New York State Defenders Association

Public Defense Backup Center
REPORT

VOLUME XV NUMBER 4 May-June 2000

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Post-Conviction DNA Deadline 9/1/00

In 1999, the legislature amended the Criminal Procedure Law to provide convicted defendants with a right to appeal from a trial court order denying a post-judgment motion for DNA testing of evidence. See L 1999, ch 560, amending CPL 450.10; *People v Rae Kellar*, 89 NY2d 948 (1997). The right to appeal was made retroactive to any motion for forensic DNA testing brought and determined since CPL 440.30 (1-a) was enacted in 1994. The legislature has now established Sept. 1, 2000 (or 30 days from notice of entry, whichever is later) as the final date for the filing of a notice of appeal from such an order entered between 1994 and Dec. 1, 1999. (L 2000, ch 8 [S.6325].)

NYSDA Welcomes New Directors

Three new directors were elected at the Board of Directors meeting on April 28, 2000. They bring a variety of public defense experiences to the Association, which welcomes their energy and commitment.

Gary A. Horton, Genesee County Public Defender, has been representing clients for 24 years, and has also been involved in administering a public defense program since the beginning of his career. A graduate of Hofstra University School of Law, he is on the Law Guardian Liaison Panel for the 4th Department, and is active in the National Defender Leadership Project of the Vera Institute of Justice, participating most recently as a Facilitator of small group case studies in October 1999. He is on the Advisory Council of the Criminal Justice Program at Genesee Community College.

Robert D. Lonski has been Administrator of the Erie County Bar Association Aid to Indigent Prisoners Society, Inc. Assigned Counsel Program, maintaining a panel of 500 attorneys, since 1993. Among his other experiences in working for the community of clients unable to afford retained legal services were serving as Executive Director of Legal Services for the Elderly, Disabled or Disadvantaged of Western New York and as a Staff Attorney with Prisoners' Legal Services of New York, Inc., where he began in 1985. He received his J.D. in 1984 at SUNY Buffalo. The Criminal Justice Section of the NYS Bar Association recognized his outstanding contributions to the delivery of defense services in New York State in 1997.

Robin G. Steinberg is Executive Director of The Bronx Defenders, a public defense office practicing what *The National Law Journal* described in January as "holistic advocacy." After graduating from New York University School of Law, she represented clients at the Criminal Trial Division of the Legal Aid Society of Nassau County, then the Criminal Defense Division of The Legal Aid Society of New York City and the Neighborhood Defender Service of Harlem, where she became Deputy Project Director. She has conducted seminars on trial advocacy for students at Harvard, Cardozo, and Touro law schools, and has also been a Facilitator for the National Defender Leadership Project.

The new directors will be among those standing for election at NYSDA's Annual Meeting, July 27-30 (see p. 5).

Schechter Steps Down

Long-time member Marvin E. Schechter has resigned from the Board of Directors due to the increasing demands of his practice and the need to spend time with his family. In addition to his over 12 years of service on the NYSDA Board, where he served as Treasurer for a year, he was the New York Team Leader for the Association's Defender Insti-

Summer Means Summer Meeting!

NYSDA's 33rd Annual Meeting and Conference

July 27-30, 2000

Hudson Valley Resort & Spa Kerhonkson, NY

Watch for the Brochure, or check www. nysda.org for developments

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tute. The Association greatly appreciates his work on its behalf, and looks forward to his continuing contributions as an active Association member to improving indigent defense services.

State Budget Includes Few Gains for Public Defense

The state budget for April 1, 2000–Mar. 31, 2001 is now final. It includes the following amounts for public defense:

Aid to Defense (ATD) $13,837,300
New York State Defenders Association (NYSDA) $1,500,000
Prisoners' Legal Services (PLS) $3,500,000
Neighborhood Defender Service (NDS) $450,000
Indigent Parolee Representation Program (IPP) $1,600,000
Capital Defense Representation $15,197,500

Specific details about ATD funds, which have been provided to certain counties at varying levels since the 1970s, have not been published. ATD funding levels have remained the same since FY93-94. The final NYSDA appropriation is less than the needed $1.6 million that was requested, but represents an increase of $100,000 over the FY99-00 level. Overall NYSDA funding will be divided between federal and state sources.

Funding for PLS was not restored to the FY97-98 level of $4,000,000 but remains at the FY99-00 level. NDS's funding was restored to $450,000 but continues to fall short of the FY98-99 funding level of $500,000.

A breakdown of the total IPP appropriation is $400,000 for non-contract counties, including $25,000 for Cayuga County related to the Willard drug and alcohol treatment center (the same funding level as last year) and $1,200,000 for the four contract counties (Monroe, Nassau, New York City Legal Aid, and Wyoming). Funding for the contract counties will be divided between federal and state sources. A NYSDA survey found that parole-related representation costs counties an estimated $5 to $6 million per year.

The budget for the Capital Defender Office includes $7,341,700 for the office's services and expenses. This represents an increase of 19% over the CDO's FY99-00 budget ($1,193,000). A $10,000 line item for production of a quarterly report remains at level funding from last year. Another line item of $7,845,800 covers the payment of assigned attorney compensation, fees and expenses for expert, investigative, and other reasonably necessary services for defendants under Judiciary Law 35-b. This is a 9% decrease from FY99-00 ($752,000).

Funding for Prosecution Increases

The budget figures for prosecution-related items follow:

Aid to Prosecution (ATP). $22,763,000
DA Salary Reimbursement. $3,582,100
DA Training $3,500,000

Funding for ATP increased by $1,600,000, or 8%, from FY99-00. The increase will go to the 32 counties that have not previously received aid for prosecutorial services. All counties will now receive some ATP money.

The state will continue to pay for the increase in district attorney salaries, which was approved by the legislature in December 1998. This is a 5% increase ($160,500) in reimbursements to counties from last year. The funds for DA training, including for the New York State District Attorneys Association and the New York Prosecutors Training Institute, are at the same level as FY99-00.

4th Dept. Rejects Media Cameras in Capital Courtroom

Broadcast media efforts to bring cameras into courts across New York State increased after a trial court ruling in January allowed television coverage of the Albany change-of-venue trial of four New York City police officers for the killing of Amadou Diallo. (See *Backup Center REPORT*, Vol. XV, No. 1.) Gannett news services in Rochester cited that decision, *People v Boss et al, In re Courtroom Television Network*, Decision and Order (Supreme Ct, Albany Co, 1/25/00, Teresi, J), when seeking to televise the capital trial of Jose Santiago. Despite a voluminous objection filed by the defense, the trial court found section 52 of the Civil Rights Law, barring cameras, unconstitutional. The judge not only cited the earlier ruling but elaborated on an alleged New York State constitutional right of the press to have access to court proceedings. On May 25, the Appellate Division, 4th Department overruled that order. The appellate court held that the trial judge exceeded his authority and that the press had no independent right of access that would supercede the statute. *Matter of Santiago v Bristol et al*, __ AD2d __ (4th Dept, No. OP 00-01131, 5/25/00). A digest of the opinion will appear in a future issue of the REPORT; the decision is available online at **http://www. courts.state.ny.us/ad4/052500.pdf** or from the Backup Center.

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Contributors Stephanie Batcheller, Sybil A. McPherson, Al O'Connor, Ken Strutin

The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone (518)465-3524; Fax (518)465-3249. Our web address is http://www.nysda.org.

The media intervenors are seeking leave to appeal. In the meantime, defense lawyers should note that this ruling is binding on all trial courts until another Judicial Department, or the Court of Appeals, holds to the contrary. *Mountain View Coach Lines, Inc. v Storms,* 102 AD2d 663 (2d Dept 1984).

Santiago Found Guilty After Mistrial Denied

The cameras question is not the only legal issue raised in the *Santiago* case. Near the end of summation, First Assistant District Attorney Richard A. Keenan addressed the jury forewoman by her name and said, "This defendant is not like you and me." The forewoman responded, "No." Santiago's lawyers demanded a mistrial, alleging prosecutorial misconduct and saying that the forewoman had prematurely formed an opinion about Santiago and could not deliberate fairly. The judge denied the mistrial, and admonished the prosecutor not to address individual jurors. (Rochester *Democrat and Chronicle,* online, 6/8/00)

The jury then found Santiago guilty. According to June 9 press accounts, they were scheduled to begin hearing the sentencing evidence a week later. If a life sentence is not returned, he will become the 7th person in New York State under sentence of death. (Rochester *Democrat and Chronicle,* online, 6/9/00)

No Right to Guilty Plea in Capital Cases

In other New York death penalty news, the Court of Appeals has affirmed the Appellate Division's refusal to grant mandamus to Kendall Francois, who had sought to plead guilty after being charged with eight counts of capital murder in Dutchess County. Following Francois's indictment, but before the prosecution had indicated whether or not it would seek the death penalty, the Court of Appeals issued *Matter of Hynes v Tomei* (92 NY2d 613, *cert. den.* __ US __). *Tomei* holds that the guilty plea provisions of New York's death penalty statute unconstitutionally burden defendants' 5th and 6th Amendment rights. Under *Tomei,* a guilty plea is prohibited while a death notice is pending. Francois unsuccessfully sought to plead guilty before the prosecution decided whether to file a death notice against him. When his offer was denied, he sought mandamus relief requiring the trial court to entertain his guilty plea. The Court of Appeals found that defendants have no unqualified right to plead guilty, thereby preventing a capital sentence because there is no mechanism for impaneling a penalty-phase jury after a guilty plea under Criminal Procedure Law 400.27. To avoid "an unseemly race to the courthouse between defense and prosecution," the court dismissed Francois's petition. A digest of the opinion in *Matter of Francois v Dolan* (No. 46, 5/18/00) will appear in a future issue of the *Backup Center REPORT*. The decision is available online at several links from NYSDA's web site, noted below. A printed copy is available from the Backup Center.

Keep Current on the Court of Appeals

Not every case in the Court of Appeals makes headlines when it is decided. Reading the concise summaries of Court of Appeals (and other decisions) found in every issue of the *REPORT* is a way public defense lawyers can catch up on developments in the law while waiting in court, while stuck in traffic, or while trying to get to sleep. But NYSDA helps defense teams stay current in other ways as well. Without waiting for the printer and the mail, anyone with an Internet connection can read the newest issue of the *REPORT* as soon as it is finished, by going to the Publications section of the NYSDA web site: www.nysda.org. While at the site, check out the Court of Appeals and Legislative News area of the Defense News section, featuring a Court of Appeals Update with pending cases summarized by Robert S. Dean of the Center for Appellate Litigation in New York City. Need to read a new decision in full soon after it is issued? Follow the links from NYSDA's site to Internet sites where opinions can be found, including the Court of Appeals, the *New York Law Journal*, and Cornell Law School's Legal Information Institute. If you get lost in the mass of information on the NYSDA site, use the site map or the search function to find your way. If you are daunted by the amount of law-related information on the World Wide Web, let the Research Links area of the NYSDA Resources section help you find the site you are looking for.

Jurors: Two Hours and You're Out

Seated jurors who are, or are going to be, more than two hours late to trial proceedings may, in the court's discretion, be replaced by alternates regardless of whether the absent jurors are "missing"—whereabouts unknown—or have notified the court of the reason for their absence. The Court of Appeals has rejected a defense argument that only "missing" jurors were subject to the two-hour rule of CPL 270.35(2)(a) as amended in 1996. *People v Jeanty et al,* Nos. 36, 37, 65 and SSM1, __ NY2d __ (4/4/00). *See* digest p. 12.

Megan's Law Hot Topic In Court and Out

The death penalty is not the only criminal law issue of importance heard in the current Court of Appeals term. Two cases considering Megan's Law, the sex offender registration statute, were on the May argument schedule—*People v. Kearns,* No. 76 and *People v. David W.*, No. 77. In *Kearns,* a defendant whose risk-level assessment was assigned when he was sentenced to time served is arguing that his risk level assessment is appealable, although risk assessments imposed after a sentence is served are not. In *David W.*, the defendant alleges state and federal due process violations in his characterization as a "violent" predator, and is challenging the procedures used to determine the risk level of those who were convicted before the effective date of Megan's Law. (*NY Law Journal,* 5/1/00.)

In another Megan's Law development, a private group placed the names of New York sex offenders on the Internet (Newsday, 4/14/00), and shortly thereafter the Division of Criminal Justice Services posted information about level

three offenders on the Web. For information on Megan's Law issues, visit the Hot Topics section of NYSDA's web site: www.nysda.org/Hot_Topics/hot_topics. html.

Gradess on Fund For Modern Courts AC Fees Panel

NYSDA Executive Director Jonathan Gradess commented during a June 6 public panel on assigned counsel fees that New York's rates do not pay for the time needed to do the job, and have not paid for the time needed to do the job for a very long time. The *New York Law Journal* reported this and other panelists' comments, including several by David Gruenberg, special counsel to the Senate Judiciary Committee, who said that public defense lawyers and their clients lack the political pull to get the legislature to act on fees. Legislators, while not indifferent to the problem, have not found a way to pay for an increase without burdening either localities or the state, Gruenberg said. He himself dropped off an assigned counsel list several years ago because of the "pathetic" compensation. The president-elect of the New York State District Attorneys Association, Robert M. Carney, was also on the panel. His remarks included the observation that prosecutors rely on aggressive, competent, and ethical defense lawyers to come forward with appropriate allegations of police misconduct. Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, another panelist, said that a homeowner could not get a leaky pipe fixed for the rate paid to counsel protecting the constitutional rights of people unable to afford a lawyer. (*New York Law Journal*, 6/7/00.)

Assembly Committees Hear Effects of Prison on Families

At a state legislative hearing held on June 2 by the Assembly committees on Codes, Children and Families, and Correction, NYSDA's Executive Director presented testimony. He offered information and insights gathered by the Association from family members of prisoners. Because many prisoners' families fear retaliation against their loved one if the families speak out publicly about harsh treatment, Byzantine visiting rules, lack of child-friendly visiting areas, and other problems they encounter in trying to help and stay in contact with their incarcerated family member, NYSDA and the League of Women Voters of New York State held their own hearing. A dozen concerned family members contacted through Prison Families of New York, Inc. testified at the Backup Center. Their testimony, redacted to preclude identification of individuals, was presented to the Assembly committees.

Beware 4th Dept. Address Confusion

Last year's move of the Appellate Division, 4th Department, can endanger criminal defendant's claims if trial courts, clerks, or attorneys provide those defendants with outdated forms bearing the old address. The forwarding order for mail to the 4th Department has expired, so that mail sent to the old address will, at best, be returned to the sender, causing delay in filing. The current address is: Appellate Division, Fourth Department, 50 East Avenue, Suite 200, Rochester NY 14604. ⚖

More Medical Sources

Anne Marie Haber's article on page 8 includes reference sources for medical terms. Additional sources include the following books (with Internet contact information for ordering) and web sites:

- *Medical Abbreviations: 14,000 Conveniences at the Expense of Communications and Safety.* (Neil M. Davis Associates 9th Edition 1999) $17.95 (bulk rates available): http://www.neilmdavis.com/Book/Description.html
- Merck Manual (Merck Publications 17th ed. 1999): http://www.merck.com/pubs/
- *Stedman's Medical Dictionary,* (Lippincott, Williams & Wilkins 27th ed. 1999) $46.95: http://www.stedmans. com/
- Tennessee Criminal Law Criminal Defense Resources web site, available through a link on the NYSDA web site (www.nysda.org) includes:
  - — Medical Links (including online medical dictionaries, *e.g.* http://www.graylab.ac.uk/omd/) includes an excellent bibliography that contains sections on investigating Rape, Child Abuse and Non-Fatal Sex Crimes and general medical reference sources: http://www.tncrimlaw.com/medical.html
  - — Forensic Science Resources in a Criminal Fact Investigation: (Bibliography) http://www.tncrimlaw. com/forensic/\fsbiblio.htm

Pro Bono Counsel Needed For Death Row Prisoners

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

Conferences & Seminars

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

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Seminar: Difficult Clients, Difficult Cases: Theory and Practice
Dates: August 2-6, 2000
Place: La Jolla, CA
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; web sites www.criminaljustice.org or www.nacdl.org

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Sponsor: National Bar Association
Theme: 75th Annual Convention & Exhibits
Dates: August 5-12, 2000
Place: Washington, DC
Contact: National Bar Association, 1225 11th Street NW, Washington DC 20001-4217. tel (202)842-3900; fax (202)289-6170; e-mail nba@nationalbar.org; web site www.nationalbar.org

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

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Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: 2000 and Beyond
Dates: September 14-16, 2000
Place: Kansas City, MO
Contact: NCADRC: PO Box 638, Holland OH 43528; tel (419)865-0513; fax (419)865-0526

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Grand Jury Practice
Date: September 15, 2000
Place: New York City
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site www.nysacdl.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: DUI Seminar: All the Nuts and Bolts
Dates: September 20-23, 2000
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; web sites www.criminaljustice.org or www.nacdl.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Trial Skills Seminar
Date: September 23, 2000
Place: Rochester, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site www.nysacdl.org

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

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Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Training
Dates: November 16-19, 2000
Place: New Orleans, LA
Contact: NLADA: tel (202)452-0620; fax (202) 872-1031, e-mail info@nlada.org; web site www.nlada.org

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Sponsor: National Coalition to Abolish the Death Penalty
Theme: Conference 2000
Dates: November 16-19, 2000
Place: San Francisco, CA
Contact: NCADP: tel (202)387-3890; web site www.ncadp.org

Sponsor: National Legal Aid and Defender Association
Theme: 78th Annual Conference
Dates: November 29-December 2, 2000
Place: Washington, DC
Contact: NLADA: tel (202)452-0620; fax (202) 872-1031, e-mail info@nlada.org; web site www.nlada.org ⚖

Job Opportunities

The Genesee County Public Defender seeks an **Assistant Public Defender, Appellate Department**, position available July 1, 2000. Appellate experience necessary. Send resume to: Gary A. Horton, Genesee County Public Defender, 1 West Main Street, Batavia NY 14020. Tel (716)344-2550 x 2280; fax (716)344-8553.

The Rochester, NY division of the New York State Capital Defender Office (CDO) seeks a **Mitigation Specialist**. The CDO, created by statute, is charged with guaranteeing effective assistance of counsel in every capital eligible case throughout New York State. Mitigation Specialists conduct thorough social history investigations; identify factors in clients' backgrounds that require expert evaluations; assist in locating experts and provide background materials and information to experts; identify potential penalty phase witnesses; and work with the client and the client's family. Extensive travel is required. Excellent oral and written communication skills required. Fluency in Spanish desirable. Salary CWE. EOE. Please send resumes to: Ms. Cheryl Thompson, Capital Defender Office, 277 Alexander Street, Suite 600, Rochester NY 14607.

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

Prisoners' Legal Services of New York (PLS) seeks two attorneys, for the positions of **Litigation Coordinator** and **Associate Director** for its 24-attorney program. The positions may be located in any PLS office: Albany, Buffalo, Ithaca, Plattsburgh, or Poughkeepsie. PLS provides civil legal services to incarcerated persons in state prisons, handling cases involving discipline matters, medical care, guard brutality, conditions of confinement, correspondence, religious freedom and jail time credit, among others, and engaging in routine and impact litigation. The program has been extremely successful in providing high quality, effective legal services and in establishing important rights for its clients. PLS believes in a team effort and team spirit, and places a strong emphasis on cooperative and collegial working relationships within and between offices. PLS encourages professional development, and provides in-house training; staff also attend relevant outside training events. PLS believes in allowing individuals substantial independence, and encourages individual initiative and innovation.

Required: admitted to practice in New York State or eligible for admission *pro hac vice* and willing to take the next available bar exam; 5 years of legal practice experience, preferably in the area of civil legal services, civil rights or poverty law. Previous supervisory and training / teaching experience preferred. Outstanding benefit package including free health, dental, disability, and life insurance, substantial leave time and very liberal and flexible leave policies. EEOE. PLS clients are about 50% African-American and 30% Latino. PLS seeks to be a well-balanced, diverse program. Minorities are encouraged to apply.

Details of the duties of the Associate Director and Litigation Coordinator were published in the last issue of the *REPORT*, available at www.nysda.org or from the Backup Center.

Send resume with a writing sample and a list of three references with phone numbers to: Tom Terrizzi, Executive Director, Prisoners' Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850. tel (607)273-2283; fax (607)272-9122. ⚖

Resources Sighted, Cited, or Sited

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

✔ *A Jailhouse Lawyer's Manual*, 5th Edition, book, $70 ($31 for inmates) (includes s&h; subject to change without notice). Inmate discount available through the mail only; — provide inmate's name, inmate number, and the inmate's institutional address. Allow 8 weeks for delivery. Send check or money order to: Columbia Human Rights Law Review, ATTN: Jailhouse Lawyer's Manual, 435 West 116th Street, New York NY 10027. To verify prices: tel (212)854-1601; e-mail jrnhum@law.columbia.edu; web site http://www.columbia.edu/cu/hrlr/jlm.html.

✔ *Contempt of Court: The Turn-of-the-Century Lynching that Launched 100 Years of Federalism*, Mark Curriden and Leroy Phillips Jr., book (394 pgs), $30, Faber and Faber, Inc. [Reviewed in NY State Bar Association *Journal* Mar-Apl/00.]

✔ "Criminal Practice Guide: DNA Evidence," Supplement to BNA *Criminal Practice Manual* and *Criminal Practice Report*, Vol. 1, #2, 2/9/00. Articles, practice samples of qualifying and cross examination of expert witness, motion for new trial, etc. Call the Backup Center about availability.

✔ *Race to Incarcerate*, Marc Mauer, book, 1999, $22.95 (+$3s&h), The New Press. Looks at past and present crime and punishment policies in America. Concludes with a chapter on new directions, looking at community policing and restorative justice. [Reviewed in ABA Criminal Justice Section's *Criminal Justice* magazine, Winter 2000.] The New Press: tel (800) 233-4830; fax (212) 629-8617; web site www.thenewpress.com.

✔ *Handbook on Questioning Children: A Linguistic Perspective*, 2nd ed, Anne Graffam Walker. Book (144 pgs) $34.95 (+$5.95s&h). PC# 5490271. ABA Service Center, tel (800)285-2221; web site (ABA Center on Children and the Law) www.abanet.org/child/catalog/books.html.

✔ *Evidentiary Privileges* (Grand Jury, Criminal and Civil Trials), Lawrence N. Gray, book (approx. 300 pp), $50 (Bar Assoc. members $38), 1999. New York State Bar Association, tel (800)582-2452 (Albany area 463-3724; web site www.nysba.org. ⚖

Book Review

Proximity to Death

by William S. McFeely
W.W. Norton & Company
206 pages

by Barbara DeMille*

On Monday, September 25, 1995, William McFeely, historian, Pulitzer Prize winning author, and emeritus Abraham Baldwin Professor of the Humanities at the University of Georgia, received a phone call from Stephen Bright, committed defense lawyer, senior and founding member of The Southern Center for Human Rights in Atlanta, Georgia. Bright needed an expert witness to testify on the history of the Confederate flag in Georgia—as a racist symbol—as well as the history of racial violence and past lynchings in the state.

At a hearing on motions for Cardzell Moore, convicted rapist and murderer, before his sentencing trial, Bright intended to fix past lynchings firmly to the present day celebratory atmosphere of a white crowd assembled outside of a prison in Georgia as a black prisoner is executed. McFeely's initial encounter with Bright, and consequently the lawyers, investigators, interns, and staff of The Southern Center for Human Rights in Atlanta—a privately-funded, non-profit organization dedicated primarily to saving convicted murderers from death—would eventually lead to his writing *Proximity to Death*.

Following his testimony on behalf of Moore, McFeely obtained permission to observe and study the Center's cases, both present and past, for more than three years. His resulting book is a record of several death penalty sentences the Center challenges—and wins, often by successfully arguing for a second trial. As McFeely makes clear, the Center's lawyers toil unceasingly, motivated by their convictions that capital punishment is wrong as well as by their concern for their clients' lives.

His study of the death penalty—its unequal application; its over-application to persons of color, especially in the South; its prohibition in 1972 (by the U.S. Supreme Court decision *Furman v Georgia*, in which Justice Brennan held "the calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity"); its reinstatement in 1976 (*Gregg v Georgia*)—is by no means a comprehensive one. Rather, this book's story is of the death penalty and its "proximity." For the Center's lawyers its application is no abstract idea of social control but rather an immediate force, felt most often by those with the least resources with which to explain or defend themselves. Spending long hours in the service of a particular client, their efforts become personal ones.

Through McFeely we learn of these determined efforts of The Southern Center for Human Rights to save convicted murderers. The members of the law office are introduced, described, made individual. The clients the law offices serve are also made individual. The brute reality of the crimes for which they have been convicted are not ignored.

One of the most interesting and "personal" sections is that in which McFeely interviews several jurors who have voted for life without parole at a sentencing trial. The process by which this jury wrestled with their decision is as enlightening as it is unpredictable.

There are also statistics here: of the 558 sentenced to death whose sentences were converted to life by the *Furman* decision, seven murdered again, six in prison, one on parole; at least three former death row prisoners whose sentences were converted to life in Florida in 1972 were ultimately found innocent.

Vigorous opposition to abolishment of the death penalty is also represented, most egregiously no doubt by Robert Bork: arguing as U.S. Solicitor General before the

U.S. Supreme Court: ". . . capital punishment serves a vital function. . . . A venting of outrage at the violation of society's most important rules—'retribution' perhaps, although stripped of its vindictiveness—is itself an important, perhaps a necessary, social function."

But McFeely's bias is clear. Against abstract opinions such as Bork's, he insistently contrasts the work of those in the front lines, those lawyers for whom a client is one other human being whose state-managed death will in no way ameliorate the death that has gone before. His story is chiefly the story of these defenders, whom he admires, fighting for principle as well as one specific life, fighting the circumstance of a sentence too often administered to the poor defended by inexperienced, poorly prepared lawyers in the initial stages of their trials.

This is often a thankless, uncelebrated task: "With the might of a commitment, of intellect, and of sheer will, [they] will try to persuade twelve citizens . . . that a person must have life, knowing that the [person] sitting next to [them] was once so grossly in violation of another's life."

A commitment such as this requires an ability to transcend an understandable revulsion for the deed done in favor of a higher value, an adroit ability to think in both the abstract and the immediate at once. McFeely, through his history of the founding, operation, and dogged work of The Southern Center for Human Rights illustrates how this is daily done. ⚖

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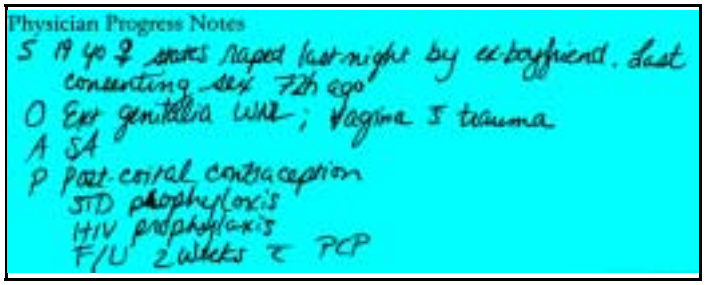
Defense Practice Tips

Understanding Medical Records: Rape

by Anne Marie Haber*

Your client is a 21-year-old male accused of raping his ex-girlfriend the night after their break up. The victim's medical records that the prosecution has given you include a portion of the physician progress notes.[1] Notes may indicate that further testing or care was provided. (You may not have access to additional records based on New York State rape shield statutes.[2])


Physician Progress Notes
S 19 yo ♀ states raped last night by ex-boyfriend. Last consenting sex 72h ago
O Ext genitalia WNL; Vagina + trauma
A SA
P Post-coital contraception
STD phophylaxis
HIV prophylaxis
F/U 2 weeks re PCP

Illegible abbreviations or acronyms and technical terminology can make medical records complex. Even if the handwriting of the health care provider is legible, there still may be other barriers to understanding.

Most health care institutions have a list of institution-accepted abbreviations and acronyms. These lists may be requested from the treating institutions. However, beware: when health care providers change employers, they often continue using accustomed abbreviations—even if the abbreviations are not on the current employer's list. It is often helpful to have a medical reference with standard abbreviations and definitions.[3] See Table 1.1 for a list of some commonly used abbreviations and acronyms.

Some health care providers use the "SOAP" format for writing their documentation. "S" or subjective information is what the patient reports. It may include quotes and feelings (*e.g.*, pain) of the patient. "O" or objective information is that which can be observed, including physical findings or laboratory results. "A" or assessment usually includes a diagnosis or a diagnosis to be ruled out. "P" or plan includes further testing to be done, treatment to be rendered, and recommendations for further care.

After using the abbreviation/acronym list, you realize that "yo" means year-old, "WNL" means within normal limits, "$\bar{s}$" means without, "SA" means sexual assault, and that "F/U" means follow-up. There is, however, still a block to understanding the content: medical terminology.

The terminology used in describing rape injuries is very specialized, but also limited. Once you learn the location of the anatomical structures, understanding the medical record will become easier.[4] Common locations of rape injury are the posterior fourchette, labia minora, hymen, and fossa navicularis.[5] See Table 1.2 for an explanation of these and other anatomical terms.

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Table 1.1
Some Common Abbreviations and Acronyms

2^0	secondary to
A	assessment
abd	abdominal
ad lib	as desired
AMA	against medical advice
A&O	alert and oriented
BM	bowel movement
BP	blood pressure
CBC	complete blood count
$\bar{c}$	with
cc	cubic centimeter
cm	centimeter
c/o	complains of
d	day
d/c	discontinue or discharge
Dx	diagnosis
ETOH	alcohol
ext	external
gm	gram
GU	genitourinary
h/o	history of
h&p	history and physical
ID	infectious disease
IM	intramuscular
inj	injection
int	internal
kg	kilogram
lt	left
m	meter
ml	milliliter
mva	motor vehicle accident
neg	negative
NPO	nothing by mouth
O	objective
OCP	oral contraceptive pills
OD	right eye
OS	left eye
P	plan
PCP	primary care provider
PE	physical examination
po	by mouth
pr	via the rectum
prn	as needed
qd	once per day
rt	right
Rx	treatment
S	subjective
$\bar{s}$	without
Sx	symptoms
UA	urinalysis
WNL	within normal limits
yo	year-old

Table 1.2
Anatomical Terms Explained

anus	The opening at the terminal end of the large bowel
clitoris	Female erectile structure; located above the urethra
fossa navicularis	The internal area between the external entryway to the vagina and the hymen
hymen	A fold of tissue in the lower segment of the vagina
labia majora	The outer lips external to the vagina
labia minora	The inner lips external to the vagina
mons pubis	The area overlying the pubic bone in females
perineum	The area of external genitalia between the pubic bone and the tailbone.
posterior fourchette	The tissue connecting the posterior labia minora, a common area of sexual assault injury
urethra	The opening leading to the bladder
vagina	Tubular structure leading to the opening to the womb; the birth canal
vulva	The female external genitalia, consisting of the mons pubis, the labia majora and minora, and the vagina

Technical terminology can also be used to describe injury. Lacerations, abrasions, ecchymosis, erythema, and edema are all common findings in sexual assault injury. See Table 1.3 for an explanation of some technical terms used to describe trauma.

Documentation Transcribed

Physician Progress Notes

Subjective:	Nineteen year old female states that she was raped last night by her exboyfriend. Last consenting sexual intercourse was seventy-two hours ago
Objective:	The external genitalia is within normal limits; no trauma in the vagina
Assessment:	Sexual Assault
Plan:	Post-coital contraception Sexually transmitted disease prophylaxis HIV prophylaxis Follow-up in two weeks with primary care provider

After looking up the abbreviations and reviewing the anatomy, you now know that the medical records do not support a finding of serious physical injury. The treating physician's assessment of sexual assault and treatment plan were based solely on the patient's reported history. The absence of documented findings of injury may indicate that there was no assault. However, it may also mean that there was no available magnification source (*e.g.*, colposcope or magnifying glass), the examiner was not trained in how to detect injuries sustained from rape, or the patient had significant healing of injuries between the time of assault and the time of examination.[6] You also know that the patient was advised to seek additional health care in two weeks, and that there may be additional records with her primary care provider. Now you can proceed with providing your client with a well-prepared defense, knowing that there are no surprises for you in the medical documentation you have obtained. ⚖

Table 1.3
Some Technical Terms Used to Describe Trauma

abrasion	a scraping away of the surface, as in a skinned knee
contusion	bruise
ecchymosis	bruising
edema	swelling
erythema	redness
laceration	tear

Notes

1. Pursuant to the Public Health Law 2805-i, the hospital is required to collect (with permission of the patient) and maintain sexual offense evidence (*e.g.*, clothing, rape kit, photographs) for at least 30 days. It is standard that a sexual assault evidence collection kit (rape kit) is completed if the patient arrives at the emergency department within 72 hours of the alleged event. For the purpose of this article, the above types of evidence will not be addressed.

2. As I am not an attorney, I make no representation as to the interpretation of New York State rules of evidence. A practitioner should consult further resources for an examination of this topic. [Ed. note: New York's rape shield statute is found at Criminal Procedure Law 60.42.]

3. One of the references I use most frequently is *Mosby's Medical, Nursing, and Allied Health Dictionary*, 15th ed. (1998).

4. For advanced study of sexual assault injury and sexual assault forensic technology, I recommend *Color Atlas of Sexual Assault*, by Barbara Girardin, *et al.*, published by Mosby, 1997.

5. Slaughter, L. *et al.* (1997). "The Pattern of Genital Injury in Female Sexual Assault Victims." *American Journal of Obstetrics and Gynecology*, 176. 609.

6. Slaughter, L. and Brown, C. (1992). "Cervical Findings in Rape Victims." *American Journal of Obstetrics and Gynecology*, 166. 83.

7. Table 1.2 contains an overview of some female anatomical structures that are prone to injury during rape. Male victims of sexual assault may sustain injury to the penis, scrotum, testicles, and anus. ⚖

Case Digest

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

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

US Supreme Court

Search and Seizure (Stop and Frisk) (Weapons-frisks) **SEA; 335(75) (85)**

***Florida v J.L.*, No. 98-1993, 3/28/00**

The police received an anonymous call that a young black male in a plaid shirt standing at a particular bus stop was carrying a gun. Two officers went to the bus stop and saw three black males. One of the officers approached them, told the defendant, who was wearing a plaid shirt, to put his hands on the bus stop, frisked him, and found a gun which resulted in firearms charges. The Florida Supreme Court found the gun should be suppressed.

Holding: An officer, for the protection of self and others, may conduct a carefully limited search for weapons in the outer clothing of a person engaged in unusual conduct where the officer reasonably concludes in the light of the officer's own experience that criminal activity is afoot. *Terry v Ohio*, 392 US 1, 30 (1968). These officers' suspicion that the defendant was carrying a weapon arose solely from a call made from an unknown location by an unknown caller. This tip lacked the moderate indicia of reliability that allows anonymous tips, if suitably corroborated, to support an investigatory stop. *Alabama v White*, 496 US 325, 327 (1990). It provided no predictive information and left the police without means to test the informant's knowledge or credibility. That the gun allegations turned out to be true does not suggest that the officers, prior to the frisk, had a reasonable basis for suspecting the defendant of unlawful conduct. There is no automatic firearm exception to the established reliability analysis. Judgment affirmed.

Concurrence: [Kennedy, J] There are many indicia of reliability not yet explored in caselaw and not at issue here.

Parole (Board/Division of Parole) (Release [Consideration for]) **PRL; 276(3)(35[b])**

Retroactivity (General) **RTR; 329(10)**

***Garner v Jones*, No. 99-137, 3/28/00**

In 1974 the respondent began serving a life sentence for murder in Georgia. He escaped from prison 5 years later. While a fugitive he committed another murder, for which he was convicted and sentenced to a second life sentence term. After he began serving his second life sentence, the State's Board of Pardon and Paroles (Board) changed its rules about reconsideration of parole after a denial; for those with life sentences, the time for mandatory reconsideration was changed from three years to at least 8 years. The respondent sued, claiming that retroactive application of the amended rule violated the *ex post facto* protection of the federal constitution. The 11th Circuit found a violation.

Holding: An *ex post facto* violation requires that the application of the changed law create a sufficient risk of increasing the measure of punishment attached to the covered crimes. *California Dept. of Corrections v Morales*, 514 US 499, 509 (1995). The change here does not by its own terms create a significant risk of prolonging the respondent's incarceration. The rule vests the Board with discretion as to how often to set an inmate's date for reconsideration, with an eight-year maximum, and permits expedited reviews in the event of a change in circumstance or new information. The Court of Appeals's analysis does not reveal, and the respondent has not yet shown, that the operation of the current amendment created significant risk of prolonging this respondent's punishment. Judgment reversed, case remanded.

Concurrence: [Scalia, J] Even if the rule posed a sufficient risk of decreasing the likelihood of parole the *ex post facto* clause would not be violated.

Dissenting: [Souter, J] Although the rule makes exceptions to the eight-year rule in appropriate cases, the state provided no evidence that the Board's occasional willingness to reexamine cases sufficiently mitigates the substantial probability of increased punishment. The Board's own web site indicates that its policies were intended to increase time served.

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

***City of Erie v Pap's A.M.*, No. 98-1161, 3/29/00**

Erie, Pennsylvania enacted an ordinance banning public nudity. The respondent (Pap's) sought an injunction against enforcement of the ordinance, alleging it was unconstitutional. The Pennsylvania Supreme Court held that the ordinance violated freedom of expression because imposing criminal and civil sanctions on those who commit sex crimes would be a far narrower means of combating secondary effects than requiring that dancers wear pasties and G-strings.

Holding: The case is not moot, because Pap's could resume its nude dancing operation. Being "in a state of nudity" is not an inherently expressive condition, though nude dancing is expressive conduct. Government restrictions on this type of public nudity should be evaluated under the test for content-neutral restrictions on symbolic speech set forth in *United States v O'Brien*, 391 US 367, 377 (1968). Efforts to protect public health and safety are within the city's powers. The regulation furthers the undeniably important or substantial government interests of regulating conduct through a public nudity ban and of combating the

harmful secondary effects associated with nude dancing. The government interest is unrelated to the suppression of free expression, as the ordinance on its face is a content-neutral restriction that regulates conduct, not expression. The pasties and G-strings requirement is a minimal restriction that leaves ample capacity to convey the dancer's erotic message, so the restriction is no greater than is essential to the furtherance of the government interest. *See Barnes v Glen Theatre, Inc.,* 501 US 560, 572 (1991). Judgment reversed.

Concurrence: [Scalia, J] The case is moot. The 1st Amendment did not repeal government's power to foster good morals and find nude public dancing immoral.

Dissents: [Souter, J] The city has not made, on this record, a sufficient evidentiary showing to sustain its regulation. [Stevens, J] Allowing suppression of protected speech based on its "secondary effects" is a new test with grave implications.

Search and Seizure (Examinations of Personal Effects) **SEA; 335(40)**

***Bond v United States,* No. 98-9349, 4/17/00**

The petitioner was a passenger when a bus stopped at the permanent Border Patrol checkpoint in Sierra Blanca, Texas. An officer boarded the bus to check the immigration status of the passengers. After doing that, on his way back out, the officer squeezed soft luggage that passengers had placed in the overhead storage space above the seats. The officer felt a brick-like item in one of the pieces of luggage. The petitioner acknowledged ownership and consented to a search of the bag, which revealed drugs. The petitioner unsuccessfully moved to suppress the evidence. The resulting federal convictions were upheld in the 5th Circuit Court of Appeals.

Holding: A traveler's personal luggage is clearly an "effect" protected by the 4th Amendment. *See United States v Place,* 462 US 696, 707 (1983). The petitioner's privacy interest in the opaque bag placed above his seat is undisputed, and his expectation of privacy in it under those circumstances was reasonable. *See Smith v Maryland,* 442 US 735, 740 (1979). When passengers place bags in an overhead bin they expect that other passengers or employees may move them for one reason or another but do not expect, as a matter of course, that others will feel a bag in an exploratory manner. The search violated the 4th Amendment. Judgment reversed.

Dissent: [Breyer, J] It is the effect and not the purpose of actions amounting to a search that matters when analyzing an expectation of privacy. The petitioner expected the bag could be handled and touched and that is what the officer did.

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

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

***Williams v Taylor,* No. 98-8384, 4/18/00**

The petitioner was convicted and sentenced to death. He later filed for collateral relief for ineffective assistance of counsel. After a hearing his conviction was affirmed but it was found that counsel's failure to discover and present significant mitigating evidence at sentencing was below the range expected of reasonable professional competent assistance of counsel. S*trickland v Washington*, 466 US 668 (1984). The Virginia Supreme Court did not accept the recommendation that the petitioner be granted a rehearing on the sentencing phase of trial, finding that the lower court wrongly adopted a *per se* approach, and relied on a mere outcome determination when assessing prejudice. *Lockheart v Fretwell,* 506 US 364 (1993). In habeas proceedings a federal district judge found the death sentence constitutionally infirm. The 4th Circuit reversed.

Holding: [Stevens and O'Connor, JJ opinions] The petitioner was denied effective assistance of counsel. The merits of the petitioner's claim are squarely governed by *Strickland,* which constitutes clearly established federal law for purposes of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). (AEDPA placed new restrictions on federal habeas relief for state prisoners.) There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Judgment reversed, case remanded for further proceedings.

Concurrence/Dissent: [Rehnquist, CJ] The Virginia Supreme Court's decision was not contrary to established federal law.

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

***Williams v Taylor,* No. 99-6615, 4/18/00**

The petitioner was sentenced to death for a double murder after his accomplice testified against him and was given a life sentence. In state habeas proceedings the petitioner alleged that the state had failed to disclose an agreement with the accomplice. In federal court the petitioner raised the additional claims that the prosecution wrongly failed to provide the defense with a psychiatric report regarding the accomplice, a juror was seated who had not revealed possible bias, and a prosecutor had failed to reveal knowledge of the juror's possible bias. After the federal Court of Appeals found that the Antiterrorism and Effective Death Penalty Act (AEDPA) applied, the district court vacated an earlier order for an evidentiary hearing and dismissed the petition.

Holding: The AEDPA bars federal litigation of issues that a habeas petitioner has "failed" to develop in state court proceedings. This is not a "no-fault" standard, but a codification of the threshold standard of diligence in *Keeney v Tamayo-Reyes* (504 US 1 [1992]). Comity is not served by

US Supreme Court *continued*

saying a prisoner "failed to develop" a claim at the state level when the prisoner was unable to do so despite diligent effort. In this case there were references to a psychiatric report at the accomplice's sentencing, which the petitioner's state habeas counsel attached to his petition; counsel's affidavit saying he did not see the report in the accomplice's file when he reviewed it is not a satisfactory explanation of its late discovery. This claim is barred.

A juror's failure to acknowledge being "related" to the prosecution's lead-off law enforcement witness despite being divorced from him, or to acknowledge that the attorney prosecuting the case had handled the uncontested divorce, were misleading as a matter of fact. There was not evidence in the trial record to put a reasonable defense attorney on notice of any omission. There must be a hearing on the issue of the juror's possible bias and the prosecutor's failure to disclose the prior representation. Decision affirmed in part, reversed in part, and remanded.

NY Court of Appeals

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

***People v Foley*, No. 34, 4/4/00**

Holding: The evidence was legally sufficient to establish the elements of second-degree burglary beyond a reasonable doubt, including that the defendant had the contemporaneous intent to commit a crime when she entered the apartment. Order affirmed.

Lesser and Included Offenses (General) (Instructions) **LOF; 240(7) (10)**

***People v Rickett*, No. 35, 4/4/00**

Holding: The trial court did not err in denying the defendant's request to charge second-degree criminal trespass as a lesser-included offense. Although second-degree criminal trespass is a lesser-included offense of second-degree burglary, there is no reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater. *See People v Scarborough*, 49 NY2d 364, 368. Order affirmed.

Juries and Jury Trials (AlternateJurors) (Discharge) **JRY; 225(5) (30)**

***People v Jeanty*, Nos. 36; 37; 65 SSM1, 4/4/00**

The defendants (cases consolidated for appeal) each challenged the replacement of sworn jurors under Criminal Procedure Law 270.35(2). In the first case, a juror did not appear for the continuation of the trial and was replaced with an alternate. In the second case, two jurors, sworn and seated for trial, called in and stated that they could not be in court that day. The jurors were replaced with alternates. In the final case, during the court's final charge to the jury, a sick juror was unable to return for the afternoon session and was replaced with an alternate. All defendants were convicted, and the Appellate Division affirmed.

Holding: Having determined that the jurors would not be in court within two hours after the time set for the trials to resume, the trial courts complied with the statute and were well within their discretion in replacing the jurors with alternates. The Legislature intended to create a bright line rule when it amended the statute. Once a court has conducted a thorough inquiry into an absent juror's whereabouts and possible time of return, if it is determined that the juror will not appear within two hours after the time the trial is scheduled to resume, the court, in its discretion may replace the juror with an alternate. There is no difference for purposes of the two-hour rule between "missing" jurors whose time of return is unknown and jurors whose absence has a known cause. The replacement of the juror whose removal was challenged on constitutional grounds did not violate the defendant's right to trial by jury. Orders affirmed.

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

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

***People v Pressley*, No.13, 4/6/00**

After his arrest, the defendant was arraigned on a felony complaint that charged him with sodomy. At a grand jury hearing, he was asked questions about the sodomy charge and also about an alleged rape of the same complainant said to have occurred months earlier than the sodomy. Subsequently, the defendant was indicted on charges that related to both incidents. After trial, he was convicted of rape, sexual abuse, and sodomy. He claimed in a post-judgment motion that he received only a few minutes of notice that the grand jury would question him about the rape incident and therefore the notice requirements of Criminal Procedure Law 190.50(5) were violated.

Holding: The trial court found after a hearing that the defense knew of the additional charges four days in advance of the defendant's testimony, and that there was no requirement of notification with regard to charges not contained in the felony complaint. The defendant had many opportunities to raise before the trial court the issue of the notice requirement, but failed to do so. It was first raised in the reply to the 330.30 motion. Neither that nor the 440.10 motion could cure the lack of preservation. Order affirmed.

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

***People v Calabria*, No. 20, 4/6/00**

The defendant was convicted of robbery and burglary. The Appellate Division affirmed.

Holding: Before trial, the court ruled lineup testimony was admissible but refused to order the defense to give the prosecutor a photo of the lineup after the arresting officer lost the file. At trial, in the presence of the jury, the prosecutor asked defense counsel for lineup photographs, in contravention of the court's pretrial ruling. A mistrial motion was denied and the jury was given curative instructions. The defendant testified that he was having dinner with his parents during the time of the robbery. The prosecutor, in asking on cross examination about a drug arrest of the defendant's parents, commented that the parents' drug activities made the cover of the *New York Post* and displayed the newspaper in the presence of the jury. A mistrial was again denied, although the prosecutor was admonished. In closing arguments, the prosecutor implied that the defendant attempted to keep the photos of the lineup from the jury. This conduct exceeded the bounds of fair advocacy and denied the defendant a fair trial. The cumulative effect was to impermissibly prejudice the defendant in the eyes of the jury. *See People v Alicea*, 37 NY2d 601, 605. Order reversed, new trial ordered.

Misconduct (Judicial) MIS; 250(10)

***In Re Mulroy*, No. 39, 4/6/00**

After a three-day evidentiary hearing, the State Commission on Judicial Conduct found against the petitioner (a judge of County Court, Onondaga County) as to six of seven misconduct charges. The Commission recommended that he be removed.

Holding: The findings, that the petitioner used racial epithets and ethnic slurs in an official and quasi-official context, attempted to influence dispositions, exhibited intemperate behavior, and gave false testimony, were supported by a preponderance of the evidence. The recommendation that the petitioner be removed from the bench was appropriate given the cumulative, serious nature of his misconduct. *Matter of Schiff*, 83 NY2d 689, 695. Determined sanction accepted, Judge J. Kevin Mulroy removed from office.

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

***People v Hill*, No. 67, 4/6/00**

Holding: On reargument after remand from the United States Supreme Court (*see New York v Hill*, No. 98-1299 [1/11/00]). Order affirmed.

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

Trial (Verdicts [Inconsistent Verdicts]) TRI; 375(70[b])

***People v Rayam*, No. 15, 4/11/00**

The defendant was convicted of unlawful imprisonment, burglary, two counts of sodomy, sexual abuse regarding events over two days, menacing thereafter, and criminal trespass for a later incident. The jury expressed difficulty in reaching a decision, and asked if they could consider reduced counts of sodomy, which was denied. The defendant was acquitted on remaining counts of sodomy and sexual abuse, allegedly committed over the same two-day period. The Appellate Division considered the weight of the evidence and affirmed.

Holding: If, based on credible evidence, a different finding would not have been unreasonable, then the appellate court should weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that could be drawn from the evidence. *People v Bleakley*, 69 NY2d 490. The appellate court was not required to conclude that the jury unreasonably credited the complainant on some counts and rejected his credibility on others; there was always the possibility that the jury did not act irrationally, but instead exercised mercy. *See People v Tucker*, 55 NY2d 1. While *Tucker* dealt with legal repugnancy, the rationale applies to weight of the evidence review as well. There is no reason that in a *de novo* review the appellate court should resolve inconsistency in favor of a defendant rather than of the prosecution, which cannot appeal acquittals in mixed jury verdicts. *See United States v Powell*, 469 US 57 (1984). Order affirmed.

Constitutional Law (United States Generally) CON; 82(55)

Sex Offenses (Juveniles) SEX; 350(12)

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

***People v Foley*, No. 17, 4/11/00**

The Appellate Division affirmed the defendant's convictions for promoting a sexual performance by children and attempted disseminating of indecent material.

Holding: The defendant contended that Penal Law 235.22, proscribing predatory pedophile activity utilizing Internet technology, unconstitutionally burdened speech. US Const, 1st Amend. The legitimate reach of 235.22 outweighs its arguably impermissible applications. Unlike the statute struck down in *Reno v American Civil Liberties* Union (521 US 844 [1997]), this statute is not overbroad because it is not directed at the mere transmission of certain types of communication, but contains a second, significant "luring" prong that targets conduct, not content of expression. The statute was meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful, sexual images. The term "harmful to minors" is not unconstitutionally overbroad, being defined in accordance with constitutional caselaw and being limited to specified types of material. The statute is not unconstitutionally vague, as each of its terms is defined in the Penal Law or has a plain, ordinary meaning. The law survives strict scrutiny

NY Court of Appeals *continued*

because it curtails the use of speech in a way which does not merit 1st Amendment protection and is carefully tailored to serve a compelling state interest. *See New York v Ferber*, 458 US 747, 773 (1982). The statute does not discriminate against or burden interstate trade.

Penal Law 263.15, prohibiting promotion of a sexual performance by a child, has not been shown to be overbroad as applied. Order affirmed.

Juries and Jury Trials (General) JRY; 225(37)
Misconduct (Judicial) MIS; 250(10)

***People v Hernandez*, No. 23, 4/11/00**

During deliberations at the defendant's murder trial, the jury requested several readbacks of trial testimony and the court's charge to the jury. After specifying the testimony to be read back and directing the court reporter to do so, the trial judge, with the consent of both parties, absented himself from the proceedings during the actual reading. The defendant was convicted of murder and related weapons offenses. The appellate court granted the defendant's petition for a writ of error *coram nobis*, vacated its prior affirmance of the judgment of conviction, and reversed the defendant's conviction and sentence.

Holding: The absence of trial judges from readbacks is disfavored, but the judge's absence did not require reversal. The mechanical readbacks here required no rulings or instructions in addition to those previously made by the court. There was no delegation of judicial authority. *See People v Monroe*, 90 NY2d 982. Order reversed, case remitted.

Larceny (Elements) (General) LAR; 236(17) (37)

Tax Evasion (General) TAX; 368(15)

***People v Nappo*, No. 26, 4/13/00**

The defendants failed to pay taxes on fuel imported from New Jersey to New York and were convicted of, *inter alia*, larceny. These counts were dismissed by County Court, and reinstated by the Appellate Division.

Holding: The prosecution argued that the defendants were required to pay taxes on the importation and distribution of motor fuel in New York State and that their failure to do so constituted a larceny of property owned by the State of New York. The state was not an "owner," as defined by Penal Law 155.00(5), of the taxes. The defendants did not steal money belonging to the state, but failed to meet their personal obligations to make payments under the Tax Law. *See People v Zinke*, 76 NY2d 8, 12. Accordingly, the defendants did not commit larceny. *See People v Jennings*, 69 NY2d 103, 126-128. Failure to remit taxes is not the same as failing to remit collected taxes such as sales taxes paid by consumers and held in trust for the state. Tax Law 1817(k). Order reversed, counts dismissed.

Instructions to Jury (MissingWitnesses) ISJ; 205(46)

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

***People v Keen*, No. 27, 4/13/00**

The defendant expected his former girlfriend to testify that they were having an argument in the next room when they heard the shooting of which he was accused. In opening statement, defense counsel indicated she would so testify. In *ex parte* conference with court and defense counsel, the witness expressed reluctance to testify; the trial court, believing she feared she would be asked to commit perjury, released her from subpoena. The court instructed the jury that if they believed that the witness was continually within the defendant's control, they could infer that her failure to testify meant her testimony would be unfavorable to the defendant. The Appellate Division affirmed the defendant's conviction.

Holding: The "missing witness" jury instruction given as to the absence of the defendant's girlfriend was proper where defense counsel indicated in opening statement, and the prosecution had reason to expect, that the missing witness would testify favorably to defendant. The jury could reasonably have found that she was continually under defense control. *See People v Gonzalez*, 68 NY2d 424, 429. The defense did not demonstrate that the girlfriend was not under its control.

The defendant's *Antommarchi* waiver of presence at sidebar discussions occurred in open court after the trial judge had articulated the substance of the right. Neither the defendant nor counsel objected to the defendant's absence at sidebar colloquies during the three-day *voir dire*. *See People v Spruill*, 212 AD2d 381, 382 *lv den* 85 NY2d 943. Order affirmed.

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

***People v Johnson*, Nos. 30; 31; 32, 4/13/00**

In these consolidated cases, the Appellate Division reversed the convictions of defendants Johnson and Sharper, and affirmed that of defendant Reyes, upon consideration of allegations that jurors in each of their trials should have been dismissed for cause.

Holding: The right to an impartial jury is fundamental. The current Criminal Procedure Law incorporates the right, and eliminates the "talismanic expurgatory oath" previously required. This gives trial courts greater flexibility and greater responsibility to decide which potential jurors should be excused for cause. *People v Culhane*, 33 NY2d 90, 104 n2. When potential jurors themselves say they question or doubt they can be fair in the case, trial judges should either elicit, when appropriate, some unequivocal assurance of the prospective jurors' ability to be impartial, or excuse the jurors when that is appropriate. The "worst the court will have done in most cases is to have replaced one impartial

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juror with another impartial juror." Not just snippets of *voir dire* but the full record should be examined. Here, the record does not support the trial courts' recollection that jurors who had expressed doubts about impartiality ever unequivocally represented that they could be fair. Orders in Johnson and Sharper affirmed, order in Reyes reversed and a new trial ordered.

Dissent: [Bellacosa, J] *Voir dire* is more of an art than a science. That many judges have reached different conclusions on the basis of the records in these cases shows that the calibrations of impartiality were matters of degree, not certainty. Such issues are quintessentially entrusted to the trial courts.

Appeals and Writs (Question of Law and Fact) **APP; 25(75)**

***People v Finkle*, No. 52, 4/13/00**

Holding: Appeal dismissed because the reversal by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal (CPL 450.90[2][a])."

Appeals and Writs (Question of Law and Fact) **APP; 25(75)**

***People v Letendre*, No. 85 SSM2, 4/13/00**

Holding: The finding of probable cause made by the Appellate Division involves a mixed question of law and fact. "Because there is support for the conclusion made by both lower courts, the probable cause issue is beyond this Court's power to review in this case." The defendant's other contentions are without merit. Order affirmed.

First Department

Rape (Defenses) (Evidence) **RAP; 320(5) (20)**

***People v Jovanovic*, No. 337, 12/21/99, 700 NYS2d 156**

The defendant was convicted of kidnapping, sexual abuse, and assault for events occurring on a date with the complainant that took place after weeks of on-line conversations and e-mail correspondence. The defendant was precluded by application of the Rape Shield Law from introducing portions of those electronic communications at trial.

Holding: The messages did not constitute evidence of the complainant's sexual conduct, but were merely evidence of statements she made about herself to the defendant, not subject to the Rape Shield Law. The redacted statements that were admitted gave the jury a distorted view of the events leading up to the date. Without proof that the defendant had reason to believe that both he and the complainant intended to participate in consensual, non-violent sadomasochism, his ability to credibly testify as to his defense was irreparably impaired. The e-mails also fall within exceptions to the shield law. The intimate nature of some made them the equivalent of prior sexual contact with the defendant. Criminal Procedure Law 60.42(1). Others reporting the complainant's sadomasochistic relationship with another man tended to rebut the prosecution's showing that the defendant caused "disease," *ie* injury. *See* Criminal Procedure Law 60.42(4). The "interests of justice" exception also applied. Criminal Procedure Law 60.42(5). The preclusion of the evidence was of constitutional dimension. It improperly interfered with the defendant's right to confront the primary witness against him. *See Olden v Kentucky*, 488 US 227 (1988). The court also erred in allowing the prosecution to introduce a newspaper article, mentioned in the e-mail, about a woman who was killed by someone she met online. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Wetzel, J])

Concurrence/Dissent in Part: [Mazzarelli, JP] The conversations concerning the complainant's sexual and sadomasochistic behavior with others was properly redacted.

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

Records (Access) **REC; 327(5)**

***Application of Fappiano v New York City Police Department*, No. 2829N, 1st Dept, 12/21/99**

The petitioner-respondent filed a FOIL application for access to records pertaining to his arrest and conviction for a sex offense. The respondent-appellant unsuccessfully argued that the records are exempt from disclosure under Civil Rights Law 50-b(1) because they identify the victim of a sex offense and the petitioner did not qualify as a person "charged" with a sex offense entitled to such records under Civil Rights Law 50b(2)(a).

Holding: Because the petitioner claims to need the documents for anticipated federal court proceedings to overturn his conviction, he is like a person who needs documents to mount a defense. Because the petitioner already knows the complainant's name, the prohibition of public inspection (Civil Rights Law 50-b[1]) is inapplicable. Order affirmed. (Supreme Ct, New York Co [Cohen, J])

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

Trial (Opening Statements) **TRI; 375(35)**

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

***People v Orr*, No. 2854, 1st Dept, 12/28/99**

Holding: The defendant, ultimately convicted of attempted grand larceny, consented to admission at trial of the videotaped conditional examination of the complainant, a

First Department *continued*

visitor from Argentina. The court properly declined to permit counsel to renege on this agreement in the midst of trial. The court's admonition to defense counsel to limit his opening statement to "any proof that you intend to produce here in the courtroom" was not improper, especially given the subsequent charge to the jury that the defense did not have to make an opening statement and that the burden of proof remained with the prosecution. *See People v Burks,* 221 AD2d 201 *lv den* 87 NY2d 920. The court's *Sandoval* ruling permitting inquiry into seven of the defendant's 25 prior convictions was a proper exercise of discretion. *See People v Walker,* 83 NY2d 455, 458-459. Questioning as to the defendant's use of aliases on 43 prior occasions should have been limited, but any error was harmless. Judgment affirmed. (Supreme Ct, New York Co [Cropper, J])

Juries and Jury Trials(Alternate Jurors)(Challenges) (Voir Dire) JRY; 225(5) (10) (60)

***People v Gibbs,* No. 2859, 1st Dept, 12/28/99**

Holding: When a sworn juror was discharged, on grounds not known before the juror was sworn, and 12 jurors had been sworn but no alternates had yet been selected, the court properly resumed "regular" jury selection to replace the discharged juror, rather than selecting an alternate as the replacement. *See People v Roberts,* 236 AD2d 233 *lv den* 91 NY2d 836. Although not required to, the court allowed the defendant and the prosecutor one additional peremptory challenge. The court's finding that the prosecutor provided a race-neutral, nonpretextual explanation for peremptorily striking a prospective juror is entitled to great deference. *See People v Hernandez,* 75 NY2d 350, 356-357 *affd* 500 US 352. The court's own observations confirmed the prosecution's allegations of the juror's inattentiveness. Judgment affirmed. (Supreme Ct, New York Co [Leibovitz, J])

Defense Systems (Assigned Counsel Systems)(Compensation Systems[Attorney Fees]) DFS; 104(5) (25[b])

***Wells v State of New York,* No. 2860, 1st Dept, 12/28/99**

Holding: The Court of Claims found that vouchers for assigned counsel fees often could not be timely submitted because of the failure of assigned counsel plan employees to promptly process needed paperwork, that late vouchers were often paid, and that attorneys were sometimes encouraged to delay voucher submission. These findings are sustained by the record, and support the conclusion that the plan's refusal to process the claimant's late vouchers was a breach of contract. Breach of contract was the theory the claimant pleaded, and appears to be what the Court of Claims found, despite its rationalization that its fee award to the claimant was based in *quantum meruit.* Judgment affirmed. (Court of Claims, New York Co [Nadel, J])

Speedy Trial (Cause for Delay) (Statutory Limits) SPX; 355(12) (45)

***People v Jackson,* No. 2871, 1st Dept, 12/28/99**

Holding: The defendant was not denied a speedy trial. A review of the minutes for the disputed days shows that on one adjournment date, defense counsel was engaged in another trial expected to last two weeks. Delay occasioned by the need for psychiatric evaluations after the defendant interposed an insanity defense was excludable under Criminal Procedure Law 30.30(4)(a); *People v Rodriguez*, 192 AD2d 465. Examination by a prosecution expert is not a mere evidence-gathering device, but is a statutorily-regulated procedure that normally results from the assertion of insanity by a defendant. The delay here was reasonable. The insanity defense was announced on April 27, 1993, the defense psychiatric report was furnished on Feb. 10, 1994, and the prosecution retained an expert whose report was filed on Sept. 21, 1994. The prosecution is chargeable with periods totaling 40 days it took them to decide whether to retain an expert, and the 29 days when they claimed they were still gathering the defendant's medical records to forward to their expert. Other delays were caused by factors outside the prosecutor's control, such as the defendant's refusal to be interviewed, and therefore did not meet the test of being due solely to prosecution inaction. *See People v Cortes*, 80 NY2d 201, 210. The defendant's constitutional right to speedy trial was not violated. *See People v Taranovich*, 37 NY2d 442, 445. Judgment affirmed. Supreme Ct, New York Co [Andrias, J at speedy trial motion; Kahn, J at trial and sentence])

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

***Application of Morgenthau v Yates,* Nos. M-4136,M-4139, M-6095, 1st Dept, 12/28/99**

Holding: Previous decision and order of June 10, 1999 (262 AD2d 83) amended by deleting the words "that it was 11-1 for conviction but" on line 10, pg. 4. Motion M-4136 granted to extent noted, other motions denied.

Juries and Jury Trials (Selection) (Voir Dire) JRY; 225(55) (60)

Motions (Suppression) MOT; 255(40)

***People v Baez,* No. 2883, 1st Dept, 1/4/00**

Holding: A suppression motion was denied before jury selection began. The hearing court reopened proceedings to allow limited re-cross-examination of the arresting detective about information discovered after the original suppression decision. The court was under no statutory obligation to

defer jury selection until the renewed motion could be decided. *See* Criminal Procedure Law 710.40(4). The defendant could not have been prejudiced, particularly in light of what occurred at the reopened hearing. *See People v Gonzalez*, 214 AD2d 451 *lv den* 86 NY2d 794. The court's identification charge to the jury did not deprive the defendant of the right to chart his own defense or remove any issues from consideration. Judgment affirmed. (Supreme Ct, Bronx Co [Davidowitz, J])

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

***People v Slater*, No. 3007, 1st Dept, 1/11/00, 701 NYS2d 371**

The defendant was convicted of two counts of second-degree murder (intentional and felony murder), and one count each of first and second-degree robbery, and was sentenced to concurrent prison terms on the murder convictions, to run consecutively to concurrent terms on the robbery convictions.

Holding: The sentences on both robbery convictions should run concurrently with the sentence on the felony murder conviction. *People v Laureano*, 87 NY2d 640, 643-644. The robbery was the predicate for the felony murder. Because the intentional murder was distinct from the second-degree robbery, which did not require injury to the murder victim, consecutive sentences were appropriate. *See People v Leo*, 255 AD2d 458 *lv den* 93 NY2d 973. Judgment modified. (Supreme Ct, New York Co [Zweibel, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Scope]) SEA; 335(10[m])

***People v Martinez*, No. 1824, 1st Dept, 1/13/00, 701 NYS2d 377**

The defendant was asked to verify his identification after a police officer stopped him for possessing an open container of alcohol. The defendant said he could get his identification from an apartment, but when the occupant thereof did not know the defendant, the defendant admitted that he had lost his identification. He was then arrested. At the police station the officer conducted a strip search to determine whether the defendant was in possession of a weapon or other contraband. The search yielded six tins of cocaine, which the defendant unsuccessfully moved to suppress.

Holding: There was reasonable suspicion justifying the strip search because the defendant sought to purposefully deprive the officer of information permitting an assessment of his identity. It is reasonable to assume that an arrested person who has done this was seeking to evade prosecution for another, possibly serious, crime. *People v Walker*, 83 NY2d 455, 462. A reasonable officer in this situation (*see Whren v US*, 517 US 806 [1996]) would have had no way of knowing whether the person in custody was or was not a dangerous felon. Judgment affirmed. (Supreme Ct, New York Co [Obus, J])

Civil Practice (General) CVP; 67.3(10)

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

***Alvarez v Snyder*, Nos. 2140; 2141; 2142, 1st Dept, 1/13/00, 702 NYS2d 5**

The plaintiffs, mothers of two detainees in previous criminal proceedings stemming from investigation of gang activity, filed a 42 USC 1983 action naming as defendants the justice whose orders affected the detainees' terms of confinement and a social worker who had logistical and security responsibilities during the proceedings. The suit sought compensatory and punitive damages and injunctive relief for alleged violations of the children's constitutional rights, including freedom of association and speech and deprivation of liberty without due process. The trial court dismissed the action.

Holding: Judicial immunity applied to the justice, because the security measures imposed upon the detainees were ordered in her judicial capacity. *See People v Little*, 89 Misc2d 742. The measures were rationally related to the imminent nature of the threats presented by the detainees, and were within the court's inherent power to do what was necessary to ensure the integrity of the proceedings. *People v Green*, 170 Misc2d 519, 523-524. Judicial immunity also extended to the special master appointed by the justice. As a general principle, judicial immunity extends to individual employees who assist the privileged official and who act under that official's direction, performing functions closely tied to the judicial process. *Hill v City of New York*, 45 F3d 653, 660. The special master's regular occupation of social worker gave no reason to remove the immunity. Order affirmed. (Supreme Ct, Bronx Co [McKeon, J])

Concurrence: [Saxe, J] While the judge did not act in the clear absence of all jurisdiction, the *ex parte* orders concerning the detainees' conditions of confinement were not within the inherent powers of the court.

Evidence (Rebuttal) EVI; 155(123)

Rape (Evidence) RAP; 320(20)

***People v Garayua*, No. 3048, 1st Dept, 1/13/00, 701 NYS2d 379**

Holding: There was legally sufficient evidence of guilt on the charge of attempted rape of a nine-year-old. The jury could reasonably infer from the evidence—the surrounding circumstances and the genital contact that ensued—the defendant's intent to have intercourse with the complainant. The contact came within "dangerous proximity" of the com-

First Department *continued*

mission of rape; even the slightest penetration would have constituted intercourse. *People v McCray*, 198 AD2d 200, 202 *lv den* 82 NY2d 927. The court properly stopped the defendant from introducing evidence concerning a prior incident of sexual abuse involving the complainant, who had little or no memory of that incident and gave no indication that her "sexual knowledge" was gained from it. The court admitted into evidence an audiotape of the defendant's phone calls to the complainant's mother. The tape served to rebut the defendant's position that he had voluntarily left the mother who, as a scorned lover, had then caused her daughter to fabricate the sexual abuse story. There was no surprise, as the defendant knew he had left messages on the mother's answering machine. Judgment affirmed. (Supreme Ct, Bronx Co [Cohen, J])

Evidence (Judicial Notice) **EVI; 155(85)**

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

***People v Darby*, No. 2185, 1st Dept, 1/18/00, 701 NYS2d 395**

Holding: At a suppression hearing, officers testified that when they were several feet from the defendant, they detected the very strong smell invariably associated with street-level phencyclidine (PCP) wafting from him. They explained that in their training and experience (approximately 50 prior arrests), they learned to recognize this distinctive odor. The defendant's expert testified that pure, unadulterated PCP did not give off an odor. The trial court rejected the officers' testimony that they had smelled PCP on the defendant prior to conducting a search of his pocket. The drugs seized were wrongly suppressed. That illegal drug sales on street corners do not involve pure, unadulterated substances is so well known that judicial notice can be taken of this fact. *See* Richardson, Evidence §2-203 (Prince, 11th ed). Therefore, the two sets of testimony did not contradict one another. The distinctiveness of the odor given off by street-level, adulterated PCP was enough, when combined with the officers' other observations and knowledge, to provide probable cause for the search. Judgment reversed. (Supreme Ct, New York Co [Yates, J])

Dissent: [Rosenberger, J] The defense expert said that adulterated PCP had no PCP-specific odor, but would smell like the added substance. The prosecution presented no evidence that the PCP recovered from the defendant had an adulterant identifiable by smell. Credibility questions are primarily for the trier of fact.

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

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

***People v Cabrera*, No. 2363, 1st Dept, 1/20/00, 701 NYS2d 402**

The defendant was charged with third-degree criminal possession of a controlled substance. After summations and submissions of the final charges to the jury, defense counsel unsuccessfully requested submission of seventh-degree criminal possession of a controlled substance as a lesser included offense.

Holding: The court refused the defense request because the timing of the request contravened the court's policy. Defense counsel's representation that he had previously indicated to the court's Law Secretary that the request might be made, but that counsel needed to hear the defendant's testimony first, is supported by the record. The prosecution concedes that an earlier request would have entitled the defendant to the requested charge. While it is preferable that both sides know of all instructions before summation, the statute appears to authorize a request like the one at issue to be made at any time prior to the submission of the case to the jury. *People v Noquera*, 102 AD2d 775 *lv den* 63 NY2d 777; Criminal Procedure Law 300.10[1]; Criminal Procedure Law 300.50[2]. There was no indication that the timing of the request manifested an abusive practice, or that granting it would have prejudiced the prosecution. Judgment reversed. (Supreme Ct, New York Co [Williams, J])

Witnesses (Cross Examination) (Defendant as Witness) (Experts) **WIT; 390(11) (12) (20)**

***People v Veneracion*, No. 5, 1st Dept, 1/25/00, 703 NYS2d 433**

Holding: The trial court's *Sandoval* ruling, allowing limited questioning about the defendant's prison possession of a weapon made from a razor blade, was an appropriate exercise of discretion, balancing probative value against the risk of prejudice; any similarities between the crimes charged and the prison infraction did not compel preclusion. *People v Mattiace*, 77 NY2d 269, 275-276. The trial court properly modified the ruling. The defendant's testimony on redirect examination with respect to the prison infraction conveyed the idea that the defendant was not the type to carry a knife-like weapon, opening the door to inquiry about his prior display of a razor to a friend. *See People v Fardan*, 82 NY2d 638. Complaints about the prosecution's use of the prior acts in summation were not preserved, and the challenged statements would be found permissible. *People v Galloway*, 54 NY2d 396.

The defendant's medical expert refused to testify because of the expert's objections to relevant questions about her credentials and performance of an unauthorized autopsy. The court's denial of an adjournment to secure another expert was a proper exercise of discretion. *See People v Foy*, 32 NY2d 473. The defendant was not prejudiced. Judgment affirmed. (Supreme Ct, New York Co [Wittner, J])

First Department *continued*

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

***People v Jones*, No. 2755, 1st Dept, 1/25/00, 702 NYS2d 53**

The defendant was convicted of attempted third-degree criminal sale of a controlled substance and violation of probation. He was sentenced to concurrent terms of 15 years to life as a persistent felony offender (PFO).

Holding: The court failed to employ the persistent felony offender procedures mandated by Criminal Procedure Law 400.20; *See People v Wilson*, 64 AD2d 782. There was no record of an order being executed or filed as required by statute, and the defendant was not given notice. This invalidates the PFO sentence. *People v Richards*, 228 AD2d 792 *lv den* 88 NY2d 1024.The appearances before the court did not constitute the preliminary hearing contemplated by Criminal Procedure Law 400.20(7). The court must ask whether the defendant wishes to present evidence on the issue of whether the defendant was a PFO or on his background and criminal conduct. This defendant was not given an opportunity to be heard until after the court adjudicated him a PFO and was preparing to sentence him as such. Sentence vacated and remanded. (Supreme Ct, New York Co [Rubin, J at plea; Rothwax, J at sentence])

Second Department

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

***People v Abbas*, Nos. 96-04823 and 96-04824, 2nd Dept, 2/14/00, 702 NYS2d 885**

The defendant was convicted and sentenced to definite sentences of one year of imprisonment for four convictions of second-degree criminal contempt, to run consecutively to each other and to an indeterminate sentence imposed for the conviction of attempted second-degree murder.

Holding: The four definite one-year sentences for criminal contempt should have merged by operation of law and run concurrently with the indeterminate sentence imposed for attempted murder. Penal Law 70.35 provides that service of an indeterminate sentence shall satisfy any definite sentence of imprisonment imposed on a person for an offense committed prior to the time the indeterminate sentence was imposed. The statute contemplated that the definite and indefinite sentences would be served concurrently. Therefore, the judgment must be modified so that the criminal contempt and attempted murder conviction sentences run concurrently. *See People v Leabo*, 84 NY2d 952. Judgment modified. (Supreme Ct, Queens Co [Finnegan, J])

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

Robbery (Instructions) **ROB; 330(25)**

***People v Davis*, No. 96-10103, 2nd Dept, 2/14/00, 704 NYS2d 99**

Holding: During *voir dire*, the defense attorney raised a successful *Batson* challenge to one of the prosecutor's peremptory challenges. The trial court committed reversible error by then permitting the prosecutor to exercise an additional peremptory challenge. *See* CPL 270.15(2); *People v Alston*, 88 NY2d 519, 529. The court also erred by not including the requested statutory definitions of "deprive" and "appropriate" in the jury charge on the robbery counts under Penal Law 155.00(3), (4). *See People v Watts*, 57 NY2d 299. Judgment reversed. (Supreme Ct, Kings Co [Feldman, J])

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

***People v Riddick*, No. 97-01180, 2nd Dept, 2/14/00, 704 NYS2d 270**

An officer received a radio transmission reporting an armed robbery by four black men, one of whom was wearing a black jacket. Ten to fifteen minutes later, the officer observed the defendant, a black man who was wearing a black jacket, standing on a corner. The officer got out of his unmarked car with his gun unholstered at his side, identified himself as a police officer, and asked to see the defendant's hands.

Holding: The officer's conduct constituted a significant limitation on the defendant's freedom, which was not justified by the vague description of a black man wearing a black jacket. *See People v Boodle*, 47 NY2d 398. The weapon, the defendant's statements, and the showup identification by the complainant must be suppressed. *See People v Madera*, 82 NY2d 775. The evidence was legally insufficient to establish the defendant's guilt as to first-degree robbery and criminal possession of a weapon, so those counts must be dismissed. Prior to retrial, there must be an independent source hearing as to the complainant's in-court identification of the defendant. Judgment reversed, two counts dismissed, and a new trial ordered on the remaining counts. (Supreme Ct, Queens Co [Erlbaum, J])

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

***People v Wilkes*, No. 97-09167, 2nd Dept, 2/14/00, 703 NYS2d 500**

The defendant was convicted of second-degree criminal possession of a weapon, third-degree criminal possession of a weapon, resisting arrest, and second-degree menacing.

Holding: The defendant's contention that the criminal possession of a weapon convictions should be set aside, on

Second Department *continued*

the ground that the term "loaded firearm" (an element of both crimes) was unconstitutionally vague, was without merit. Judgment affirmed. (County Ct, Rockland Co [Nelson, J])

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

Double Jeopardy (Dismissal) DBJ; 125(5)

***People v Campbell*, No. 98-03041, 2nd Dept, 2/14/00, 703 NYS2d 498**

The defendant was charged with first and second-degree criminal contempt for violating an order of protection requiring him to stay away from his former girlfriend. The jury found him guilty of second-degree criminal contempt, but could not reach a decision as to the first-degree charge. With the defendant's consent, the court ordered a partial mistrial and directed a second trial on that count. The defendant was convicted by the second jury of first-degree criminal contempt.

Holding: The prosecution for first-degree criminal contempt after a verdict of guilty on the lesser charge violated the double jeopardy protection of the federal and New York Constitution. US Const 5th, 14th Amends; NY Const, art I, §6. There was only a single violation of the order of protection, so that upon conviction of the lesser charge, the defendant could not be prosecuted for the greater. *See People v Diaz*, 167 AD2d 414.

During the first trial the prosecutor failed to produce one of the complainant's tape-recorded calls to 911. The tape was *Rosario* material (*see People v Rosario*, 9 NY2d 286 *cert den* 368 US 866). The failure to disclose it constitutes *per se* error requiring reversal. *See People v Ranghelle*, 69 NY2d 56, 63. Judgment reversed. (Supreme Ct, Kings Co [Martin, J at trial; Knipel, J at sentencing])

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

***People v Dickens*, No. 99-02620, 2nd Dept, 2/14/00, 702 NYS2d 925**

The defendant unsuccessfully sought modification of his sentence to provide that the term of imprisonment for aggravated criminal contempt run concurrently with terms of imprisonment for attempted assault and criminal possession of a weapon.

Holding: The trial court erred in imposing a prison sentence for aggravated criminal contempt to run consecutively to the one imposed for attempted second-degree assault. The intent to cause physical injury was a material element of both crimes, which arose out of a single incident. *See People v Laureano*, 87 NY2d 640, 643. Where the court imposed concurrent sentences for the assault and weapons possession charges, and the contempt and assault sentences must be concurrent, the prosecution's contention that the sentence for contempt should run consecutively to the weapons possession sentence is incorrect. Judgment modified. (County Ct, Nassau Co [Calabrese, J])

News Media (Shield Laws) NEW; 269(45)

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

***Matter of Grand Jury Subpoena Served Upon Newsday Reporter Moore*, No. 00-01072, 2nd Dept, 2/18/00**

The prosecutor subpoenaed two news reporters to testify before the grand jury investigating alleged misconduct by the county sheriff. The reporters' employers sought to quash the subpoenas on the ground that they possessed a qualified constitutional and statutory privilege, commonly known as the shield law. The court limited the subpoenas to require the reporters to respond only to questions aimed solely at authenticating, for admission as evidence before the grand jury, a videotape broadcast and newspaper article.

Holding: The petitioners abandoned any claim of protection under the shield law. Under the particular circumstances of this case, there was no basis to invoke the constitutional privilege (*see O'Neill v Oakgrove Constr.*, 71 NY2d 521) with respect to the limited questions permitted by the court (*see Tofani v State of Maryland*, 297 Md 165) because the material in question had already been broadcast or published. (Supreme Ct, Suffolk Co [Jones, J])

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

Sentencing (Restitution) SEN; 345(71)

***People v Pestone*, No. 98-00279, 2nd Dept, 2/22/00, 704 NYS2d 480**

The defendant was convicted of grand larceny and sentenced to probation, including a restitution condition. Upon a finding that he had violated probation by failing to make agreed-upon restitution payments, the court imposed a sentence of imprisonment.

Holding: The court acted within its discretion in revoking the sentence of probation and sentencing the defendant to incarceration. *See People v Martinich*, 258 AD2d 742. The probation was revoked because of the defendant's failure to abide by the terms thereof. To the extent that his inability to pay restitution was due to his subsequent federal incarceration, it was a self-created hardship. *See Matter of Knights v Knights*, 71 NY2d 865. Judgment affirmed. (Supreme Ct, Westchester Co [Cowhey, J])

Second Department *continued*

Speedy Trial (Due Process) **SPX; 355(25)**

***People v Balken*, Nos. 99-03968; 99-06189, 2nd Dept, 2/22/00, 705 NYS2d 590**

The defendant was originally charged with driving while under the influence of alcohol, stemming from a single auto accident that resulted in the deaths of two passengers, but the charge was unsupported by medical evidence and was dismissed. After 18 months, the defendant was charged with criminally negligent homicide. The county court granted the defendant's motion to dismiss the indictment, finding that he had been denied due process as a result of the delay.

Holding: The 18-month delay was not *per se* unreasonable. *See People v Jones*, __ AD2d __ (2d Dept, 12/6/99). The reason for the delay appeared to be not an effort to gain unfair tactical advantage but that investigators initially believed that they had insufficient evidence to proceed once the DWI charge proved to be unfounded. They later decided, in good faith, to advance the case before the grand jury, which is not a due process denial even where a defendant is prejudiced thereby. *See People v Lesiuk*, 81 NY2d 485, 491. The defendant here showed no prejudice from the delay and was not deprived of due process. Judgment reversed. (County Ct, Suffolk Co [Cacciabaudo, J])

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

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

***People v Martinez*, No. 97-06181, 2nd Dept, 2/28/00, 704 NYS2d 826**

Holding: The trial court erred by allowing the arresting detective to testify that he had interviewed and obtained the statements of two men who were not called as witnesses at the trial, and that he had some information, obtained a photograph of the defendant, and subsequently arrested him. Such testimony implied that the men identified the defendant as the perpetrator. *See People v Brazzeal*, 172 AD2d 757, 761-762. The error was not harmless. Judgment reversed. (Supreme Ct, Queens Co [Dunlop, J])

Confessions (General) **CNF; 70(32)**

***People v Delgado*, No. 98-05594, 2nd Dept, 2/28/00, 704 NYS2d 273**

The police told the defendant's mother they were taking him to the station house. When the defendant's mother telephoned the station house she was truthfully informed that the defendant was there, that there was a problem, and that she should come down. There is no indication that the defendant's mother attempted to obtain a lawyer for him.

Holding: The defendant's statements are admissible. Where there had been no attempt by the police to conceal the defendant's presence or to deceive the family, a refusal to allow a parent to see a child does not render any subsequent confession *per se* inadmissible. *People v Salaam*, 83 NY2d 51, 55. Since the defendant was 16 years old, there is no requirement that a family member be present during the questioning. *See People v Dearstyne*, 230 AD2d 953, 958. Judgment affirmed. (Supreme Ct, Queens Co [Robinson, J])

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Appeals and Writs (Counsel) **APP; 25(30)**

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

***People v Nuness*, Motion No. 74-90, 4th Dept, 11/12/99**

Holding: The defendant's contention in this motion for writ of error *coram nobis* that he was denied effective assistance of appellate counsel because the lawyer failed to raise issues, including the duplicitous nature of convictions of first-degree robbery and criminal use of a firearm, may have merit. Therefore, the order of Mar. 16, 1990 is vacated and the appeal will be considered *de novo. See People v Vasquez*, 70 NY2d 1 *rearg den* 70 NY2d 748. Motion granted, order entered

Contempt (General) **CNT; 85(8)**

Double Jeopardy (General) **DBJ; 125(7)**

***People v Wood*, No. KA 97-5394, 4th Dept, 11/12/99**

The defendant was convicted of five counts of first-degree criminal contempt (Penal Law 25.51[c]) and second-degree aggravated harassment (Penal Law 240.30[2]) for having telephoned his ex-wife in violation of an order of protection. Family Court had found him guilty of contempt based on the same conduct.

Holding: The defendant's double jeopardy motion to dismiss the contempt charges was denied, the prosecutor asserting that the criminal proceedings were based on a City Court order of protection whereas the Family Court proceedings were based on an order from that court. Civil sanctions can constitute punishment for underlying criminal conduct, triggering double jeopardy protections. *People v Roach*, 226 AD2d 55, 58; *United States v Ursery*, 518 US 267 (1996). The legislature intended the incarceration penalty in Family Court Act article 8 to allow a proceeding in either Family Court or a criminal court to obtain punishment for violating protective orders. Family Court Act 846-a has been specifically found to be punitive in nature. *See Matter of Walker v Walker*, 86 NY2d 624, 629. The two criminal prosecutions that this defendant has undergone were for the same offense under the "same elements" test of *Blockburger v*

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United States (284 US 299, 304 [1932]), as applied in Justice Leventhal's opinion in *People v Arnold* (174 Misc2d 585). The contempt charges also violated the statutory double jeopardy protection of CPL 40.20. Judgment modified, convictions of five counts of first-degree criminal contempt reversed and dismissed. (Supreme Ct, Monroe Co [Ark, J])

Dissent: [Wisner, J] An element of each offense being proof of a lawful protective order, and such orders having been issued in different courts, the *Blockburger* test was not met. As the contempts were to vindicate the authority of different courts, CPL 40.20 was not violated.

Sentence (Restitution) SEN; 345(71)

***People v White*, No. KA 98-5316, 4th Dept, 11/12/99**

Holding: The defendant did not expressly agree to the $3,573.90 restitution ordered as part of his sentence for second-degree burglary. The amount was improperly based exclusively on amounts recited in the presentence report. *See People v Bernier*, 197 AD2d 882. That the defendant failed to request a hearing or object to the amount did not constitute waiver, due to the "essential nature" of the right to be sentenced according to law. *People v Dickson*, __ AD2d __ (4/29/99). Further, the total amount of restitution sought is inconsistent with the total of the itemized list supplied by the complainant to the probation department and there is no sworn testimony sufficient to establish the lost wages total. *See People v Morales*, 256 AD2d 729. The victim impact statement was not sworn, and therefore could not be relied upon for restitution. *See People v Welsher*, 154 AD2d 915, 916 *lv den* 74 NY2d 952. Judgment modified, restitution order vacated, matter remitted for a hearing on the amount of restitution. (County Ct, Lewis Co [Merrell, J])

Prisoners (DisciplinaryInfractions) PRS I; 300(13)

***Matter of Duamutef v Johnson*, No. TP 99-241,4th Dept, 11/12/99**

The petitioner prisoner was determined to have violated inmate rules by failing to obey a direct order and unauthorized assembly. He sought various documents, and the hearing was adjourned. When the hearing did commence, the hearing officer said that the petitioner had what the officer had. The petitioner said that he had been denied, based on security concerns, Freedom of Information Law access to requested interdepartmental communications by the author of his misbehavior report. The respondents denied this, saying that the petitioner had the requested documents, including a memo from the misbehavior report author to a sergeant identifying a prisoner who said the meeting was held to prevent violence, and the sergeant's memo to a superior officer saying that the petitioner seemed to have been the main speaker and that the petitioner claimed he got caught up in a conversation that began when he was watching television.

Holding: The hearing transcript makes clear that the hearing officer denied the existence of any relevant writing except for the actual misbehavior report. The documents should have been disclosed absent a finding that doing so would be hazardous to the facility's safety or goals. *See Matter of Moore v Goord*, 255 AD2d 640 *lv den* 93 NY2d 802. The petitioner has shown no prejudice stemming from the unavailability of these documents at the hearings so that annulment is not required. *See Matter of Samuels v Kelly*, 143 AD2d 506 *lv den* 73 NY2d 707. However, it is troublesome that the documents were incorporated into the appellate record and treated as if they had been disclosed. Determination confirmed. (Transferred from Supreme Ct, Orleans Co [Punch, J])

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches] [Probable Cause Searches]) SEA; 335 (15[k] [p])

***People v Brooks*, No. KA 99-307, 4th Dept,11/12/99**

Holding: There are no facts to support a reasonable suspicion of criminal activity, which was required to justify a stop of the defendant's vehicle. *See People v Spencer*, 84 NY2d 749, 753 *cert den* 516 US 905. The officer had an eyewitness report that three black males had robbed a warehouse and driven away in a light green, four-door, midsize, 1993 or 1994 Ford. A license plate number and a description of the perpetrators' clothing were included in the report. About 35 minutes later, the officer saw the defendant's vehicle, a light green Chevrolet Corsica, within a mile of the warehouse, driving toward the scene. Seeing that the car was of the same general size, shape, and color as the reported vehicle and was occupied by three black men, he stopped it without checking the license number. As to clothing, he observed only that at least one man was wearing a baseball cap, which had not been included in the report description of the robbers. The sparse and general information acted upon by the officer did not support a reasonable suspicion that the defendant and his companions were the robbers. *See People v Brown*, 215 AD2d 333. Judgment reversed, motion to suppress granted, indictment dismissed. (Supreme Ct, Monroe Co [Affronti, J])

Driving While Intoxicated(Breathalyzer) DWI; 130(3)

***People v Dailey*, No. KA 99-355, 4th Dept, 11/12/99**

Holding: A breathalyzer test administered to the defendant showed a .15% blood alcohol content. The defense motion to exclude this result because there was no showing that the proper chemical compound had been used in the test was properly denied. The certificate accompanying a record

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showing that the breathalyzer ampoule control contained the catalyst "silver" said that the record was made in the regular course of business of the state police crime laboratory, where making such records is the regular course of business. The record was admissible as a business record. All other circumstances surrounding the record's making affected its weight, but not its admissibility. CPLR 4518(a). The defendant relied on the periodic chart, a table of atomic weights, a legal periodical article, and two decisions saying that identification of the breathalyzer catalyst as "silver" rather than "silver nitrate" renders the record inadmissible. *See People v Iwasiw*, 167 Misc2d 1013. Although these submissions raised issues about the reliability of the record of analysis, they did not negate its admissibility. *Cf People v Uruburu*, 169 AD2d 20, 22 *lv den* 78 NY2d 1082.

The prosecution satisfied other challenged elements of their foundational burden, presenting evidence that the breathalyzer was properly and timely calibrated and properly functioning when the instant test was administered. *See People v Donaldson*, 36 AD2d 37, 41. The operator's certification by the Board of Health was presumptive evidence that the test was properly given. *See* Vehicle and Traffic Law 1194(4)(c). Judgment affirmed. (County Ct, Yates Co [Falvey, J])

News Media (General) **NEW; 269(10)**

Trial (Prejudicial Publicity) (Public Trial) **TRI; 375(40) (50)**

Matter of The Herald Company v Burke,
No. OP 99-712, 4th Dept, 11/12/99

Holding: The petitioner sought in an original CPLR article 78 proceeding access to the transcripts of "proceedings" held in a criminal case, and a declaration of its right to not be excluded from further trial court proceedings. The presumption of openness applies to various pretrial proceedings. *See eg Press-Enter. Co. v Superior Ct. of California, Riverside County*, 464 US 501 (1984). It must be determined whether the past "proceedings" were the types that have historically been open, and whether public access would play a significant positive role in the functioning of the processes at issue. Courts may hold *in camera* conferences if constitutional values can be protected by later release of a transcript. *United States v Valenti*, 987 F2d 708, 712. As to the date on which a possible plea disposition was discussed along with matters unrelated to any motions, the petitioner is entitled to the transcript only up to the point at which the defendant's application to accept a plea offer was denied; informal discussions have not historically been open. As to the date on which defense motions to strike the death notice and remove the prosecutor were considered, the defendant was questioned in the absence of the prosecutor about his awareness of a plea offer, and a juror's vacation schedule was discussed resulting in a hardship elimination, the petitioner is entitled to the portion of the transcript regarding legal argument on the motions. The questioning of the defendant and the striking of the juror were not in the nature of proceedings. As to arguments on a motion to quash a subpoena, the petitioner is entitled to an unredacted transcript. Future decisions about courtroom closure will depend on the nature of the proceedings and the possible prejudice to the defendant of public and press attendance. Petition granted in part. (County Ct, Onondaga Co [Burke, J]) ⚖

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