People v Brnja*, 50 NY2d 366, 372. While handcuffing a suspect does not nec-

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essarily constitute an arrest, cases where it did not have specified that the handcuffing is permissible in the context of ensuring officers' safety until they can conduct a pat-down for weapons. *See People v Allen*, 73 NY2d 378, 379. The police handcuffed this defendant knowing that he was unarmed. *See People v Battaglia*, 56 NY2d 558. This situation is distinguishable from temporary detentions of shorter duration up to 30 minutes that have been upheld. *See People v Hicks*, 68 NY2d 234.

Two audiotaped 911 calls were properly admitted as spontaneous descriptions of substantially contemporaneous events. A third tape, of a call made by a witness who first called her employer, was not properly admissible. Judgment reversed, suppression granted, and a new trial ordered. (Supreme Ct, New York Co [Berkman, J at hearing; Carruthers, J at trial and sentence])

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

People v Pariante, No. 3781, 1st Dept, 5/29/01, 726 NYS2d 405, 283 AD2d 345

Holding: The defendant pled guilty to six counts of first-degree robbery and two counts of first-degree attempted robbery. A trial court's duty to inquire into whether a plea was knowing and voluntary is triggered when the defendant's recitation of the facts casts significant doubt upon the defendant's guilt or on the voluntariness of the plea. *See People v Lopez*, 71 NY2d 662. That happens when, as here, an affirmative defense is raised. First-degree robbery requires a loaded weapon. Penal Law 160.15(4). The defendant said that at the time of each alleged offense, he had used a newspaper, sometimes with a pipe in it, rather than a gun. The court advised the defendant that he had to admit the elements of the crime but failed to make inquiry as to whether the defendant was aware of the affirmative defense and was knowingly waiving it. The identical factual recitation by the defendant regarding each count of the indictment was more than sufficient to cast doubt upon whether he fully understood his plea. *Cf People v Toxey*, 86 NY2d 725. Judgment reversed, plea vacated, and case remanded. (Supreme Ct, New York Co [Scherer, J])

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

Impeachment (Of Defendant) **IMP; 192(35)**

Weapons (Firearms) (Pistols) **WEA; 385(21) (22)**

People v Wilson, No. 4288, 1st Dept, 5/29/01, 727 NYS2d 62, 283 AD2d 339

Holding: The defendant was convicted of robbery, criminal possession of a weapon, grand larceny, and criminal possession of stolen property. He gave testimony portraying himself as a nonviolent person. The court was not obliged to interrupt cross-examination of the defendant to inform him that the court was modifying its *Sandoval* ruling to allow the prosecutor to inquire into the defendant's prior robbery conviction. *See People v Branch*, 83 NY2d 663, 666. That a BB gun may be a dangerous weapon does not preclude it from also being an "imitation pistol" under Penal Law 265.01(2). A BB gun is not a 'firearm" and so is not a "real" pistol under Penal Law 265.00(3), but is an "imitation" one. The defendant's contention that medical records purportedly containing *Brady* material (*Brady v Maryland*, 373 US 83 [1963]) were improperly withheld should have been raised as a CPL 440.10 motion. *See People v Love*, 57 NY2d 998. The absence of these records prevents a determination of whether they are exculpatory, and if so, could have affected the verdict. To the extent that the record permits review, the records could not have affected the verdict. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, J])

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

Police (Misconduct) **POL; 287(32)**

People v Brooks, Nos. 4308-4308A, 1st Dept, 5/31/01, 729 NYS2d 459, 283 AD2d 367

The defendant was convicted of burglary, intimidating a witness, and criminal possession of stolen property, then moved to vacate the judgment pursuant to CPL section 440.10.

Holding: The defendant argued that the court should have granted a hearing on whether the complainant was acting as a police agent when he recorded a telephone call made by the defendant while the case was pending. The prosecutor represented that the recording was made without police involvement and there was no showing to the contrary. Therefore, the court's inquiry into the matter was sufficient and no evidentiary hearing was required. *See People v Bent*, 160 AD2d 1176 *lv den* 76 NY2d 937. The defendant was not deprived of meaningful representation; counsel's decision not to call a witness involved trial tactics as there was a risk the witness's testimony would be damaging. *See People v Thomas*, 244 AD2d 271 *lv den* 91 NY2d 898. The prosecution concedes that the court improperly increased the sentence on the burglary conviction when the defendant refused to sign an order of protection as evidence of his receipt thereof. *See People v Culpepper*, 33 NY2d 837 *cert den* 417 US 916. Judgment modified, reducing the sentence on the burglary convic-

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tion, and otherwise affirmed. Order denying defendant's motion to vacate the judgment affirmed. (Supreme Ct, New York Co [McLaughlin, J])

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

Larceny (Evidence) **LAR; 236(35)**

People v Auguste, No. 4321, 1st Dept, 5/31/01, 728 NYS2d 8, 283 AD2d 373

The defendant was convicted of grand larceny and criminal possession of stolen property arising from the taking of a purse from an undercover police officer.

Holding: Where the officer was leaning forward in her chair and did not realize that the purse was taken until she saw another officer arrest the defendant, there was no physical nexus between the undercover officer and her purse. The defendant's conviction for grand larceny was not based on legally sufficient evidence and was, regardless, against the weight of the evidence. *See People v Cheatham*, 168 AD2d 258, 259. The defendant's claim that the court erroneously failed to give an adverse inference charge regarding the loss of the undercover officer's memo book is unpreserved for appellate review. If reviewed, no prejudice would be found to have resulted either from the loss of the book or the failure to give an adverse inference charge. *See People v Vazquez*, 88 NY2d 561, 577. Judgment modified, reducing the defendant's conviction for grand larceny to petit larceny and reducing the sentence imposed, and otherwise affirmed. (Supreme Ct, New York Co [Torres, J])

Search and Seizure (Motions to Suppress) **SEA; 335 (45)**

People v Peart, Nos. 2736, 2637, 1st Dept, 5/31/01, 726 NYS2d 625, 283 AD2d 14

The court granted the defendants' consolidated motions to suppress physical evidence seized by the police during a nighttime stop of the defendants' vehicle, which had no license plates. During the stop, one defendant made furtive motions toward the floor.

Holding: The motion court fully credited the officer's testimony that the defendants' car was being driven without documentation and that the stop of the vehicle was proper. *See People v Duncan*, 234 AD2d 8. However, the court concluded under that under *People v Hollman* (79 NY2d 181, 194), "the officer's questions were accusatory and intruded impermissibly beyond a mere request for information." But after a lawful stop of a vehicle, furtive motions toward the floor of the vehicle create a reasonable basis for an officer to believe that a weapon may be involved. *See People v Jones*, 248 AD2d 328 *lv den* 92 NY2d 854. Officers in such circumstances need not wait to see a weapon before taking reasonable measures to protect themselves. *People v Allen*, 73 NY2d 378, 380. The motion court's characterization of the officer's questions, such as why the defendant had made motions towards the floor of the car and what had he put down there, as "accusatory" is not borne out by the record. *Cf People v Boyd*, 188 AD2d 239. Order reversed and matters remanded. (Supreme Ct, Bronx Co [Benitez, J])

Second Department

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

People v Jones, No. 98-00221, 2nd Dept, 2/5/01, 720 NYS2d 509, 280 AD2d 490

In the second round of jury selection in this sexual offense trial, the defendant's peremptory challenge to a white male potential juror was denied after a *Batson* (*Batson v Kentucky*, 476 US 79 [1986]) objection by the prosecution. On the mistaken advice of a legal advisor that he needed to exhaust his remaining peremptory challenges to preserve appellate review of the *Batson* ruling (*cf* CPL 270.20[2]), the defendant, acting *pro se*, peremptorily challenged the next potential juror to be considered. When asked to supply a race-neutral reason, the defendant asserted that he was exhausting his peremptory challenges to protect his right to appeal the denial of his initial challenge.

Holding: The sole basis of the later challenge was to preserve review of the prior one, so *Batson* was not implicated and denying the later challenge was error. However, the right to exercise a peremptory challenge is strictly statutory. Non-constitutional error may be deemed harmless where, as here, the properly-admitted evidence is overwhelming and there is no "significant probability" that the jury would have acquitted the defendant had it not been for the error which occurred. *See People v Ayala*, 75 NY2d 422, 431. The issue regarding the prior peremptory challenge is without merit. Judgment affirmed. (Supreme Ct, Queens Co [Eng, J])

Dissent: Depriving the defendant of a challenge to which he was entitled violated his right to a jury of his choosing (*see People v McGee*, 76 NY2d 764) and wasn't harmless.

Admissions (Co-defendants) **ADM; 15(5)**

People v Jones, No. 99-00564, 2nd Dept, 2/5/01, 720 NYS2d 520, 280 AD2d 489

The defendant was convicted of first- and second-degree robbery.

Holding: Admission into evidence of the redacted statement of the codefendant that a robbery was commit-

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ted by "another individual" violated the defendant's right to confrontation. See *Gray v Maryland*, 523 US 185 (1998). Coupled with the testimony of the complainant that there were two primary participants in the robbery, and the testimony of a detective that he arrested the defendant shortly after he took the codefendant's statement, the statement strongly incriminated the defendant. See *People v Khan*, 200 AD2d 129. The prosecution used the codefendant's statement to corroborate the complainant's testimony, which was the sole evidence against the defendant. The error cannot be deemed harmless. Judgment reversed, new trial ordered. {Supreme Ct, Queens Co [Flaherty, J]}

Accusatory Instruments (Sufficiency) ACI; 11(15)

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

Matter of Elizabeth G., No. 99-04869, 2nd Dept, 2/5/01, 721 NYS2d 65, 280 AD2d 478

The respondent had been observed stopping cars with lone male drivers at an intersection in Queens known to police as a prostitution location. The Presentment Agency brought juvenile delinquency proceedings, alleging acts which if committed by an adult would constitute second-degree criminal nuisance. The Family Court dismissed the petition on the ground that it was facially insufficient.

Holding: The "minor and momentary inconvenience" to an apparently small number of motorists did not constitute a "condition which endanger[ed] the safety or health of a considerable number of persons" as required by Penal Law 240.45[1]. The Presentment Agency was attempting to circumvent the legislative requirement that a juvenile delinquency proceeding must be predicated on conduct that would constitute a crime, not conduct which would constitute only a violation, *i.e.* loitering for the purpose of prostitution. *See Matter of C.S.*, 155 Misc2d 1014. Prosecutors cannot employ penal statutes in a manner that clearly frustrates legislative intent. *See People v Allen*, 92 NY2d 378. By charging criminal nuisance but attempting to prove loitering for the purpose of prostitution, the Presentment Agency violated the state and federal constitutional fair notice requirement. *See People v Grega*, 72 NY2d 489, 493, 495-496. The petition was properly dismissed. Order affirmed. (Family Ct, Queens Co [Lubow, J])

Evidence (Uncharged Crimes) EVI; 155(132)

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

People v Negron, No. 98-07053, 2nd Dept, 2/13/01, 721 NYS2d 75, 280 AD2d 557

The defendant was charged with second-degree attempted murder arising out of an incident in which he allegedly threw paint remover and lighted matches at his girlfriend. He did not deny that he was present, but claimed that the complainant set herself on fire accidentally.

Holding: The trial court erred in permitting the introduction, over defense objection, of evidence that approximately a year later the defendant had set fire to the house of another girlfriend when she was not home. The trial court instructed the jury that this evidence was introduced solely for establishing the identity of the person who set the fire. However, identification was not raised as a defense. *See People v Torres*, 215 AD2d 702; *People v Sanchez*, 154 AD2d 15, 24. The instruction permitted the jurors to infer that the defendant had the propensity to commit the charged crime. *See People v Alvino*, 71 NY2d 233. This error cannot be deemed harmless.

The court also erred in permitting the prosecution's expert to testify that the complainant's injuries were consistent with the prosecution's theory of events. This usurped the jury's function of determining the cause of the fire. *People v Grutz*, 212 NY 72, 81-82. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Friedman, J])

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

People v Quinones, No. 00-05699, 2nd Dept, 2/13/01, 720 NYS2d 531, 280 AD2d 559

During her arraignment, the defendant was served with notice pursuant to CPL 190.50 of her right to testify before the grand jury about the underlying events. The defendant served a cross-notice of her intent to testify. After her appearance was rescheduled, defense counsel was unable to contact her, necessitating a further rescheduling. On March 2, 2000, defense counsel hand-delivered to the prosecution a letter requesting that the appearance be again rescheduled, for March 14. However, on March 3, the last day of its term, the grand jury voted on the indictment and returned a true bill against the defendant on various charges. The defendant's motion to dismiss the indictment on the grounds that it was obtained in violation of CPL 190.50(5)(a) was granted, with leave to the prosecution to re-present. The prosecution appealed.

Holding: The defendant was properly notified of the grand jury proceeding and afforded a reasonable time to appear. *See People v Pugh*, 207 AD2d 503. That counsel could not contact his client did not render the notice unreasonable or improper. *See People v Choi*, 210 AD2d 495. Failure to appear should not be excused where it is of the defendant's "own creation." *See People v Savareese*, 258 AD2d 484. Order reversed, motion denied, indictment reinstated. (Supreme Ct, Kings Co [Silverman, J])

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Jury and Jury Trials (Challenges) (Selection) **JRY; 225(10) (55)**

People v Camacho, No. 98-07915, 2nd Dept, 2/20/01, 720 NYS2d 533, 280 AD2d 609

In response to a *voir dire* question as to whether she would be more sympathetic to the testimony of an undercover police officer than another witness, a prospective juror stated: "The more I sit here and think about it, I think I would be. I don't think I would be very objective, to be honest with you." The defendant's challenge for cause was denied and he then exercised a peremptory challenge against the juror.

Holding: "No unequivocal assurance of impartiality was obtained from this juror." *See People v Johnson*, 94 NY2d 600. Because the defendant then exercised a peremptory challenge, and eventually exhausted his allotment of peremptory challenges, his conviction must be reversed. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosenzweig, J])

Counsel (Duties) (General) **COU; 95(20) (22.5)**

Impeachment (Of Defendant) **IMP; 192(35)**

People v Killiebrew, No. 98-10081, 2nd Dept, 2/26/01, 721 NYS2d 104, 280 AD2d 684

The defendant was convicted of second-degree assault and second-degree possession of a weapon. At arraignment on the greater charge of first-degree assault, defense counsel informed the court that the defendant "tells me that the complaining witness came towards him in a very threatening manner and he thought he was going to be attacked." The trial court ruled that the defendant could be impeached with this statement if he testified and raised a defense which was inconsistent with justification. The defendant did not testify.

Holding: The trial court properly ruled that the defendant could be impeached with a statement made by his attorney on his behalf if he testified inconsistently with that statement. See *People v Mahone*, 206 AD2d 263. Judgment affirmed. (Supreme Ct, Kings Co [Juviler, J])

Parole (Release – Conditions) **PRL; 276(35)(a)**

Sentencing (Ex Post Facto Punishment) **SEN; 345(35)**

Matter of Monroe v Travis, No. 99-09983, 2nd Dept, 2/26/01, 721 NYS2d 377, 280AD2d 675

The petitioner, a sex offender incarcerated in state prison since 1982, became eligible for conditional release in December 1995. Parole Division policy postdating his offense required that he secure approved housing—a residence with a responsible adult willing to cooperate with the petitioner's parole officer—before his request for conditional release could be granted. He could not find housing deemed appropriate, and the Division refused to release him to a homeless shelter. He brought an article 78 proceeding, which was dismissed.

Holding: It is within the Division's discretion to impose the special condition of securing approved housing, even though that condition must be satisfied before conditional release can be granted. *See* Executive Law 259-c[2], 259-g; 9 NYCRR 8003.2[1], 8003.3; *People ex rel. Wilson v Keane*, 267 AD2d 686. The special condition did not violate the federal constitutional prohibition against *ex post facto* laws. *See Doe v Simon*, 221 F3d 137. Judgment affirmed. (Supreme Ct, Queens Co [Schmidt, J])

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

People v Hales, No. 97-09970, 2nd Dept, 3/5/01, 721 NYS2d 257, 281 AD2d 433

Holding: The trial court *sua sponte* and over defense objection excluded the defendant's mother from the courtroom during the jury charge, on the ground that the presence of a witness during the charge might influence or distract the jury.

This justification "was not sufficient to demonstrate that an overriding interest was likely to be prejudiced by her presence." *See People v Martinez*, 82 NY2d 436. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rios, J])

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

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

People v Milgrom, No. 96-00086, 2nd Dept, 3/12/01, 721 NYS2d 777, 281 AD2d 492

Holding: The defendant pled guilty to second-degree possession of a controlled substance. During the plea allocution, the court said that the defendant was giving up the right to appeal from the judgment as well as the adverse suppression ruling.

Where a plea allocution demonstrates a knowing, voluntary and intelligent waiver of the right to appeal, intended to cover all aspects of the case, and no constitutional or statutory mandate or public policy concern prohibits acceptance of the waiver, it will be upheld completely. This is true "even if the underlying claim has not yet reached full maturation." *People v Muniz*, 91 NY2d 570, 575. Here there was a valid waiver of the right to appeal, which encompassed the denial of the suppression motion. *See People v Kemp*, 94 NY2d 831; *People v Williams*, 36 NY2d

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829 *cert den* 423 US 873. Judgment affirmed. (Supreme Ct, Queens Co [Fisher, J])

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

Witnesses (Police) **WIT; 390(40)**

People v Rivera, No. 99-01786, 2nd Dept, 3/12/01, 722 NYS2d 242, 281 AD2d 496

Holding: The defendant was convicted of second- and third-degree sale of a controlled substance. The court's exclusion of the defendant's mother from the courtroom during the testimony of an undercover police officer violated the defendant's right to a public trial. During the *Hinton* hearing, the defendant argued against exclusion, so the prosecution was required to present evidence that the mother threatened the safety of the undercover officer. *See People v Glover*, 93 NY2d 1010. Nothing in the record demonstrates that the defendant's mother posed a threat to the officer. *See People v Perez*, 252 AD2d 593. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Ruchelsman, J])

Counsel (Waiver) **COU; 95(40)**

People v Campbell, Nos. 99-02621 and 99-02623, 2nd Dept, 3/12/01, 721 NYS2d 681, 281 AD2d 488

The defendant pled guilty to third-degree attempted criminal sale of a controlled substance under two indictments. A motion to dismiss the indictments based on an unreasonable delay in sentencing was denied. Before sentencing, the defendant moved to relieve assigned counsel and requested a new attorney. Without making any inquiry into his ability to represent himself, and in the absence of any request to do so, the court relieved counsel and directed the defendant to proceed *pro se*.

Holding: The defendant's knowing, voluntary, and intelligent waivers of his right to appeal his convictions encompass his claim that the court erred in denying his motion to dismiss the indictments. *See People v Espinal*, 277 AD2d 464; *People v Jones*, 255 AD2d 456. However, the defendant did not effectively waive his right to counsel. *See People v Smith*, 92 NY2d 516. Because he was deprived of his right to counsel at sentencing, his sentences must be vacated. Judgments modified and affirmed as modified, sentences vacated, matter remitted for resentencing. (Supreme Ct, Queens Co [Golia, J])

Discovery (Procedure [Subpoena Duces Tecum]) **DSC; 110(30[t])**

Matter of Hybrid Films v Combest, No. 01-01759, 2nd Dept, 3/13/01, 721 NYS2d 795, 281 AD2d 500

In connection with the filming of a documentary about the Brooklyn North Homicide Task Force, the petitioner filmed the respondent's arrest and interrogation. The respondent, the defendant in *People v Combest*, Indictment No. 3753/2000, served a subpoena *duces tecum*, seeking production of the outtakes. He later limited this to request only the outtakes of his interrogation. The petitioner sought to quash the subpoena pursuant to CPLR 2304.

Holding: A judge ordered the outtakes produced under seal for *in camera* review, but after the action was transferred, a new judge directed that the outtakes be released to the parties in the criminal action. In so doing, the court failed to address the requirements of Civil Rights Law 79-h(c). The court shall maintain possession of the outtakes until an issue concerning their release arises at trial. The respondent should then be afforded a hearing to make the necessary showing under Civil Rights Law 79-h(c). If the test is satisfied, the court shall review the outtakes *in camera* and redact any irrelevant material prior to release. Order reversed, matter remitted. (Supreme Ct, Kings Co [Knipel, J])

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

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

People v Delgado, No. 97-05246, 2nd Dept, 3/19/01, 281 AD2d 556; 723 NYS2d 40

The defendant was convicted of first-, third- and seventh-degree possession of a controlled substance. He was represented by counsel, but moved *pro se* under CPL 30.30 to dismiss the indictment. The court responded by stating, without more, that it denied all *pro se* motions.

Holding: The decision whether to entertain a *pro se* motion is a matter committed to the sound discretion of the court. However, there may be circumstances where an unjustified refusal to entertain a meritorious *pro se* motion would constitute an abuse of discretion. *See People v Rodriguez*, 95 NY2d 497. The court should either entertain the motion or state on the record reasons for refusing to address it. Appeal held in abeyance, matter remitted. (Supreme Ct, Queens Co [Lewis, J])

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

People v Parson, No. 99-00960, 2nd Dept, 4/2/01, 722 NYS2d 412, 282 AD2d 477

Holding: The trial court erroneously denied the defense challenge to a prosecution peremptory strike of a black prospective juror. The defendant sufficiently preserved this issue by arguing below that the prosecutor's reasons for excusing a black female prospective juror were

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a pretext for improper discrimination. The court expressly decided the point, preserving the sufficiency of the prosecutor's "race-neutral" explanation for appeal. *See* CPL 470.05(2); *see also People v Duncan*, 177 AD2d 187. "While a potential juror's residence and her status in a particular lawsuit may constitute legitimate race-neutral reason for striking that juror, the concerns regarding those factors must be related to the factual circumstances of the case and the qualifications of the juror to serve on that case. (*see, People v Jones*, 223 AD2d 559, 560. . .)." The prosecution failed to meet this burden and overcome the inference of discrimination established by the defendant. Judgment reversed, new trial ordered. (County Ct, Nassau Co [DeRiggi, J])

Counsel (*Anders* Brief) **COU; 95(7)**

People v Herrera, 99-09656, 2nd Dept, 4/2/01, 282 AD2d 472, 722 NYS2d 742

Holding: "In his brief, assigned counsel has indicated that his client suggested issues relating to the legal sufficiency and weight of the evidence introduced against him at trial that he believed could be raised on appeal. Counsel 'then proceeded to analyze these issues in the brief and demonstrate why [they were] factually and legally without merit, thereby disparaging his client's appellate claims and "for all practical purposes, precluding his client from presenting them effectively in a pro se brief'" (*People v Orve,* 178 A.D.2d 564, 577 N.Y.S.2d 871, quoting *People v Vasquez,* 70 N.Y.2d 1, 4, 516 N.Y.S.2d 921, 509 N.E.2d 934; *see also, People v Brewley*, 178 A.D.2d 483, 576 N.Y.S.2d 822; *People v Simmons*, 156 A.D.2d 602, 550 N.Y.S.2d 839; *cf., McCoy v Court of Appeals of Wisconsin*, 486 U.S. 429, 100 L. Ed. 2d 440, 108 S. Ct. 1895). Also, the defendant's argument concerning the weight of the evidence, and other arguments, including but not limited to the argument that there should be a new trial due to prosecutorial misconduct in summation, cannot be characterized as 'wholly frivolous' (*People v Vasquez, supra,* at 3, quoting *Anders v California,* 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396). The defendant is entitled to 'substantially the same assistance of counsel as one who can afford to retain an attorney of his choice' (*People v Gonzalez*, 47 N.Y.2d 606, 610, 419 N.Y.S.2d 913, 393 N.E.2d 987; *see, Douglas v California,* 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814). For these reasons, new counsel must be assigned." Motion granted, counsel relieved, new counsel appointed to file a brief within 90 days. (County Ct, Westchester Co [Lange, J])

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**

Sentencing (General) **SEN; 345(37)**

People v Murray, No. 00-04328, 2nd Dept, 4/2/01, 723 NYS2d 196, 282 AD2d 475

The defendant, while on probation, was arrested for a murder that occurred before he was placed on probation. He failed to notify his probation officer of the arrest, a violation of his probation. The court considered the facts of the homicide when determining the defendant's sentence for the probation violation.

Holding: Considering the defendant's conduct that occurred before the date he was placed on probation was improper. *See* Penal Law 65.10; CPL 410.70; *see also People v Hudson,* 270 AD2d 287. Amended judgment modified, sentence vacated, case remitted for resentencing and further proceedings. (Supreme Ct, Kings Co, [Kriendler, J])

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

People v Hymes, No. 98-10180, 2nd Dept, 4/9/01, 722 NYS2d 759, 282 AD2d 546

Holding: The prosecution used peremptory challenges to remove the first two black prospective jurors. When a peremptory challenge was made to the third black prospective juror, the defense made a *Batson* challenge. *See Batson v Kentucky*, 476 US 71 (1986). The court rejected the challenge, but said that if a pattern of discrimination did develop, the issue would be revisited. After a fourth black prospective juror was struck peremptorily by the prosecution, the court asked the prosecutor for a nonpretextual race-neutral explanation for the challenge. That explanation was accepted. The court sustained a *Batson* challenge to the striking of the fifth black prospective juror. Contrary to the court's initial ruling, a prima facie case of discrimination had been established in the third round of jury selection. *See People v Jenkins*, 75 NY2d 550. Appeal held in abeyance, matter remitted for a hearing at which the prosecution must establish a nonpretextual, race neutral explanation for the exercise of that peremptory. (Supreme Ct, Queens Co [Lewis, J])

Evidence (Weight) **EVI; 155(135)**

People v Miller, No. 99-05235, 2nd Dept, 4/9/01, 722 NYS2d 751, 282 AD2d 550

Holding: An acquittal on the charge of third-degree criminal sale of a controlled substance did not render the defendant's conviction for third-degree criminal possession of a controlled substance against the weight of the evidence under CPL 470.15(5). *People v Washington* (209 AD2d 560) "concerned the sale of heroin to two others

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and the criminal possession charge concerned cocaine found in that defendant's pocket." That case does not stand for the general proposition that acquittal on third-degree sale renders a simultaneous conviction for third-degree possession against the weight of the evidence. Judgment affirmed. (County Ct, Nassau Co [Calabrese, J])

Bail and Recognizance (General) **BAR; 55(27)**

Habeas Corpus (State) **HAB; 182.5(35)**

People ex rel. Schreiber o/b/o Romano, Jr. v Warden of Queens House of Detention for Men, No. 00-04932, 2nd Dept, 4/9/01, 723 NYS2d 96, 282 AD2d 555

Holding: The nature of the offense, the likelihood of conviction, and the severity of the potential sentence all increase risk of flight. *People ex rel. Parone v Phimister*, 29 NY2d 580, 581. The bail-setting court's exercise of discretion in denying bail (solely on the strength of the prosecution's case) had a rational basis. The court hearing the *habeas corpus* proceeding exceeded the narrow scope of its review powers and substituted its own discretion by finding the bail court's ruling improper and fixing bail. Judgment reversed, proceeding dismissed. (Supreme Ct, Queens Co [Lonschein, J])

Dissent: [Friedmann, J] The defense had informed the bail court that the defendant had remained in the jurisdiction, knowing he was a suspect, during this 11-year investigation. He owned a business, and had a wife and infant child. In response to prosecution concerns, the defense suggested home confinement with electronic monitoring. At a later appearance the prosecution repeated the strength of its case and added that the substantial bail package was insufficient in light of the defendant's alleged assets. At a third appearance, the court acknowledged that the bail proposed by the defense was very impressive but remanded the defendant saying, "'I read the Grand Jury minutes.'" The *habeas* court noted that there is no such thing as preventive detention in New York, and, based on the defendant's roots in the community, fixed bail at $2 million dollars. The bail court had failed to find the defendant a flight risk.

Defenses (Justification) (Self-defense) **DEF; 105(37) (45)**

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

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

People v Carrera, No. 97-08869, 2nd Dept, 4/16/01, 725 NYS2d 344, 282 AD2d 614

The defendant stabbed the deceased in the chest with a knife, which eventually caused his death, during a struggle. The defendant testified that the stabbing occurred after the deceased swung a screwdriver at the defendant's head. When the deceased dropped the screwdriver, the defendant picked it up and struck the deceased with it, causing non-fatal wounds.

Holding: The trial court's instruction to the jury on excessive force was improper. The error was unpreserved, but reviewed in the interest of justice. The continued use of deadly force after an aggressor no longer poses a threat may support a finding that the defendant is no longer acting in self-defense. Where homicide is charged, the prosecution must proved that the excessive force caused the death. *See People v Hill*, 226 AD2d 309, 310. The instructions here improperly allowed the jury to convict based on a finding that the defendant was not justified in inflicting the nonfatal wounds after the stabbing. Even with correct instructions, there was insufficient evidence for the jury to conclude that the screwdriver wounds caused death. The court also erroneously instructed on the duty to retreat; the evidence raised a factual question as to whether the area where the struggle occurred was part of the defendant's dwelling where there would have been no duty to retreat. *See* Penal Law 35.15(2)(a)(i). This issue should have been submitted to the jury. *See People v Berk*, 88 NY2d 257 *cert den* 518 US 859. Judgment modified, manslaughter conviction reversed and new trial ordered thereon, and as modified, affirmed. (Supreme Ct, Kings Co [Wade, J])

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

People v Davis, No. 97-11421, 2nd Dept, 4/16/01, 722 NYS2d 919, 282 AD2d 617

Holding; "At a joint trial of the defendant and his codefendant, Maurice McCorkle (*see*, *People v McCorkle*, [278 AD2d 249]), the trial court permitted the prosecutor to exercise a peremptory challenge to exclude a prospective juror because he was of Haitian ancestry. Since the People have correctly conceded that this constituted reversible error (*see*, *People v McCorkle, supra*), a new trial is ordered." (County Ct, Nassau Co, [Ort, J])

Evidence (Preservation) **EVI; 155(107)**

Juries and Jury Trials (Discharge) **JRY; 225(30)**

People v Whyte, No. 97-11648, 2nd Dept, 4/16/01, 725 NYS2d 347, 282 AD2d 629

A sworn juror admitted that she knew a witness that was about to testify at the trial. The juror stated that she would not let her personal feelings interfere with her decision in the trial. Without the request of the prosecutor, the trial court dismissed the juror, stating that "she might

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have a 'jaundice[d] view on the credibility of the witness based upon that prior relationship.'"

Holding: The trial court erred in its decision to dismiss the juror. The trial court's decision was based on speculation, since the juror stated that her knowledge of the defendant would not interfere with her ability to be impartial. According to CPL 270.35, "if at any time after the trial jury has been sworn and before the rendition of its verdict . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case … the court must discharge such juror." The court "must be convinced that it is 'obvious that a particular juror possess a state of mind which would prevent the rendering of an impartial verdict' (*People v Buford*, 69 NY2d 290, 298-299)." The issue was preserved because the defendant objected to the dismissal. The defendant was not required to remind the court that the statue requires a finding that the juror is grossly unqualified. (Supreme Ct, Queens Co [Finnegan, J])

Dissent: [Friedmann, J] Whether the court failed to apply the "grossly unqualified" standard is unpreserved. The court providently exercised its discretion. See CPL 270.20 (1)(b).

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

People v Flores, No. 96-11321, 2nd Dept, 4/23/01, 282 AD2d 688; 725 NYS2d 655

A letter written in Spanish was read in the courtroom during the trial. Only one line from it was translated. It was subsequently admitted into evidence without an accompanying English translation. One of the jurors knew Spanish and translated the letter for the other jurors during deliberations. The jury asked the court officer if they could have the whole letter translated into English. The court officer said that the evidence "was 'the way it was'" and then asked the jury if they wanted someone from the court to translate the letter for them. The court was never properly informed of this exchange. The defendant was convicted of second-degree kidnapping.

Holding: "It is well settled that a court 'may not delegate to a nonjudicial staff member its authority to instruct the jury on matters affecting their deliberations' (*People v Bonaparte*, 78 NY2d 26; *see also*, *People v Torres*, 72 NY2d 1007; CPL 310.10[1]). Here the court officer usurped the court's function by permitting the jury to believe that it could allow one of their members to translate the letter. Moreover, the juror's translation injected 'non-record evidence into the calculus of judgment which a defendant cannot test or refute by cross-examination.' (*People v Maragh*, 94 NY2d 569, 575)." Judgment reversed. (Supreme Ct, Queens Co [Lewis, J])

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

Search and Seizure (Standing to Move to Suppress) **SEA; 335(70)**

People v Zappulla, Nos. 99-02915 and 01-02880, 2nd Dept, 4/23/01, 724 NYS2d 433, 282 AD2d 696

The defendant was arrested at a motel after his girlfriend filed a complaint that he had stolen her fur coat and jewelry. He was read his *Miranda* rights. *See Miranda v Arizona,* 384 US 436 [1963]). A motel key to a room not registered to the defendant was found on him. Police requested the motel manager to open the room, where a fur coat was found. Police then obtained a warrant and searched the room, finding a body. The defendant confessed under questioning to homicide.

Holding: Possession of the key, particularly to a room not registered to him, did not confer standing on the defendant to challenge the room search. *See People v Rodriguez*, 69 NY2d 159. The confession should have been suppressed. The 24-hour gap between the *Miranda* warnings and the second interrogation did not meet the standard of a "reasonable time." *See People v Glinsman*, 107 AD2d 710 *lv den* 64 NY2d 889 *cert den* 472 US 1021. As the defendant spent much time at a hospital being treated for injuries from a car accident on the way to central booking, he had not been in a continuous custodial environment. The second interrogation concerned an unrelated crime. However, reversal is not required in view of the overwhelming evidence of guilt, including the room key, DNA testing showing the decedent's blood on the defendant's clothes, and the defendant's statements to another jail inmate. Judgment affirmed. (Supreme Ct, Kings Co [Kreindler, J])

Arrest (Probable Cause) **ARR; 35(35)**

People v Kennedy, No. 98-10333. 2nd Dept, 4/30/01, 726 NYS2d 109, 282 AD2d 759

An anonymous caller told the police that the defendant was involved in a shooting. The caller provided a telephone number. The police traced the number, got an address, then arrested the defendant, who was subsequently identified in two line-ups.

Holding: For an arrest to be supported by an anonymous tip, the informant must have some basis of knowledge for the information and it must be shown that the informant is reliable. *See Aguilar v Texas,* 378 US 108; *Spinelli v United States,* 393 US 410. The anonymous caller did not indicate that she had personal knowledge of the shooting, or provide any details about the crime from which such knowledge can be inferred. There was no probable cause to support the defendant's arrest. The lineup identifications must be suppressed as the fruit of an illegal arrest. *See People v Brown,* 256 AD2d 414. Judgment

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reversed. (Supreme Ct, Kings Co [Marrus, J])

Discovery (Prior Statement of Witnesses) DSC; 110(26)

People v Holman, No. 96-05893, 2nd Dept, 5/7/01, 724 NYS2d 449, 283 AD2d 440

Holding: While the loss of a police officer's memo book was inadvertent and not the result of prosecutorial failure to exercise due care, the defendant was prejudiced. Identification was a central issue, and the memo book would have been helpful to the defense in cross-examining the officer. *See People v Wallace*, 76 NY2d 953. The court's failure to impose any sanction warrants a new trial. Judgment reversed. (Supreme Ct, Kings Co [Ferdinand, J])

Evidence (Hearsay) EVI; 155(75)

People v Fenner, No. 94-10348, 2nd Dept, 5/14/01, 727 NYS2d 117, 283 AD2d 516

The defendant was convicted based on the testimony of an eyewitness who heard a shot and saw the defendant riding away. When the defendant was gone, the witness said, "I can't believe Les shot you" and asked the decedent, "Do you believe that was him?" The decedent said he could not believe it. At the scene, the decedent did not tell his girlfriend who had shot him, saying that he "would tell her 'later.'" He whispered the defendant's name to his brother in the ambulance, and told his girlfriend at the hospital that it had been the defendant.

Holding: The statements were not excited utterances. The decedent was capable of studied reflection, repeating what he was told at the scene, delaying comment to his girlfriend, urging his brother to remain calm in the ambulance and concealing his identification of the defendant from others in the ambulance. *See People v Edwards*, 47 NY2d 493, 496-497. Judgment reversed, new trial ordered with leave to re-present appropriate charges to the grand jury. (Supreme Ct, Kings Co [George, J])

Dissent: [Smith, J] The circumstances of the decedent's statement at the scene were brought out on cross examination, and the jury could rationally find guilt. In any event the error was harmless in light of compelling evidence of guilt.

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

People v Harris, No. 97-05027, 2nd Dept, 5/14/01, 726 NYS2d 672, 283 AD2d 520

"After defense counsel peremptorily challenged four of the five remaining white venirepersons in the second round of jury selection, the prosecutor made a motion pursuant to *People v Kern* (75 NY2d 638, *cert denied* 498 US 824), and established a prima facie case of discrimination." After defense counsel's explanation, the court accepted the defense challenge of three jurors and rejected the fourth.

Holding: The court's decisions to reject defense counsel's fourth challenge was incorrect. "During voir dire, the challenged venireperson stated that he had previously worked in the Bronx County District Attorney's office, where he handled police paperwork in connection with criminal evidence, and that he was familiar with the vouchering process . . . [T]he court erred by concluding that the explanation was pretextual and by seating the juror over the defendant's objection. . . ." *People v Bailey*, 200 AD2d 677. "[C]ounsel's reasons had a bearing on the case and related to a legitimate concern." Judgment reversed. (Supreme Ct, Queens Co [Flaherty, J])

Contempt (General) CNT; 85(8)

Self-Incrimination (General) SLF; 340(13)

Matter of County of Orange v Rodriguez, No. 00-02388, 2nd Dept, 5/14/01, 724 NYS2d 477, 283 AD2d 494

Holding: After he was arrested for several felonies unrelated to a murder for which he was under suspicion, the appellant failed to comply with an order suspending his pistol permit. The petitioner county commenced an action to hold the appellant in civil contempt pursuant to Judiciary Law 753 and CPLR 5104. The record shows that the court did not rely on initial actions in failing to turn over his firearms, but based a finding of contempt "solely on the appellant's good faith invocation of his Fifth Amendment privilege in response to questions posed at the contempt hearing regarding the location of the weapons that he had been ordered to surrender." This was improper. *See United States v Rylander*, 460 US 752, 760 (1983). Judgment reversed, matter remitted for further proceedings on the county's petition. (County Ct, Orange Co [DeRosa, J])

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

People v Henry, No. 97-06593, 2nd Dept, 5/21/01, 727 NYS2d 445, 283 AD2d 587

The defendant was convicted of the sale and possession of a controlled substance.

Holding: After the jury had notified the court for the second time that it was deadlocked, the court, in its *Allen* charge (*see Allen v United States*, 164 US 492 [1896]),

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"instructed that each juror had to 'try to convince the others, if you could, that you're correct and show them why you're correct. Show them the law. Show them the evidence.' This language impermissibly shifted the burden of proof to the defendant . . ." by obliging the jurors to explain their respective positions, thus depriving the defendant of a fair trial. *See People v Antommarchi*, 80 NY2d 247, 252. Judgment reversed, new trial granted. (Supreme Ct, Queens Co [Rios, J])

Third Department

Discovery (General) **DSC; 110(12)**

Impeachment (Of Defendant, including *Sandoval*) **IMP; 192(35)**

People v Felix-Torres, No. 11516, 3rd Dept, 3/1/01, 721 NYS2d 415, 281 AD2d 649

The defendant, charged with attempted murder and other crimes, requested all *Rosario* material (*People v Rosario*, 9 NY2d 286, 289-290 *rearg den* 9 NY2d 908, 14 NY2d 876, 15 NY2d 765, *cert den* 368 US 866). The prosecution provided certain items and advised that it planned to cross-examine the defendant about his HIV-positive status. The court disallowed reference to HIV or AIDS in the case in chief, but permitted cross-examination as to whether the defendant had a life-threatening disease. During closing, the prosecutor suggested that the defendant, knowing he had a life-threatening disease, had nothing to lose. The defendant later filed two Freedom of Information Law requests and received additional material.

Holding: While the defendant's health was relevant to whether he intended to commit the crimes charged, the prosecution presented no evidence to support the inference that he knew he had nothing to lose and acted on that knowledge. However, there was sufficient evidence to establish the requisite intent independent of the defendant's medical condition. The defendant was deprived of *Rosario* material. The record did not contain the documents actually disclosed, making appellate determination of the extent of the violation and prejudice impossible. A showing of actual prejudice is now required by CPL 240.75; the *per se* rule established in *People v Ranghelle*, 69 NY2d 56 was legislatively abrogated after this appeal was taken. Matter remitted to afford the defendant an opportunity to demonstrate prejudice and to permit the court to determine whether reversal is warranted. (Country Ct, Montgomery Co [Catena, J])

Sentencing (Appellate Review) (General) (Guidelines) **SEN; 345(8) (37) (39)**

People v Warren, No. 11600, 3rd Dept, 3/1/01, 721 NYS2d 152, 280 AD2d 75

The defendant pled guilty to crimes including first-degree criminal contempt and first-degree sexual abuse. He was sentenced as a second felony offender, and an order of protection was entered as to his spouse (the criminal contempt complainant) and his stepdaughter (the sexual abuse complainant).

Holding: The defendant agreed to the order of protection as part of the plea bargain and waived his right to appeal. The challenge to the issuance of the order of protection was not preserved for appellate review. *See gen People v Sanders*, 163 AD3d 616 *lv den* 76 NY2d 944. The challenge to the scope of the order is unpersuasive; the defendant's daughters had begun residing in the same household as the defendant's stepdaughter so their inclusion in the order was authorized by CPL 530.13(4)(b). The challenge to the duration of the order of protection was preserved despite the plea bargain and the waiver of the right to appeal. The order is an integral part of the conviction and sentence and its duration is expressly limited by statute (CPL 530.13[4]); a challenge to its duration is directed at an aspect of the underlying sentence. *See People v Seaberg*, 74 NY2d 1, 9. In fixing the expiration date of the order, the court added the statutory limit of three years to the maximum term of the aggregate of the *entire* sentence imposed. However, such three-year period can be added only to the maximum term of the sentence for the counts *upon which the order of protection was issued*—in this case upon the counts of criminal contempt and sexual abuse. *See People v Nunez*, 267 AD2d 1050, 1051 *lv den* 94 NY2d 905. Matter remitted to permit correction of the specific expiration date. (County Ct, St. Lawrence Co [Nicandri, J])

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

Sentencing (Excessiveness) **SEN; 345(33)**

People v Coleman, No. 11988, 3rd Dept, 3/1/01, 721 NYS2d 160, 281 AD2d 653

In satisfaction of a three-count indictment, the defendant pled guilty to second-degree assault, on the understanding that he would receive a determinate prison sentence of 5 years, with a mandatory 1.5 years of post-release supervision.

Holding: The defendant's allegations of ineffective assistance of counsel do not survive his knowing, voluntary and intelligent waiver of his right to appeal "'the judgment of conviction.'" In any event, defense counsel mentioned mitigating circumstances at sentencing and

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the record as a whole shows that the defendant received meaningful representation. Inasmuch as the defendant waived his right to appeal the conviction, a challenge to the harshness of the sentence imposed is not preserved for review. *See People v Buckner*, 274 AD2d 832 *lv den* 95 NY2d 904. Nevertheless, in the interest of justice, the sentence is reviewed and found unduly severe. The defendant had "virtually no criminal record," no history of violent conduct, and was extensively involved in his community. While awaiting sentencing, he completed an anger management program. His sentence is reduced to the statutory minimum of two years. Judgment modified, and as modified, affirmed. (County Ct, Albany Co [Rosen, J])

Accusatory Instruments (Amendment) (Sufficiency) **ACI; 11(5) (15)**

People v Struts, No. 12418, 3rd Dept, 3/1/01, 721 NYS2d 425, 281 AD2d 655

The defendant was indicted on two counts of third-degree rape, based on two separate instances of alleged sexual intercourse with a female just before and just after her sixteenth birthday. Neither count of the indictment alleged that the defendant and complainant were not married to each other as required by the statute. Penal Law 130.25(2). The defendant's motion to dismiss both counts was granted.

Holding: An indictment must contain a factual allegation of every element of a charged crime. CPL 200.50[7]. "'[I]t is bright line law that if the offense charged has an exception contained within the statute, the indictment must contain an allegation that defendant's conduct does not come within the reach of the exception." *People v Hogabone*, __ AD2d __, 716 NYS2d 836, 837. Failure to include an element is a fatal defect, not mere typographical error as the prosecution alleged. Nor could the prosecution legally amend the indictment to cure the failure. CPL 200.70(2); *see People v Bingham*, 263 AD2d 611. The indictment was properly dismissed as facially invalid. Order affirmed. (County Ct, Albany Co [Rosen, J])

Sentencing (Hearing) **SEN; 345(42)**

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

People v Neish, No. 12293, 3rd Dept, 3/22/01, 722 NYS2d 815, 281 AD2d 817

The defendant was classified as a risk-level I sex offender under the Sex Offender Registration Act (SORA). At the risk assessment hearing, the prosecution asked to be heard to argue that the defendant be determined a risk-level II offender for a repeat sex offense. The court permitted the prosecution to place its position on the record, but then denied its request.

Holding: While SORA was amended prior to the defendant's risk assessment hearing to afford the prosecution the right to be heard (*see* L 1999, ch 453, § 6 [eff. 1/1/00]), the court did not err by denying the request. The prosecution's right to be heard was waived by its failure to provide prior written notice of the assessment sought. "Without such notice, the offender's opportunity to be heard in response, which SORA expressly recognizes, cannot be a meaningful one." *See Mathews v Eldridge*, 424 US 319, 348-349 (1976). Further, the court's risk-level determination has a substantial basis in the record. Order affirmed. (County Ct, Broome Co [Smith, J])

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

Sentencing (General) **SEN; 345(37)**

People v Chappelle, No. 12222, 3rd Dept, 4/12/01, 723 NYS2d 544, 282 AD2d 834

In satisfaction of a three-count indictment, the defendant pled guilty to third-degree possession of a controlled substance. Pursuant to the plea bargain, he waived his right to appeal. After his motion to withdraw the plea was denied, he was sentenced as a second felony offender to the agreed-upon prison term of 6 to 16 years.

Holding: Penal Law 70.06(4)(b) obliges the court to fix the minimum period of imprisonment under an indeterminate sentence for a second felony offender at one-half the maximum term imposed. While the maximum term in the instant case was permissible, the minimum term imposed did not comply with the statutory mandate. Where a plea bargain includes a sentence which is illegal because the minimum is less than required by law, the proper remedy is to vacate the sentence and afford the defendant the opportunity to withdraw the plea. *People v Martin*, __ AD2d __, 718 NYS2d 445, 447. Judgment reversed, plea and sentence vacated, case restored to the pre-plea stage. (County Ct, Ulster Co [La Buda, J])

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**

People v Constanza, Jr., No. 11922, 3rd Dept, 5/3/01, 725 NYS2d 686, 281 AD2d 120

The defendant's probation was revoked and six-month prison terms imposed following allegations that he violated conditions of probation requiring him to complete a violence intervention program and refrain from intimidating behavior. He continued, *inter alia*, to assert

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that he was the victim in this matter involving behavior toward his girlfriend.

Holding: The burden of proving a justifiable excuse for a probation violation, or that the failure to comply was not willful and/or voluntary, is on the probationer. *See Humphrey v Maryland*, 290 Md 164; *Black v Romano*, 471 U2 606, 612 (1985). The record shows that the prosecution satisfied their burden of proving beyond a preponderance of evidence that the defendant violated each of the relevant conditions of probation. Contrary to the defendant's contention, his due process rights were not violated. He was unequivocally advised eight weeks into the program that identification of abusive behavior was necessary for program compliance. He was later advised that he was not in compliance and was in jeopardy of being discharged. It was not an abuse of discretion to revoke probation solely on the basis that the defendant failed to complete the violence intervention program. *See People v Styles*, 175 AD2d 961 *lv den* 79 NY2d 923. Due process does not require a court to consider alternatives to incarceration before revoking probation or hold a separate mitigation hearing (*see People v McCloud*, 205 AD2d 1024 *lv den* 86 NY2d 738). Success in non-approved programs did not constitute sufficient mitigation to warrant continuation of probation; a probationer's attempt to rewrite the conditions of probation should not be tolerated. Judgment affirmed, matter remitted for further proceedings. (County Ct, Clinton Co [McGill, J])

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

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

People v More, No. 11455, 3rd Dept, 5/10/01, 725 NYS2d 706, 283 AD2d 715

The defendant was convicted of third-degree possession of a controlled substance, resisting arrest, and false personation. He argued that his arrest was merely a pretext for the body cavity search, which revealed several rocks of crack cocaine. No *Miranda* warnings were given. Going to the police station, the defendant blurted out several statements, including a response to an officer's question about a struggle during the strip search. He made additional statements after being transported to the hospital. The statement made in response to the officer's question was excluded.

Holding: No warrant was needed, as the police obtained prior voluntary consent for entry from a tenant of the premises. The totality of the circumstances, including the observation of a pipe and a white substance believed to be cocaine within reach of the defendant, combined with the officers' experience and training, constituted reasonable cause for arrest. That the material tested negative for a controlled substance did not vitiate the arrest. *See* CPL 140.10[1]; *People v Tejeda*, 270 AD2d 655, 657 *lv den* 95 NY2d 805. The decision to conduct an immediate strip search, though of concern, was justified by the information police had before they entered the premises, their experience, and what they saw. *See People v Smith*, 59 NY2d 454. The defendant's spontaneous oral statements were not the product of questioning or its functional equivalent and were clearly admissible regardless of whether *Miranda* warnings were given. *See People v Torres*, 21 NY2d 49, 54. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, J])

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

People v Elliotte, Nos. 11523 & 11765, 3rd Dept, 5/10/01, 726 NYS2d 471, 283 AD2d 719

The defendant was convicted of third-degree possession of a controlled substance following a buy and bust operation targeting another individual. The police had heard that person say he would be alone, but the defendant was also present. When apprehended, the defendant dropped a brown fast-food bag. A search revealed cold french-fries and a beer can containing a plastic bag of crack cocaine.

Holding: "A defendant's presence at a narcotics transaction, in the absence of overt criminal activity or furtive behavior on his or her part, does not provide probable cause to arrest, although under certain circumstances presence at the scene might furnish a trained policeman with probable cause to effect an arrest." *See People v Martin*, 32 NY2d 123, 125. That the defendant was with the buy-and-bust target, and the arresting officer's training led him to believe more than one person would be involved, were insufficient indicia of criminality. Prearrest information pertained only to the target, and the confidential informant could not identify the defendant at the scene. No furtive behavior was noted, and no evidence was presented to show that the defendant had knowledge of the drug purchase. Equally innocent explanations exist; conduct which may be indicative of innocence or guilt is insufficient to establish probable cause to arrest. *See People v Carrasquillo*, 54 NY2d 248, 254. Absent probable cause to arrest, there was no basis upon which to conduct a search of the bag. The motion to suppress should have been granted. Judgment and order reversed,

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motion to suppress granted, indictment dismissed. (Supreme Ct, Albany Co [Lamont, J])

Double Jeopardy (Collateral Estoppel) **DBJ; 125(3)**

Probation and Conditional Discharge (Revocation) **PRO; 305(30)**

People v West, No. 11910, 3rd Dept, 5/10/01, 725 NYS2d 704, 283 AD2d 721

After the defendant was convicted of several charges relating to abuse of a former domestic partner and their child, he was sentenced to probation. He was subsequently charged with a number of felonies and misdemeanors alleging abusive acts towards a different female. Following a hearing, the court found defendant in violation of probation and sentenced him to 1½ to 3 years.

Holding: The dismissal of charges by a grand jury does not preclude a subsequent revocation of probation based on the same facts. *See gen Matter of McWhinney v Russi*, 228 AD2d 980. Failure to indict is not tantamount to an acquittal, and collateral estoppel does not apply. There was ample evidence to support the finding that the defendant was in violation of his probation. The prosecution's failure to provide the defendant with a copy of the grand jury transcript did not violate the *Rosario* rule. Since the grand jury proceedings resulted in a "no bill," there would be no trial. The prosecution is not mandated to order a transcript under these circumstances. *See* CPL 240.45[1][a]). Lacking access to the statements, the prosecution cannot be held responsible for a failure to turn them over to the defendant. *People v Fishman*, 72 NY2d 884, 886. Judgment affirmed. (County Ct, Clinton Co [McGill, J])

Police (General) **POL; 287(20)**

Search and Seizure (Stop and Frisk) **SEA; 335(75)**

People v Mitchell, No. 10376, 3rd Dept, 5/17/01, 724 NYS2d 229, 283 AD2d 769

Albany police detectives received information that two persons believed to be suspects in Albany robberies were involved in a criminal trespass outside of Albany. One had eluded arrest. Driving outside Albany, the police observed the defendant in a convenience store. Because he matched the description given, and seemed to give them an "inordinate amount" of attention the several times they drove by, they entered and asked him his name, address, and what he was doing in the area. Determining that his answers were "patently false," they advised the defendant that they were conducting a criminal investigation and asked if he would accompany them to headquarters. He agreed. Following *Miranda* warnings, he confessed to the Albany robberies.

Holding: CPL 140.50(1) codifies the "stop-and-frisk" doctrine established in *Terry v Ohio*, 392 US 1 (1968). However, the initial encounter did not constitute a "stop" as contemplated in *Terry*. It was a lower level of police intrusion, a simple request for information, which need only be supported by an articulable reason justifying such action. *See People v Hollman*, 79 NY2d 181, 189. The defendant's false responses justified proceeding to the second level of inquiry, asking whether the defendant was willing to accompany them. That the defendant fit the description of the perpetrator of the robberies would itself justify a common law inquiry. The defendant's contention that the police could not conduct inquiries outside their jurisdiction is rejected. Judgment affirmed. (County Ct, Albany Co [Breslin, J])

Criminal Law and Procedure (General) **CLP; 98.8(10)**

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

People v MacNeil, No. 12549, 3rd Dept, 5/24/01, 727 NYS2d 485, 283 AD2d 835

The day before the defendant's Sex Offender Registration Act (SORA) risk assessment hearing, the prosecutor submitted a letter requesting a risk level II classification. At the hearing, the court allowed the prosecution an opportunity to be heard as to the defendant's juvenile adjudication and failure to accept responsibility, but classified the defendant as a risk level I sex offender. The prosecution appealed.

Holding: The prosecution did not comply with SORA as the notice was not filed "at least fifteen days prior to the determination hearing" as required by Correction Law 168-d(3). The argument that the abbreviated notice was excusable because the defendant did not object at the hearing is rejected; there was no evidence of a knowing and intelligent waiver by the defendant of this due process right. "'[T]he prosecution's right to be heard was waived by its failure to provide the court and defendant with [sufficient] prior notice of the assessment sought.'" *People v Neish*, __ AD2d __, 722 NYS2d 815, 816. The court's determination of the defendant's risk level has a substantial basis in the record. Treating the prior adjudication solely as endangering the welfare of a child, not a sex offense, was not an abuse of discretion. *See* Correction Law 168-d(2). Order affirmed. (County Ct, Broome Co [Smith, J])

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

Identification (Suggestive Procedures) **IDE; 190(50)**

People v Graham, Nos. 11759 & 79572, 3rd Dept, 5/31/01, 725 NYS2d 145, 283 AD2d 885

Holding: The uncontroverted, if limited, evidence at a hearing on a witness's pretrial identification from a single photograph established that the witness had known the defendant for 10 or 15 years (*see People v Collins*, 60 NY2d 214, 219) and knew his street name. Their prior relationship was not fleeting, distant, or the result of a brief encounter. *See People v Newball*, 76 NY2d 587, 591-592. This made the witness impervious to suggestion in the identification. *People v Rodriguez*, 79 NY2d 445, 452.

The prosecution was not required to disclose the witness's rap sheet at the hearing, because the witness did not testify then. CPL 240.44[2]. The claim that the rap sheet showed that the witness had been incarcerated over a period of 18 years before the murder, undermining the basis for the *Rodriguez* ruling, was unpreserved because there was no motion to reopen the hearing.

A 1995 statement given by the witness to an investigator for a co-defendant saying that the witness only knew that the shooter was not the co-defendant was not newly discovered evidence. It was additional impeachment material as to the witness's ability and motive to identify the shooter; it did not create any reasonable probability of a more favorable verdict. *See* CPL 440.10[1][g]; *People v Richards*, 266 AD2d 714 *lv den* 94 NY2d 924.

The ineffective assistance of counsel claim, where the defender office representing the defendant had represented two prosecution witnesses earlier, was not persuasive. There is no showing that the potential conflict affected or influenced the defense provided. *See People v Jordan*, 88 NY2d 785, 787. Judgment and order affirmed. (County Ct, Albany Co [Breslin, J])

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

People v Hope, No. 11008B, 3rd Dept, 6/7/01, 726 NYS2d 166

The defendant, an inmate, pled guilty to attempted promoting prison contraband. He argued on appeal that the statements he made in an interview with a correction officer should have been suppressed because he was never given *Miranda* warnings.

Holding: *People v Alls* (83 NY2d 94 *cert den* 511 US 1090) established an "additional restraints" test to determine whether a custodial situation necessitating *Miranda* warnings exists for an inmate already confined to a correctional facility. The test requires a showing "that the circumstances of the detention and interrogation 'would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement.'" *People v Ward*, 241 AD2d 767, 768 *lv den* 91 NY2d 837. Here, the defendant was handcuffed and driven to an isolated location. There is no indication that the defendant was told that the interview was voluntary or that he was free to leave at any time. On these facts, the defendant could have reasonably believed that his freedom was restricted beyond ordinary confinement. *Miranda* warnings should have been administered. The error was not harmless; the prosecution did not obtain a statement from the defendant that the denial of suppression did not influence his plea, nor negotiate a waiver of the defendant's right to appeal. Judgment reversed. (County Ct, Washington Co [Hemmett Jr., J])

Robbery (Elements) (Evidence) **ROB; 330(15) (20)**

Sentencing (Excessiveness) **SEN; 345(33)**

People v Rychel, No. 12277, 3rd Dept, 6/14/01, 728 NYS2d 211

The defendant waived his right to a jury trial and agreed to a set of stipulated facts, on the basis of which the court found the defendant guilty of third-degree robbery.

Holding: The defendant did not challenge the sufficiency of the evidence in the stipulation prior to sentencing, thereby waiving the right to do so on appeal. *See People v Mills*, 103 AD2d 379, 388. The stipulation contained all of the elements of third-degree robbery and was legally sufficient to support the conviction. All that is necessary is that there be a threatened use of force (*see People v Woods*, 41 NY2d 279, 283), which the defendant admitted in the stipulation. Review of the record reveals further proof which was available to the prosecution to prove its case, but which was unnecessary in light of the defendant's stipulation. The defendant's claim that his sentence was excessive is without merit. He received the agreed-upon sentence, which was within the statutory parameters. *See People v Bailey*, 265 AD2d 731, 732. No abuse of discretion or extraordinary circumstances appear in the record. Judgment affirmed. (County Ct, Chemung Co [Buckley, J])

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

Grand Jury (General) (Witnesses) **GRJ; 180(3) (15)**

Third Department *continued*

People v Gray, No. 12668, 3rd Dept, 6/14/01, 728 NYS2d 513

The defendants' motions to dismiss their indictment were granted on the grounds that the prosecution was obligated to present evidence of witnesses' exculpatory statements to the grand jury or at least apprise the grand jury of their existence.

Holding: A determination as to whether a defense should be charged to the grand jury depends upon its potential to eliminate an unfounded or needless prosecution. *See People v Valles*, 62 NY2d 36, 38. The prosecution is not obligated to present exculpatory statements to the grand jury or apprise it of their existence where, as here, the information would not have eliminated such a prosecution but would have "merely raised a question of fact." *People v Perry*, 187 AD2d 678, 678 *lv den* 81 NY2d 891. Since the two individuals whose statements were the subject of the alleged violation were listed by one defendant as alibi witnesses, it can be presumed that the defense was aware of the statements and no *Brady* violation exists. *See People v Quinones*, 228 AD2d 796. Order reversed and indictment reinstated. (County Ct, Columbia Co [Leaman, J])

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

Sentencing (Excessiveness) SEN; 345(33)

People v Arroyo, No. 12309, 3rd Dept, 6/21/01, 728 NYS2d 231

The defendant agreed to plead guilty to attempted second-degree assault pursuant to a plea bargain agreement under which he would be sentenced to either six months in jail with five years' probation or one year in jail with no probation. Based on its review of the presentence report and statements of the complainant and her mother, the court informed the defendant that it could not go along with the plea agreement and that if the defendant still chose to plead guilty, the court would impose a sentence of $1^{1}/_{3}$ to 4 years. The court granted an adjournment to allow the defendant to consider the matter. The defendant elected to plead guilty and was sentenced to 1 to 3 years in prison.

Holding: Pursuant to CPL 380.50 (2)(b), where a defendant is to be sentenced for a felony, the court shall permit the victim to make a statement relevant to sentencing. There is no preclusion against statements of other individuals. *See People v Rivers*, 262 AD2d 108, 108-109 *lv den* 94 NY2d 828. The court stated on the record that its decision to impose a harsher sentence than originally agreed to was not based solely on the complainant's statement but also on information in the presentence report, especially the defendant's criminal history. The court was under no obligation to adhere to the previous plea agreement after receiving the added information, since the defendant was given an opportunity to withdraw his guilty plea. *See People v Wood*, 207 AD2d 1001. Judgment affirmed. (County Ct, Broome Co [Smith, J])

Evidence (Hearsay) (Other Crimes) EVI; 155(75) (95)

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

People v Toland, Nos. 12298, 78021, 3rd Dept, 6/28/01, 728 NYS2d 538

The defendant appealed his convictions related to the disappearance and death of a young woman and the denial of his motion to vacate the judgment under CPL 440.10.

Holding: The court did not abuse its discretion by admitting evidence of a similar, uncharged crime under the exceptions in *People v Molineux* (168 NY 264). One exception applies when, as here, the "'identity of the defendant has not been conclusively established by other evidence and there is clear and convincing proof that the *modus operandi* is so unique as to make the evidence highly probative . . .'" *People v Nuness*, 192 AD2d 960, 961 *lv den* 82 NY2d 723). This test was met by evidence that the defendant had a penchant for engaging in bondage with women, including the woman in the uncharged homicide, consistent with the manner in which the decedent in this case had been bound. The balancing of the prejudicial impact of the evidence against its probative value, required for admission of evidence of uncharged crimes (*see People v Ventimiglia*, 52 NY2d 350, 359-360), in this case favors admission. Evidence of telephone conversations in which the decedent indicated plans to meet her boyfriend was admissible under the "state of mind" hearsay exception, as the statements were made under circumstances making it probable that the expressed intent was serious. *People v Malizia*, 92 AD 2d 154, 160 *affd* 62 NY2d 755 *cert den* 469 US 932. The court erred in imposing consecutive sentences for kidnapping and murder. The *actus reus* element of the murder charge is a material element of the kidnapping, mandating concurrent sentences. *See People v Molina*, 248 AD 2d 489 *lv den* 92 NY2d 902. Judgment modified, and as modified, affirmed. (County Ct, Schenectady Co [Eidens, J])

Probation and Conditional Discharge (Conditions and Terms) (Revocation) PRO; 305(5) (30)

People v Gemmill, No. 12428, 3rd Dept, 6/28/01, 728 NYS2d 548

The defendant pled guilty to burglary and waived his

Third Department *continued*

right to appeal. The court deferred sentencing and continued the defendant's release with the requirement that he satisfactorily complete a drug and alcohol treatment program, under an agreement that he would face a longer prison term if he did not. The defendant was discharged from the program for noncompliance with its rules. The court revoked his probation and sentenced him to the longer prison term.

Holding: Where a defendant waives the right to appeal, that waiver encompasses the right to challenge whether requiring successful completion of a treatment program is an impermissible term of interim probation. *See People v La Valley*, 272 AD2d 786. Review of the issue would show that the program was authorized and the court did not deprive the defendant of his due process rights. While the condition was not explicitly reiterated at the time of the plea, the defendant was aware of the program condition, which was explained at arraignment and which the defendant was adhering to at the time of the plea. As the program was under the control of a private agency (*compare People v Avery*, 85 NY2d 503), interim probation did not implicate the statutory requirements of CPL 390.30 (6). Compliance with treatment was an authorized presentence condition under CPL 400.10 (4). Judgment affirmed. (County Ct, St. Lawrence Co [Nicandri, J])

Fourth Department

Double Jeopardy (Collateral Estoppel) **DBJ; 125(3)**

Sentencing (Persistent Felony Offender) (Persistent Violent Felony Offender) **SEN; 345(58) (59)**

People v Williams, No. KA 98-05081, 4th Dept, 2/7/01, 720 NYS2d 858, 280 AD2d 913

The defendant was convicted of second-degree burglary. The prosecutor applied to have the defendant adjudicated as a persistent felony offender. Before the court issued a decision, the prosecutor applied to have the defendant treated as a persistent violent felony offender. The defendant conceded that status and was sentenced. As to certain counts, the Appellate Division reversed the conviction and granted a new trial. *See People v Williams*, 237 AD2d 982 *lv den* 90 NY2d 866. Following the retrial, the defendant was acquitted of second-degree burglary but convicted of third-degree burglary. Because the lesser charge was not a violent felony, he could not be sentenced as a persistent violent felony offender. Over objection, the prosecutor applied to change the defendant's classification to persistent felony offender.

Holding: The defendant failed to preserve the contention that the prosecutor was collaterally estopped by the earlier election to seek persistent violent felony offender status from seeking to have him sentenced as persistent felony offender. CPL 470.05 (2). Furthermore, the argument is without merit. The sentence was not vindictive. The defendant's lengthy criminal record was the "driving force behind . . . sentencing." *People v Young*, 94 NY2d 171, 180 *rearg den* 94 NY2d 876. The court properly granted the prosecutor's challenge for cause after a prospective juror was unable to state that she could render an impartial verdict. *See People v Thorn*, 269 AD2d 756, 757-758. Judgment affirmed. (Supreme Ct, Monroe Co [Mark, J])

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

People v Burroughs, No. KA 98-05122, 4th Dept, 2/7/01, 721 NYS2d 213, 280 AD2d 965

Holding: The defendant was convicted of multiple counts of second-degree possession of a forged instrument and second-degree forgery. He had used a fictitious name, date of birth, and social security number to obtain a learner's permit, driver's license, and certificate of title from the Department of Motor Vehicles and an insurance policy. His contention that he was denied a fair trial because of prosecutorial misconduct is without merit. While the prosecutor made some comments during summation that were improper, including that the defendant "needs a strong message," the comments were not so egregious as to deny the defendant a fair trial. *See People v Hanright*, 187 AD2d 1021 *lv den* 81 NY2d 840. Judgment affirmed. (Supreme Ct, Monroe Co [Ark, J])

Evidence (Voice) **EVI; 155(134.5)**

Forensics (General) **FRN; 173(10)**

People v Gifford, No. KA 98-05124, 4th Dept, 2/7/01, 720 NYS2d 876, 280 AD2d 967

Holding: The contention that the court erred by admitting evidence concerning the procedures used to administer a voice stress test to the defendant is without merit. Although the results of the test should not have been admitted (*see People v Hughes*, 88 AD2d 17, 20 *affd* 59 NY2d 523), the court's curative instruction rendered the error harmless. *See gen People v Hopkins*, 86 AD2d 937, 940 *affd* 58 NY2d 1079. The court was within its discretion in prohibiting the defendant from cross-examining the complainant regarding an alleged prior false accusation of sexual misconduct, as the defendant failed to make the required showing that the prior accusation was false and suggested a pattern. *See People v Mandel*, 48 NY2d 952, 953 *app dismis'd and cert den* 446 US 949 *reh den* 448 US 908. Judgment affirmed. (County Ct, Monroe Co [Marks, J])

Fourth Department *continued*

Confessions (*Huntley* Hearing) **CNF; 70(33)**

People v Stroman, No. KA 99-02082, 4th Dept, 2/7/01, 720 NYS2d 434, 280 AD2d 887

Holding: The court erred by denying the defendant's motion for a *Huntley* hearing (*People v Huntley*, 43 NY2d 175). The complainant called the defendant from the police station and the conversation was recorded. The defendant contended that his statements were involuntary because the victim was acting as an agent of the police and made a threat creating a risk of false self-incrimination. CPL 60.45 (2)(b)(i). When a defendant raises "the issue of voluntariness of an admission made to a private person . . . claimed [to be] acting as a police agent, the court should conduct a hearing." *People v Mirenda,* 23 NY2d 439, 449. The defendant is entitled to such a hearing even if it "appears highly unlikely" that the private actor was acting as a police agent. Decision reserved, matter remitted for a *Huntley* hearing. (County Ct, Cayuga Co [Corning, J])

Sentencing (Excessiveness) **SEN; 345(33)**

People v Cooper, No. KA 99-02109, 4th Dept, 2/7/01, 721 NYS2d 187, 280 AD2d 913

Holding: The defendant used an unlicensed firearm to prevent a robbery. An armed assailant was killed and two accomplices were wounded. The defendant did not waive the right to appeal the severity of his sentence where the court did not advise him of the potential term of incarceration. *See People v Cormack*, 269 AD2d 815. The sentence of concurrent indeterminate terms of incarceration of two and a half to five years is unduly harsh and severe. The judgment is modified in the interest of justice by reducing the sentence to one and a half to three years. (County Ct, Erie Co [Rogowski, J])

Sentencing (Restitution) **SEN; 345(71)**

People v Swiatowy, No. KA 99-05512, 4th Dept, 2/7/01, 721 NYS2d 185, 280 AD2d 71

The defendant pled guilty to second-degree assault and admitted during allocution that he stabbed the complainant. When the defendant appeared for sentencing the prosecutor advised him that the complainant had made a claim for restitution based on medical bills. Because the court did not have sufficient information concerning the complainant's damages, it severed the issue of restitution. Both parties consented and the court noted that if the parties could not resolve the issue a hearing would be conducted on the issue. Four months later the Department of Social Services submitted a claim for restitution for Medicaid totaling $8,955.54. The court rejected defense counsel's contention that the claim was untimely, held a hearing, and fixed restitution at $8,955.54 plus a 5% surcharge.

Holding: The court properly directed the defendant to pay restitution thirteen months after he was sentenced. Although a court should normally fix restitution at sentencing (*People v Consalvo,* 89 NY2d 140, 144), its failure to do so does not necessarily deprive it of jurisdiction to impose restitution later. *People v Daprano,* 224 AD2d 441, 441-442 *lv den* 88 NY2d 965. It is enough that the prosecutor expressed the intent to seek restitution at the sentencing hearing. *See People v Kevin C,* 265 AD2d 828, 828-829. The addition of restitution must occur within a reasonable time after sentencing; an unreasonable delay will result in loss of jurisdiction. Because the court here did not have sufficient information at the time of sentencing, it properly severed the issue of restitution. Amended sentence affirmed. (County Ct, Genesee Co [Noonan, J])

Discrimination (Race) **DCM; 110.5(50)**

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

People v Sprague, No. KA 00-00200, 4th Dept, 2/7/01, 721 NYS2d 205, 280 AD2d 954

This court had earlier reserved decision and remitted this matter. The lower court was directed to set forth its basis for sustaining the prosecutor's *Batson* challenge (*Batson v Kentucky*, 476 US 79 [1986]) to a defense peremptory strike excusing an African American prospective juror. After a hearing, the trial court found that the defense attorney's peremptory challenge to the prospective black juror because she had folded her arms across her chest, was—although honestly believed by counsel—"based upon such an insignificant reason that it was the equivalent of a pretextual reason in that it amounted to purposeful discrimination . . ." *People v Sprague*, 185 Misc2d 595, 599.

Holding: The court erred. The third element of *Batson*, whether the race-neutral explanation is a pretext for racial discrimination (*People v Payne,* 88 NY2d 172, 181), was satisfied because defense counsel "honestly believed" that the juror's body language communicated hostility. Because there was no intent to discriminate, there was no *Batson* violation. There is no authority to conclude that a proffered race-neutral reason, while not actually pretextual, is so insignificant as to amount to pretext. Judgment reversed and new trial granted. (Supreme Ct, Monroe Co [Mark, J])

Fourth Department *continued*

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

Cook v Relin, No. CA 00-01802, 4th Dept, 2/7/01, 721 NYS2d 885, 280 AD2d 897

Holding: The court properly granted the civil defendant's motion for summary judgment on the ground that his statements were constitutionally protected expressions of opinion. In light of the "the content of the whole communication, its tone and apparent purpose" a reasonable listener would view the communication as an expression of opinion. *Immuno AG. v Moor-Jankowski,* 77 NY2d 235, 254 *cert den* 500 US 954. The tone of the communication, made in the midst of a heated and bitter political campaign, was sarcastic, caustic and ironic, making it evident that the communication was intended to be "invective expressed in the form of heavy-handed and nonsensical humor." *Steinhilber v Alphonse,* 68 NY2d 283, 293. In context it would be plain to a reasonable listener that the defendant's portrayal of the plaintiff as hypocritical and dishonest was no more than political hyperbole and therefore not actionable. *Duane v Prescott,* 134 AD2d 560 *lv den* 72 NY2d 801. Statements that might have falsely implied that the plaintiff was intoxicated at a golf outing are not actionable because the implication did not reflect on his performance or competence as an attorney. *See Golub v Esquire Publ.,* 124 AD2d 528, 529-530 *lv den* 69 NY2d 606. The alleged false comments that the defendant made disparaging the plaintiff as a restaurateur were not actionable due to the single instance rule; the plaintiff did not allege special damages. *See gen Larson v Albany Med. Ctr.,* 252 AD2d 936, 939. (Supreme Ct, Monroe Co [Doyle, J])
Dissent: The statements were "reasonably susceptible of a defamatory connotation." *James v Gannett Co.,* 40 NY2d 415, 419 *rearg den* 40 NY2d 990.

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

Matter of Moore v Goord, No. TP 00-01898, 4th Dept, 2/7/01, 720 NYS2d 694, 280 AD2d 905

Holding: The determination that the defendant was guilty of unauthorized soliciting, in violation of inmate rule 103.20 (7 NYCRR 270.2 [B][4][ii]), is not supported by substantial evidence. Although the defendant was in possession of materials published by the American Freedom Communion, there is no evidence that he was involved in the solicitation of members for the organization. He did not raise on administrative appeal his claim that he did not possess unauthorized organizational materials and therefore did not violate inmate rule 105.12 (7 NYCRR 270.2 [B][6][iii]). He therefore failed to exhaust his administrative remedies as to that issue. *See Matter of Battiste v Goord,* 255 AD2d 941, 942. He has already served his penalty and there was no loss of good time, so the matter need not be remitted for reconsideration of the penalty. Determination modified and as modified, confirmed. (Supreme Ct, Wyoming Co [Dadd, J])

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

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

People v Riley, No. KA 98-5104, 4th Dept, 3/21/01, 727 NYS2d 366, 281 AD2d 992

Holding: The defendant's contention that he was denied effective assistance of appellate counsel may have merit. Defense counsel did not raise the issue of whether the defendant was denied his right to decide whether to testify at trial. Motion for writ of *error coram nobis* granted, order and decision of Mar. 31, 1999 vacated, and the appeal to be considered de novo. *See People v LeFrois,* 151 AD2d 1046.

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

People v Burrows, No. KA 98-05227, 4th Dept, 3/21/01, 722 NYS2d 675, 280 AD2d 132

Holding: The defendant was charged in a single indictment with two counts of first-degree rape and two counts of third-degree rape involving different complainants. In moving to sever the counts, defense counsel requested an *ex parte in camera* hearing to demonstrate that the trial should be separated "in the interest of justice and for good cause shown." Criminal Procedure Law 200.20 (3)(b)(ii). The defendant specifically claimed that "he [had] substantial testimony to . . . [give] regarding certain counts and a genuine need to refrain from testifying on others." The defense made an insufficient showing under the statute, so the court was within its discretion to deny the severance motion without a hearing. *See People v Lane*, 56 NY2d 1. The offenses charged in the indictment "are defined by the same or similar statutory provisions and consequently are the same or similar in law." CPL 200.20 (2)(c). Furthermore, the defendant failed to demonstrate that he had important testimony to give as to certain counts, and even failed to specify the counts on which he was going to testify. Judgment affirmed. (County Ct, Monroe Co [Egan, J])

Fourth Department *continued*

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

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

People v Cooper, No. KA 99-05136, 4th Dept, 3/21/01, 722 NYS2d 202, 281 AD2d 903

Holding: When seeking to withdraw a guilty plea, the defendant contended that he was coerced by erroneous and misleading information from his attorney. After an evidentiary review, the court determined that the defendant's attorney had given him "sound professional advice." Much weight must be given to the decision of the hearing court because of its opportunity to hear and see witnesses. *See People v Prochilo*, 41 NY2d 759, 761. The record fully supports the court's finding of no coercion. The record also established that the defendant made a knowing, intelligent, and voluntary waiver of the right to appeal. *See People v Seaberg*, 74 NY2d 1, 11. The defendant expressly waived the right to appeal from the court's suppression rulings, precluding him from seeking review of those rulings. CPL 710.70 (2); *see People v Williams,* 36 NY2d 829 *cert den* 423 US 873. The court erred in its decision that 'by law' the state sentences should run consecutive to the federal sentence that the defendant was currently serving. A court may order the sentences to run concurrently if the defendant had minor involvement in the crime or if there were mitigating circumstances. Penal Law 70.25 (2-b). The defendant wasn't given the statutorily required opportunity to present the court with information that would help the court in making this decision, requiring resentencing. *See People v Adams,* 161 AD2d 1203, 1204. Sentences vacated and matter remitted. (Supreme Ct, Erie Co [Forma, J])

Guilty Pleas (Errors Waived By) (General) **GYP; 181(15) (25)**

People v Pergolizzi, No. KA 99-05164, 4th Dept, 3/21/01, 722 NYS2d 849, 281 AD2d 958

The defendant pled guilty to driving while intoxicated.

Holding: The defendant's waiver of the right to appeal was never mentioned during the colloquy. There was never a sufficient inquiry by the court concerning the defendant's understanding of the waiver. It is not possible to determine on appeal if the waiver was made knowingly, intelligently or voluntarily. *See People v Callahan,* 80 NY2d 273, 283. In addition, when the defendant was asked whether she was intoxicated at the time of the crime, she said that she believed her ability was impaired. This was a denial of an essential element, intoxication. The court wrongly accepted a plea based on these facts without any further inquiry. *See People v Lopez,* 71 NY2d 662, 666. Judgment reversed, plea vacated, matter remitted. (Supreme Ct, Monroe Co [Ark J])

Counsel (*Anders* Brief) **COU; 95(7)**

Sentencing (Enhancement) **SEN; 345(32)**

People v Rucker, No. KA 99-5440, 4th Dept, 3/21/01, 727 NYS2d 833, 281 AD2d 993

Holding: After a guilty plea, the defendant was sentenced to an indeterminate term of 5 to 10 years. In exchange for his plea, the defendant was promised an indeterminate sentence of 3 to 6 years. When the defendant didn't cooperate with the probation department in its preparation of the pre-sentencing investigation report, the court enhanced the defendant's sentence. Appellate counsel sought to be relieved asserting there are no nonfrivolous issues meriting consideration. *See People v Crawford,* 71 AD2d 38. The facts here raise the issue whether the court properly enhanced the defendant's sentence. S*ee People v Parker*, 271 AD2d 63. Counsel is relieved, new counsel assigned to brief that and any others that counsel's review of the record may disclose. Judgment reversed. (County Ct, Monroe Co [Bristol, J])

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

Sentencing (Restitution) **SEN; 345(71)**

People v Young, No. KA 00-00598, 4th Dept, 3/21/01, 723 NYS2d 588, 281 AD2d 950

The defendant pled guilty to second-degree robbery.

Holding: The defendant's recitation of facts underlying the plea did not cast doubt upon his guilt so as to require an inquiry into a possible intoxication defense. *See People v Rivera,* 266 AD2d 576, 577. Intoxication was first raised in the presentence report; the contention that the plea was flawed due to this possible defense has not been preserved. There was no attempt to withdraw the guilty plea or vacate the conviction based on the presentence report information. *See People v Lopez*, 71 NY2d 662, 665-666. In the report, the defendant gave intoxication as a reason for his actions, but did not claim that he was innocent, *ie* unable to form the intent required under Penal Law 15.25. The defendant also contended that the court erred in determining the amount of restitution without holding a hearing. The terms of the plea bargain set out in the record do not include restitution, so the waiver of the right to appeal does not encompass a challenge to the restitution ordered by the court. *People v Oehler*, 278 AD2d 807.

Fourth Department *continued*

Neither the plea agreement nor the minutes of the allocution support the amount ordered. Reliance on a victim impact statement is inappropriate because the statement is not sworn. *People v White*, 266 AD2d 831, 832. That the defendant neither requested a hearing nor objected to the amount does not constitute waiver of the right to a hearing. Judgment modified by vacating the amount of restitution, matter remitted for a hearing to determine restitution. (County Ct, Oswego Co [McCarthy, J])

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

Sentencing (Determinate Sentencing) **SEN; 345(30)**

People v Luke, No. KA 00-00643, 4th Dept, 3/21/01, 725 NYS2d 153, 281 AD2d 947

Holding: "In stating on the record that defendant 'should serve a long time and not be released to parole until it's absolutely mandatory,' the sentencing court did not depart from the plea bargain or in effect impose a determinate term of nine years. Thus, contrary to defendant's contention, the indeterminate term of incarceration of 4½ to 9 years imposed by County Court is legal (*see* Penal Law § 70.04 [former (3), (4)]). Defendant's waiver of the right to appeal, which is valid and all-encompassing on its face (*see generally*, *People v Kemp*, 94 NY2d 831, 833), bars consideration of defendant's challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737)." Judgment affirmed. (County Ct, Erie Co [Drury, J])

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

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

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

People v Larkin, No. KA 00-01660, 4th Dept, 3/21/01, 723 NYS2d 293, 281 AD2d 915

Police, who knew that the defendant's drivers license was suspended, observed him commit numerous traffic violations after leaving a drug house. He entered a mini-mart, where the police saw him placing a baggie of cocaine under a jacket on a counter. He was arrested for unlicensed operation and other traffic offenses and taken to the station where he confessed to purchasing cocaine at the drug house.

Holding: The court properly refused to suppress the cocaine. The defendant's vehicle was not stopped by police (*see People v Strong*, 234 AD2d 990 *lv den* 89 NY2d 1016) and they had reasonable suspicion, as aggravated unlicensed operation is a crime. The court properly continued court proceedings without the defendant, who had been given *Parker* warnings (*see People v Parker*, 57 NY2d 136, 141) and advised of the trial date. Numerous attempts were made to find him when he did not appear. The third-degree criminal possession of a controlled substance conviction must be reversed, as the charge was dismissed before trial based on insufficiency of evidence at the grand jury. The court's error in admitting evidence concerning the dismissed charge was not preserved and was harmless because proof of guilt was so overwhelming. Defense counsel's failure to seek preclusion of evidence relating to the dismissed charge was not so "egregious and prejudicial" as to deprive the defendant of a fair trial. *See People v Benevento*, 91 NY2d 708, 713. The court's error in admitting the defendant's unsigned and unsworn confession was also not preserved. Judgment reversed in part. (Supreme Ct, Monroe Co [Mark, J])

Counsel (Conflict of Interest) (Right to Counsel) (Scope of Counsel – Duration) **COU; 95(10) (30) (38)**

Ethics (Defense) **ETH; 150(5)**

People v Cotton, No. KA 00-01804, 4th Dept, 3/21/01, 725 NYS2d 480, 280 AD2d 188

The defendant was arrested for murder in 1992. The charges were dismissed. He was rearrested in 1994, was interrogated in the absence of counsel, and made an incriminating statement. The court denied a motion to suppress the statement.

Holding: The issue is whether an attorney who represented the defendant could unilaterally deprive him of his right to counsel by communicating to an assistant prosecutor that the attorney had a conflict of interest. The attorney said he could no longer represent the defendant due to subsequent representation of someone who implicated the defendant in this murder. The prosecution did not meet their burden of showing that the defendant and the interrogating officer knew that the defendant was no longer represented and that defendant (in the presence of counsel) had voluntarily and intelligently waived further representation. *See People v Skinner*, 52 NY2d 24, 29; *see also People v Settles*, 46 NY2d 154, 165-166. Although defense counsel articulated a potential conflict of interest that could preclude him from representing the defendant, this did not automatically end an attorney-client relationship. *See People v Gomberg*, 38 NY2d 307, 313-314. Without a determination made by attorney and client together that it is in the best interest of the defendant to obtain new counsel, the relationship could not be severed. In any event, the police did not rely on the attorney's disclaimer. Judgment reversed. (County Ct, Monroe Co [Marks, J])

Fourth Department *continued*

Concurrence: "Had defendant's attorney unequivoally informed the prosecutor that he no longer represented defendant, we would affirm."

Evidence (Circumstantial Evidence) (Hearsay) **EVI; 155(25) (75)**

Witnesses (Experts) **WIT; 390(20)**

People v Mason, KA No. 00-02365, 4th Dept, 3/21/01, 722 NYS2d 840, 281 AD2d 893

Holding: The court properly allowed the testimony of a witness about a conversation she overheard between the defendant and the witness's neighbor, although the witness was unable to identify the defendant's voice. Circumstantial evidence may establish the identity of a party to a conversation. *See People v Lynes*, 49 NY2d 286, 291-292. The witness knew the defendant, she saw his car in front her neighbor's house, and she saw him leave her neighbor's house after the conversation. These facts provide sufficient "indices of reliability" for the jury to determine whether the defendant was a party to the conversation. It was proper for the court to allow the testimony of the emergency room physician about the amount of force necessary to cause the complainant's injuries because the subject matter was beyond the scope of knowledge of the average juror. *See People v Eberle*, 265 AD2d 881, 882. The admissibility of expert testimony is always within the sound discretion of the trial court. *See People v Miller,* 91 NY2d 372, 379. Judgment affirmed. (Supreme Ct, Monroe Co [Wisner, J])

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

Criminal Law and Procedure (General) **CLP; 98.8(10)**

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

People v Grosso, No. KA 00-02469, 4th Dept, 3/21/01, 722 NYS2d 846, 281 AD2d 986

The defendant was convicted of third-degree sodomy and third-degree sexual abuse involving two teenage employees.

Holding: At the prosecution's request, the court ordered the courtroom closed while Jane Doe 1 and Jane Doe 2 testified. After Jane Doe 1 had testified for 40 minutes, the court interviewed her and she stated that she would be uncomfortable if anyone was in the room while she testified. The court continued its complete closure order for the duration of her testimony. The belated inquiry violated the defendant's right to a public trial, as a court must conduct a careful inquiry to ensure that there are compelling reasons for closing the courtroom, and articulate those reasons on the record, before courtroom closure. *See People v Ballard*, 224 AD2d 914. The court interviewed Jane Doe 2, who said she would feel uncomfortable only if the defendant's family were present in the courtroom. The court's continued complete closure as to Jane Doe 2 was error; the closure should have been no broader than necessary given her comments.

The second count of defendant's indictment is not multiplicitous. While the language of that count is identical to count one, Jane Doe 1 testified that two acts of sodomy occurred approximately 10 minutes apart. *See People v Nailor* 268 AD2d 695, 696). Judgment reversed, new trial granted. (County Ct, Onondaga Co [Fahey, J]) ⚖

Book Review

(continued from page 17)

secondary emotions are difficult enough, the user is expected also to grasp such esoteric concepts as "sabotaging thoughts", "a systematic method of performing a personalized analysis of thoughts, feelings, and behaviors," and "relapse prevention."

In addition, many of the scenarios and graphics used to demonstrate a concept or point fall far beyond the life experiences of the average prisoner, who tends to be poor and minority. References are made to blond hair, sunburns, and camping trips. Of the 47 graphic depictions of people in the workbook, only 2 or possibly 3 can be said to represent people of color. The same is true of the graphics that depict life scenes. Most of them portray middle class whites mountain climbing, dining in restaurants, enjoying a cabin on the lake, or working in an office setting.

The authors, however, do make an occasional attempt to reach out to the average prisoner. Several of the scenarios that are handled well refer to a possible drug situation, children expressing feelings about a parent who has been imprisoned, and a resentful relative bent on embarrassing an ex-prisoner whenever the opportunity arises. But when the authors attempt to use street language, it appears forced and awkward. They even bleep the use of curse words.

While *Inside Out* has limitations as a workbook for the majority of prisoners, it could have value for some white middle class offenders and prisoners when used as part of a treatment or counseling program in which professional help and assistance is readily available. ⚖

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