

CASES OF INTEREST
March 2011

People v. Bryan Colon
Appellate Division, Fourth Department
2011 WL 455286
February 10, 2011

When he learned of the defendant's parole violations, a senior parole officer instructed that defendant be taken into custody when he arrived at the parole office. The defendant's parole officer did arrest and shackle the defendant upon his arrival, and then the senior parole officer began his paperwork. However, by the time the paperwork was finished, the parolee had escaped.

In 2007 the Court of Appeals held in *People v. Bratton* (8 NY3d 637) that a parole officer is required to obtain a **warrant** before arresting a parolee for an alleged parole violation, and that there is no statutory exception to that warrant requirement (unless the parolee commits an offense in the officer's presence).

Because no such warrant existed here it could not be said that the defendant had escaped from custody, since custody requires an **authorized arrest** (PL §205.00 (2)). Therefore, the Court found the evidence legally insufficient to support the conviction for escape in the first degree, and reversed the conviction.

People v. Pierre Cosby
Appellate Division, Fourth Department
2011 WL 458084
February 10, 2011

This case is notable not because this Court affirmed the conviction below, but because in the process of doing so the justices concluded that part of trial counsel's duty of effective assistance is the **affirmative duty to advise a defendant of the right to testify on his or her own behalf at trial**, and that that decision rests with the defendant alone. This is true even if, in the particular case on trial, doing so would be against the advice of the attorney.

[**N.B.** While we're on the subject of counsel's duty to the client... The US District Court of WNY recently granted a *habeas* petition based on the failure of defense counsel (in an Erie County prosecution) to give adequate advice to his client as to whether he recommended that the client accept the plea. The Court found in **Young v. Zon** (2011 WL 691631), that to the extent that the defense attorney failed to offer any recommendation about the pros and cons of accepting the plea, he was ineffective. It is required, at a minimum, that counsel communicate to the defendant the terms of the plea offer, and should usually inform the defendant of the strengths and weaknesses of the

case against him, as well as the alternative sentences to which he would most likely be exposed. This, of course, works in conjunction with the affirmative duty to avoid exerting undue influence on the accused's decision and to ensure that the decision whether or not to plead is ultimately made by the defendant. The true failing here was that the attorney failed to offer any recommendation. As the Court quoted: "While representation may be an art...a blank canvass [sic] does not constitute a picture, much less art." Don't let this happen to you.]

People v. Ollman Lopez
Court of Appeals
2011 WL 588457
February 22, 2011

In this case the defendant was in custody in Pennsylvania for a case that arose there and on which he had counsel. This Court found that when the defendant was questioned by a New York detective about a different matter, without obtaining a waiver in the presence of his counsel, New York's indelible right to counsel was violated.

The Court concluded that since the defendant was in jail on bail, it was reasonable to suspect that an attorney had entered the case. Therefore, the officer doing the questioning was **required to make a reasonable inquiry concerning the defendant's representational status**, and would be charged with the knowledge that such an inquiry would have revealed.

It is good to know that the *Rogers* Rule still exists: once a defendant is in custody on a matter and is represented or has requested counsel **on that matter**, custodial interrogation **about any subject** must cease. However, the Court made clear that this decision was premised on the fact that the right to counsel was violated on the particular matter for which the defendant was in custody. Had he been released on the Pennsylvania matter, even if later arrested on a NY warrant, he **could** have been questioned on any unrelated matter on which he did not have counsel.

People v. Isidore Farkas
Court of Appeals
2011 WL 588475
February 22, 2011

This is a somewhat odd **speedy trial** case in which the defendant was originally charged with a number of misdemeanors. More than a year later he was indicted for additional charges arising out of that incident. The Court held both that 1) once the action has been commenced, it includes the filing of all further accusatory instruments directly derived from the original one (directly derived meaning that the indictment can be traced to or originates from the prior accusatory instrument); and 2) that all excludable periods pertaining to the original accusatory instrument, would apply to the later charges as well.