Legislative Report
by Andy Kossover, Esq.

Forfeiting The Constitution
by Richard D. Willstatter and
Steven L. Kessler

People V. Deyoung: Lessons In The Scope Of Judicial Diversion Programs and Effective Defense Lawyeri
by Alan Rosenthal and Patricia Warth, Esq.

Handling Rat Testimony IV
by Ray Kelly, Esq. and
Donald G. Rehkopf, Jr., Esq.

Unequal Justice: Distinctions Between Federal & State Practice
by Jay Goldberg, Esq.

Book Review: The Central Park Five: A Chronicle of a City Wilding
reviewed by Richard J. Barbuto, Esq.

Book Review: Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge
reviewed by John S. Wallenstein, Esq.

THE BRADY PUNCH: Suppressed Evidence and Preserving the Integrity of the Criminal Justice System – A View from the Bench
by Hon. Frank J. Labuda and Felicia S. Raphael, Esq., Page 16
Message from the President

Discovery reform is a priority of this Association. NYSACDL members made hundreds of calls and emails to Legislators in support of discovery reform earlier this year. The Assembly passed A.8080 which is at least a first step. That bill permits judges to order prosecutors to turn over evidence even if they do not intend to offer it on their direct case. We are committed to assuring that New York becomes a leader in assuring that no more people are wrongfully convicted of crimes. We invite the prosecution bar to join us in that effort.

On July 30, 2012, the New York Law Journal published an article in which New York County District Attorney Cyrus Vance criticized NYSACDL Past President Marvin Schechter. Marvin is currently Chair of the New York State Bar Association’s Criminal Justice Section which, unlike our Association, has prosecutors, defense lawyers and judges as members. Mr. Vance and his immediate predecessor, Westchester County D.A. Janet DiFiore, publicly complained to State Bar president Seymour James about Marvin Schechter’s personal comments in his “Message from the Chair” published in the Summer 2012 New York Criminal Law Newsletter. Mr. Schechter wrote that “Assistant district attorneys do not emerge from law school with a genetic disposition to hiding Brady material. Instead this is something which is learned and taught.” Mr. Vance and Ms. DiFiore apparently took great offense at the notion that District Attorneys would even consider teaching their Assistants to withhold Brady information.

Of course, Mr. Schechter obviously meant that District Attorneys “teach” this by creating an atmosphere in which winning (obtaining convictions) is rewarded and losing (acquittals) is frowned upon and in which prosecutors who violate Brady go unpunished and their misdeeds are strongly defended in the courts. Significantly, Mr. Vance pointed to a handbook in which prosecutors are urged to comply with Brady by disclosing “material and exculpatory” evidence. But any criminal law practitioner knows that is simply not the disclosure standard. Criminal defense lawyers know, as would anyone who bothers to look, that our Constitution requires the government to deliver to the defendant any “favorable information,” not merely information that is “exculpatory.” One can readily determine what is favorable to a defendant but whether information is exculpatory may be debatable. Moreover, the issue of materiality only arises in the context of an appeal from a conviction. Thus, a conviction can be reversed only if an appellate court finds the Brady violation was “material” or made a real difference. The underlying problem is that prosecutors can violate the constitutional command to disclose favorable information but risk reversal only if an appellate court finds their failure to disclose that information was material. And it is beyond dispute that prosecutors routinely and vigorously defend Brady challenges on this basis.

What message is delivered to line Assistants when their offices defend Brady violations in this manner? What message is sent when no sanctions are
imposed by the US Attorney or the District Attorney upon the violators? What is learned by the line assistants when a record of convictions is rewarded but when prosecutors who lose cases are blamed? The obvious lesson is that it is best to win and that only Brady violations so egregious as to warrant an appellate reversal should be avoided. This is the atmosphere to which Mr. Schechter referred and which must change if wrongful convictions are to be avoided.

NYSACDL’s letter to the editor of the New York Law Journal on this subject, “D.A. Policies Fail to Protect Rights,” was published on July 31, 2012 followed by letters from Past Presidents Daniel N. Arshack and Lawrence S. Goldman. As expected, letters upbraiding the defense bar were submitted by Brooklyn D.A. Charles Hynes, Nassau D.A. Kathleen Rice and Bronx D.A. Robert Johnson. Instead of taking the high road by recommitting themselves to abiding by the dictates of Brady, Giglio, Vilardi and their progeny, the elected prosecutors of this State have decided, despite case after case of Brady violations, to deny the very existence of a Brady problem.

Indeed, Erie County DA Frank A. Sedita, III wrote an article published in the Buffalo News on August 25, 2012 asserting that the “real” problem in this country is wrong acquittals, not wrongful convictions. (“Wrongful acquittals are far more common than wrongful convictions” August 25, 2012) Good responsive letters were printed by Robert D. Lonski, administrator of the Erie County Bar Association Assigned Counsel Program and Stephen Saloom, Policy Director of the Innocence Project. Mr. Sedita’s article demonstrates the wrong-headedness of District Attorneys who are all too ready to blame juries for prosecutors’ failures of proof and to criticize judges for reversing convictions when prosecutors fail to follow the rules. To hear prosecutors, like Mr. Sedita, proclaim their infallibility and assert that they “know” that acquitted defendants are guilty is disconcerting, to say the least.

Fortunately, NYSACDL and our allies are finding support among the public and the state legislature. We have been working to publicize the need for discovery reform in the media. On June 9, 2012, the Journal News (a Westchester/Rockland newspaper) and lohud.com published our Op-Ed entitled “Proposed Laws Will Prevent Wrongful Convictions.” On August 15, 2012, the Times Herald Record (a newspaper in the Hudson Valley and Catskills) published an article entitled “Sharing all evidence crucial to defendant” by Heather Yankin quoting NYSACDL’s President and President-elect, Ben Ostrer.

Although we believe that the prosecution bar should join us in our call for more transparency, open discovery, and a commitment to full disclosure of all favorable evidence because those efforts will assure that we avoid more wrongful convictions, we are realists and therefore expect resistance from our adversaries. But even they know that the tide of change is turning every time an innocent man or woman is exonerated. Each of you should take the time to buttonhole your state legislators and Members of Congress to push for discovery reform.

Criminal defense lawyers protect the Constitution. We assure that the rule of law is respected and that a measure of balance is brought to criminal proceeding. We are a voice for the wrongfully accused and for justice for those who have committed crimes. Criminal defense lawyers have the experience and knowledge to bring these issues to the public square. NYSACDL will always support you in that effort.

Richard D. Willstatter, NYSACDL President

“
I would rather have a mind opened by wonder than one closed by belief.”

Gerry Spence
Editors’ Page

We are pleased to present the current issue of ATTICUS. We hope you will enjoy
the content and the contributions of our new Book Review Editor Dick Barbuto
as well as first time contributors Hon. Frank J. LaBuda and Felica S. Raphael
who offer a unique perspective on Brady compliance and violations. Their view
of Brady from the perspective of the bench concerning this very hot button issue
is a welcome contribution to our publication. Prior to his judicial service Judge
LaBuda spent over 20 years in private practice and served as Chief Assistant
District Attorney of Sullivan County.

ATTICUS also thanks another first time contributor and long time NYSACDL
member Jay Goldberg for his article. Jay is one of the deans of the New York
defense bar. We also note the valued and regular contributions of Richard
Willstatter, Steven Kessler, Alan Rosenthal, Patricia Warth, Ray Kelly and Don
Rehkopf Jr. We hope you enjoy the Fall issue and again invite members to submit
their contributions.

Please be sure to circle January 24, 2013 on your calendar, when we will again
assemble at the Prince George Ballroom on East 27th Street in Manhattan for our
annual dinner. We will be honoring Judge Jeffrey G. Berry, an innovative judge
who has served as County Court and Acting Supreme Court Justice in the Hudson
Valley since 1991, with our Justice William Brennan Award as Outstanding Jurist.
We will also be honoring Susan Necheles, Esq. as the recipient of the
Hon. Thurgood Marshall Outstanding Practitioner Award. Our Justice Through
the Arts Award will be presented to Emmy Award Winning Filmmaker Ken Burns,
his daughter and son-in-law Sarah Burns and David McMahon for their work
on the riveting “Central Park Five” documentary which brings to the masses the
reality of false confessions. This promises to be one of the best attended Dinners
in memory so members are encouraged to promptly respond upon receiving your
invitations.

Thank you for your continued support of ATTICUS,
Co-Editors

John S. Wallenstein
jswallensteinEsq@aol.com

Ben Ostrer
ostrerben@aol.com

Richard J. Barbuto
Book Review Editor
rbarbuto1@hotmail.com

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Events

NYSACDL 2012
Board Meetings

December 1, 2012
New York City

Kindly check www.nysacdl.org
for dates and locations of future
Board Meetings.

It is a practice to schedule board
meetings throughout the state.

Continuing
Legal Education

WEAPONS FOR THE FIREFIGHT
CLE SEMINAR

December 8, 2012
Manhattan

Visit our website www.nysacdl.org
for registration information or contact:
Margaret Alverson, Executive Director
malverson@nysacdl.org
212-532-4434

Printed and published in New York.
Legislative Committee Report

This Report is expected to be published on or about Election Day. Until such time the State Legislature incumbents learn their fate, the Legislative Committee’s activity has been limited to preparation for the post-election sessions of the Legislature. If you are reading this prior to Election Day, the Committee encourages you to attend candidates’ forums and ask questions of the candidates regarding criminal justice issues of importance to our members and clients.

We are currently preparing position papers on our legislative priorities. As I’ve reported previously, the centerpiece of our efforts remains badly needed Discovery Reform. A confluence of efforts by numerous committees and organizations are educating senators and assembly members on the need for revising Article 240 of the Criminal Procedure Law. Several bills have been introduced and more are anticipated. It is significant to note that at least three of the entities focusing on discovery reform include participation by not only the criminal defense bar, but also prosecutors and judges. These include Chief Judge Jonathan Lippman’s New York State Task Force on Wrongful Convictions, the Criminal Justice Section of the New York State Bar Association, and the New York State Office of Court Administration’s Subcommittee on Discovery Reform.

In addition to Discovery Reform, we continue to pursue a meaningful sealing statute, the raising of the age of criminal responsibility and Youthful Offender treatment. We are also wary of a renewed effort to revisit an initiative to provide for mandatory forfeiture at criminal sentencing. This proposal was successfully defeated during the last session of the legislature. However, the desire by prosecutors for additional revenue streams may revive this ill-conceived plan.

Finally, we are giving consideration to organizing a “lobby day” in Albany at which we will call upon members and others to spend a day in Albany to visit with key legislators to drum up support for our legislative priorities.

I wish to extend a big Thank You to outgoing President Richard Willstatter and our lobbyist Sandra Rivera of Manatt, Phelps & Phillips, LLP for their tireless and excellent work on behalf of this Committee, our clients, and our membership.

Please remember that by remaining a member of NYSACDL, you are an important part of this pursuit of justice and well-reasoned legislation.
In the News

October 18th, 2012
Appellant Attorney Galluzzo Gains Reversal in Western Express Case
NYSACDL Member Matt Galluzzo was one of the appellants’ attorneys in People v. Western Express, et al, in which the Court of Appeals reversed the Appellate Division 1st Dept., which had overturned the Supreme Court’s dismissal of enterprise corruption charges (Penal Law §460.00 et.seq.) Chief Judge Lippmann, writing for the Court of Appeals, observed that the Enterprise Corruption statute as applied to the money laundering allegedly undertaken by the defendants was [not an]” enduring, structurally distinct symbiotically related criminal entity with which appellants’ were purposefully associated”. http://www.nycourts.gov/ctapps/Decisions/2012/Oct12/156opn12.pdf

October 10th, 2012

Birman Obtains Reversal in People v. Urbina
NYSACDL Member Carl David Birman obtained a reversal in People v Urbina 2012 WL 4801016 on October 10, 2012, in the Appellate Division, Second Judicial Department, which reversed the conviction in an attempted rape case for failing to charge the jury as to at least one lesser count of a multi-count indictment. The four-judge panel relying on People v. Leon, 7 N.Y. 3d 109, holding that the “refusal to submit that noninclusory concurrent count was an improvident exercise of discretion. The court’s mistake was compounded when the prosecutor asserted in her summation that the court’s reason for submitting only one count was “because” the defendant was guilty of that count, which strongly implied that the court also believed that the defendant was guilty of that count. The improper implication was only strengthened when the court overruled defense counsel’s objection.” People v. Urbina, 2010-11815, 2012 WL 4801016 (N.Y. App. Div. Oct. 10, 2012)

October 2nd, 2012
Kuby Wins Release and 7 Figure Payment for Wrongful Incarceration
The tenacious work of NYSACDL Member Ron Kuby coupled with what he described as a thoughtful judge and a prosecutor willing to consider the possibility that his office got it wrong, resulted in the release of Michael Clancy from prison in 2008 and now a seven figure payment for his wrongful incarceration. Mr. Clancy who is now 38, was in prison for 10 years for a murder he says he did not commit and for which another man may now be prosecuted. His conviction was vacated without the benefit of DNA or other forensic evidence. Kuby, was quoted as saying it was the open-mindedness of Bronx Supreme Court Justice Denis Boyle and Bronx Assistant District Attorney Gary Weil that brought Clancy’s nightmare to an end.

Clancy was charged with second-degree murder charges arising out of a homicide which took place at a Bronx Domino’s location. A drug dealer named David Prieto, who was identified as having been present at Domino’s, and was then facing capital murder charges in federal court arising during narcotics racketeering. During the course of Prieto’s cooperation with federal prosecutors he disclosed that it was not Clancy, but a man named “Drew” who was responsible for the Domino’s homicide.

In turned out that concern about Prieto’s usefulness as a federal witness would be compromised if he testified in the state action on behalf of Clancy. Prieto’s attorney advised him to not testify in the Clancy case until the federal matter was concluded.

Clancy was of second-degree murder convicted on eyewitness testimony but without the benefit of Prieto’s testimony. He was sentenced by Judge Boyle to 25-years-to-life. A decade later, Prieto came forward leading to the release of Mr. Clancy.

September 24th, 2012
Strategies for Representing Juveniles in Adult Court
The Supreme Court has issued two major decisions that will fundamentally alter how criminal defense lawyers approach serious juvenile cases prosecuted in adult criminal courts. In Graham, the Supreme Court barred mandatory life without parole sentences for juvenile offenders in non-homicide cases. This past term, in Miller, the Court extended the bar on mandatory life without parole sentences to juveniles in homicide cases. These decisions will not only entitle some defendants to re-sentencing, but will also reshape how lawyers approach cases involving juvenile offenders. The Supreme Court has made it clear that based upon all available scientific evidence, juveniles are developmentally different from adults and should be treated differently for that reason.

To provide support and assistance for those attorneys handling juvenile re-sentencings, or representing a juvenile in new cases, the National Association of Criminal Defense Lawyers (NACDL), of which NYSACDL is an affiliate, is collaborating with a number of groups to provide a series of free training programs. The programs are free, and membership is not required. In order to access the live broadcast, and participate in the discussion, registration is required.

The first two programs are now available for download

Lessons Learned from Graham v. Florida: http://www.ustream.tv/recorded/25400255
Re-Sentencing Juveniles Post Miller: http://www.ustream.tv/recorded/25402189
Constitutional Rights, Not “Mere Technicalities” The fundamental Constitutional rights to due process, proof beyond a reasonable doubt, and the presumption of innocence are not “mere technicalities” designed to obfuscate guilt. Nor are the discovery reforms currently before the New York state legislature a set of procedural hurdles designed to make law enforcement’s job more difficult. As NYSACDL President Richard Willstatter writes “[t]he discovery reforms sought in the state legislature by our Association, by the Innocence Project, by the New York Civil Liberties Union and by the New York City Legal Aid Society, among others, would provide fairer and earlier access to the evidence against the accused and would require the prosecution to disclose information which is helpful to the accused. The failure of prosecutors to disclose information which is favorable to the accused is a violation of the constitution and yet these prosecutorial violations of law often result in no penalty whatever. When innocent people are convicted, the guilty are free to commit more crimes. Wrongful convictions are bad for everyone.” (Willstatter, Response to Editorial of Frank A. Sedita, III dated August 25, 2012). NYSACDL disagrees with the recent editorial by Frank Sedita, III in the Buffalo News that wrongful acquittals outpace wrongful convictions. (Wrongful Acquittals are Far More Common than Wrongful Convictions, BuffaloNews.Com, August 26, 2012).

August 20th, 2012
Olean NY Not Guilty Verdict in a two count Assault 2nd trial was obtained by Mark Williams Public Defender in Cattaraugus County Court. Williams expressed special thanks to investigator Mark A. Cunningham who quickly jumped into action when the defendant was arrested last September for breaking the jaw in two places as well as the right ocular floor of a man who had jumped him outside a bar. The defendant reportedly hit his attacker only three times and each time in response to his attacker coming at him, he was charged with the assault 2nd. The alleged victim claimed brass knuckles, which were never found and seemed imaginary but a way for the “victim” to save face for getting his butt kicked by the guy he was trying to beat up. The police were exposed for a faulty investigation.

Forensic psychological evaluations and expert witness testimony in criminal law
Stephen Reich, Ph.D., J.D., Director, Psychologist and Lawyer

The right experts make a real difference

August 3rd, 2012
Prosecutors’ Stance on Brady Obligations Generates Ongoing Dialogue
NYSACDL continues to take issue with local District Attorneys’ responses to NYSBA Criminal Justice Section Chair Marvin Schecter’s denouncement of the failure by prosecutors to recognize and adhere to their Constitutional obligation to disclose favorable information to the defense. Lawrence Goldman, New York practitioner and NYSACDL Past President writes to the Editor of the New York Law Journal “the vast majority of [Brady] violations are due to the prosecutors’ lack of understanding of and inattention to the Brady obligations imposed on them, and
not on deliberate, willful violations of those duties. Thus, I do not believe that the District Attorneys are actually, in the words of their letter, “teaching their assistants to violate the Constitution.” However, it is equally clear to me that District Attorneys are not placing much emphasis on “teaching their assistants to follow the Constitution” with respect to their Brady obligations either. ‘More Training for Prosecutors’, NYLJ, August 3, 2012.

NYSACDL Past President Daniel Arshack echoes this sentiment in a Letter to the Editor “What sanction did [Bronx D.A. Robert Johnson’s] office level on the assistant whose ‘inexcusable’ and ‘deplorable’ misconduct resulted in a mistrial** and a variety of additional disclosures ordered by the court? None. That’s the most important training that prosecutors get. This just supports the fact that “they just don’t get it.” ‘Prosecutor’s ‘Don’t Get It’, NYLJ, August 3, 2012.

NYSACDL President Richard Willstatter writes in a letter to the Editor of the New York Law Journal that “[p]rosecutors all too frequently violate defendants’ right to receive favorable information.” (D.A.s Policies Fail to Protect Rights, NYLJ, July 31, 2012). Mr. Willstatter writes in support of New York State Bar Criminal Justice Section Chair Marvin Schechter who, in his Message from the Chair, Summer 2012, laments the systemic failure of prosecution offices to level the playing field by disclosing favorable information to the defense. Mr. Schecter’s Message, in turn, prompted an outcry by District Attorneys Association of New York which took issue with Mr. Schecter’s observation that concealing favorable material from the defense is a tactic which prosecutors are taught. (D.A.s Challenge Claim by Bar Section Head They Undermine ‘Brady’, by Joel Stashenko, NYLJ July 30, 2012). Noting that Brady violations are a prime contributor to wrongful convictions, NYSACDL supports broad discovery reforms. As NYSACDL President Willstatter writes:

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Prosecutors’ Failure to Adhere to Brady’s Requirements an Ongoing Problem

NYSACDL President Richard Willstatter writes in a letter to the Editor of the New York Law Journal that “[p]rosecutors all too frequently violate defendants’ right to receive favorable information.” (D.A.s Policies Fail to Protect Rights, NYLJ, July 31, 2012). Mr. Willstatter writes in support of New York State Bar Criminal Justice Section Chair Marvin Schechter who, in his Message from the Chair, Summer 2012, laments the systemic failure of prosecution offices to level the playing field by disclosing favorable information to the defense. Mr. Schecter’s Message, in turn, prompted an outcry by District Attorneys Association of New York which took issue with Mr. Schecter’s observation that concealing favorable material from the defense is a tactic which prosecutors are taught. (D.A.s Challenge Claim by Bar Section Head They Undermine ‘Brady’, by Joel Stashenko, NYLJ July 30, 2012). Noting that Brady violations are a prime contributor to wrongful convictions, NYSACDL supports broad discovery reforms. As NYSACDL President Willstatter writes:
“As the D.A.s should know, the state bar’s Task Force on Wrongful Convictions found that Brady violations are a continuing problem, denying defendants a fair opportunity to organize and present a defense. That is why the state bar endorsed A.4879/S.3276 and one major reason why broad discovery reform is required and is sought by our association, the New York Civil Liberties Union, the Innocence Project, the Legal Aid Society, and the National Association of Criminal Defense Lawyers, among others. Predictably, these needed reforms are resisted by the district attorneys association.”

NYSACDL Annual Dinner and Awards Ceremony to Honor Burns’ Central Park Five
January 24, 2013 - NYSACDL Annual Dinner and Awards Ceremony will again be held at the Prince George Ballroom, Manhattan. NYSACDL will install Benjamin Ostrer of Chester, New York as NYSACDL President 2013 and will honor Ken Burns, Sarah Burns, and David McMahon for their documentary, The Central Park Five, with the Justice Through the Arts Award.

We welcome information from all members concerning verdicts and results.

Email submissions to atticus@nysacdl.com or to any of the editors.

“Criminal defense lawyers are like cornerbacks, even the best get burned.”

Michael Connelly, “The Fifth Witness”
The Governor’s proposed forfeiture bill will be recognized by forfeiture practitioners as a hodgepodge of clauses from selected state and federal rules and statutes. While many have been cribbed from Rule 32.2 of the Federal Rules of Criminal Procedure, other provisions are taken from the federal civil forfeiture statute in 18 U.S.C. § 983, while still others are derived from the criminal forfeiture provisions of 21 U.S.C. § 853. Presumably, the thinking by many of the statute’s proponents, who themselves were federal prosecutors before their current positions as state prosecutors, was that since federal forfeiture law has been deemed constitutional, provisions borrowed from those statutes must necessarily meet constitutional muster as well. While the bill, and its amendments, is clearly a rush job, state prosecutors apparently hope that they can partake in the presumably thoughtful process that led to the enactment and promulgation of the federal forfeiture statutes and rules by stealing their work product, without the need
for the “usual” vetting process that accompanies such an important statute.

Unfortunately, there is no organized intelligence behind the adoption of the federal scheme. Provisions are lifted randomly and out of context, while “balancing provisions” – those which have led courts to uphold the constitutionality of the statutes as a whole – are omitted. Parroting some of the language of due process does not satisfy the Constitution. Among their host of flaws, the proposed amendments trample on the rights of innocent third parties, rights that have been, until now, protected by New York’s uniquely crafted forfeiture statutes, properly forged through the legislative process. A few of the proposal’s problems are addressed herein.

Insufficient Protection for Innocent Third Parties: The Governor’s proposal provides inadequate protections for innocent third parties. It was the protection of the rights of innocent property owners that formed the foundation for the Legislature in drafting CPLR Article 13-A, New York’s primary civil forfeiture law. In drafting that statute, the Legislature created the category of “non-criminal defendant”, unique to New York among all jurisdictions in the country. The purpose of this creation was to ensure that the prosecution’s burden of proof is properly calibrated to the alleged degree of culpability of the defendant and the type of property involved.

An equally egregious abridgement of the rights of innocent third parties is hidden in what is omitted, rather than contained, in proposed section 425.15[1]. While that section mimics federal Rule 32.2(b)(2) in requiring the court to promptly enter a forfeiture order at the close of the forfeiture phase of the case, it fails to incorporate the related notice provisions of subdivision (b)(6) of the same rule, which require the government to “publish notice of the [forfeiture] order and send notice to any person who reasonably appears to be a potential claimant” to the forfeited property.

Proposed section 425.15[2], also patterned on federal law, falls short when it departs from the script. Unlike Rule 32.2, this section provides that “[i]f no third party timely files a claim . . . the forfeiture order becomes final as to all parties.” That provision – and what it omits – is a significant change for the worse. Federal Rule 32.2(c)(2) provides that if no third party files a timely petition, the forfeiture order becomes final, but only “if the court finds that the defendant . . . had an interest in the property . . ..” Under federal law, no property can be criminal forfeited unless the court first finds that the defendant had an interest in the property. Under the proposed state law, there is no such requirement. This is a huge problem.

Even more problematic is the bill’s omission of one of the two main bases for third parties to protect their property from criminal forfeiture under federal law. 21 U.S.C. § 853(n) sets forth two ways in which a third party claimant can prevail over the government: either by establishing an interest in the property in issue that was superior to that of the criminal defendant at the time of the criminal activity, or by demonstrating that the claimant received the property as a bona fide purchaser for value. The proposed state statute preserves only the bona fide purchaser for value standard, and purports to substitute the “superior interest” test with a virtual verbatim cribbing of the “innocent owner” defense from federal civil forfeiture law, codified at 18 U.S.C. § 983(d). This is a significant change for the worse because, under the superior interest

“When a prosecutor walks into court and says we’ve been investigating this case for two and a half years, grand jury investigation for nine months, and we have 51 witnesses, you know what that means -- they have a circumstantial evidence case, and I suggest it’s a weak circumstantial evidence case.”

Gerry Shargel
standard, the claimant does not have to prove innocent ownership, a concept which, by the way, is akin to proving a negative and is therefore extraordinarily difficult. Clearly, if the claimant was the owner of the property in issue rather than the defendant at the time of the defendant’s criminal activity, there should be no basis for forfeiting the property from the defendant and the owner’s state of mind should be irrelevant. While there should be no objection to adding further defenses to forfeiture for innocent third parties, depriving them of an existing defense constitutes an inexcusable contraction of third party rights. This problem is exacerbated by the absence of any corresponding state requirement that the property first be demonstrated to be “property of the defendant” before it is forfeited, even if no party makes a claim. Further, the innocent owner defense is in most cases of very limited applicability, and the bill’s attempt to graft it onto criminal forfeiture law as part of a legislative rush to balance the budget is a high-risk, low-reward proposition.

Perhaps the bill’s most insidious contraction of the rights of innocent property owners is its purported adoption of the federal definition of “owner” to exclude those “with only a general unsecured interest in, or claim against, the property or estate of another...” While this language does not sound unreasonable on its surface, in fact it constitutes a huge barrier to the assertion of valid property claims in federal forfeiture proceedings. The government has sought to exclude a vast number of legitimate property interests under this provision, arguing that everyone from account holders to lenders to check cashing businesses awaiting delivery of sealed bags of cash from the bank are barred from seeking the return of their property. The litigation of these legitimate claims often stalls at the earliest stages as the government files canned motions to dismiss for purported lack of standing, increasing litigating costs and inhibiting the protection of valid third party property interests.

Less Protection for the Defendant: Further, the proposed statute provides insufficient constitutional protections for the criminal defendant. For instance, proposed CPL § 425.10[2] purports to provide the defendant an opportunity for a hearing to contest the prosecution’s forfeiture evidence against him. In the federal rule on which this section is based, the defendant is entitled to a hearing on all contested forfeiture with respect to all forfeiture-related issues. See Fed. R. Crim. P. 32.2(b)(1)(B). The proposed statute mimics the language of the federal rule but restricts the defendant’s right at the hearing to adduce evidence to contest only one issue – whether any of the evidence relied upon should be suppressed under the Fourth Amendment. This is a substantial retraction of a defendant’s rights. And no reason has been submitted for such a reduction.

Fewer Constitutional Protections for All: The proposed bill also omits provisions for “interests of justice” dismissals, and for vacating or modifying a forfeiture or provisional remedy on the ground that is disproportional to the gravity of the offense. Further, proposed section 425.35 explicitly overrides the crucial provision in Article 13-A permitting the release of restraining funds to pay the defendants living expenses, property expenses and/or attorney’s fees. See CPLR 1312[4]. The bill’s purported concession is that fees already paid prior to the commencement of forfeiture proceedings are exempt from forfeiture. Now, however, if the prosecutor secures ex parte an attachment of or restraining order against a defendant’s funds prior to the commencement of the prosecution, the

“Quote me as saying that that Imperial bastard will never set foot in Louisiana, and that when I call him a [SOB] I am not using profanity, but am referring to the circumstances of his birth.”

Huey Long on national Ku Klux Klan leader Dr. Hiram Evans’ pledge to campaign against Long for having an “un-American attitude toward] authority”
defendant will be prevented from using his assets to secure forfeiture counsel, criminal counsel or both. This would lead to the remarkable situation of a wealthy defendant, who is presumed innocent, receiving a court appointed attorney – paid for from taxpayer funds – because he did not pay an attorney before his assets are frozen.

The bill runs afoul of the due process protections articulated by the Supreme Court and the Second Circuit in United States v. James Daniel Good, 510 U.S. 43 (1993) and Krimstock v. Kelly, 306 E.3d 40 (2d Cir. 2002). The Second Circuit held in Krimstock that any party whose property is seized without a warrant and incident to an arrest is entitled to a prompt post-seizure hearing before a neutral magistrate at which the government must demonstrate probable cause for the seizure, probable cause for continued impoundment of the property pending trial, and that there are no less restrictive means available to ensure the property’s availability for potential forfeiture during the pendency of proceedings. If the government cannot establish all three factors at the hearing, the property must be released pending trial. Proposed CPL § 425.45, in conjunction with proposed Penal Law § 62.00[3](b) (i)-(ii), provides a huge loophole to this constitutional requirement, as it permits the seizure of property without a warrant “if there is probable cause to believe that the property is subject to forfeiture” – in the opinion of the arresting officer – after which the property can be held for at least 90 days before the government is required to seeking a court order authorizing continued retention of the property. This procedure fails to comport, at minimum, with the due process parameters established by the Second Circuit in Krimstock.

Senseless Provisions: The rush job of this proposed law has resulted in numerous provisions that make no sense. As but one example, section 425.30[2] purports to provide that “any rebuttable presumptions shall be treated in the same manner as a forfeiture brought under [CPLR Article 13-A]”. Most of the rebuttable presumptions in Article 13-A, however, relate to civil forfeiture claims against non-criminal defendants – a category that, as noted earlier, does not exist in the proposed law.

Justifications for the Proposed Law: Further, and as the prosecutors most assuredly know, all of the reasons adduced for adopting the proposed statutes can easily be satisfied by New York’s existing laws.

Yet, the entire notion that criminal forfeiture should be a mandatory requirement in every sentencing is fundamentally ill-conceived. New York defendants are already required to pay restitution to make victims whole, to pay fines (which are discretionary), to pay a variety of costly surcharges including the so-called mandatory surcharge, the crime victim’s assistance fee, the DNA databank fee, the sex offender registration fee, restitution collection fees, parole fees and probation supervision fees, not to mention a host of civil penalties such as driver responsibility assessments. The new criminal forfeiture proposal will double the criminal financial penalties for defendants who must make restitution. Many of these defendants will be unable to pay the required restitution even over time and imposing an additional forfeiture judgment against them will result in a crushing blow to them and their families. If we want to avoid adding to an underclass of poor people who will never emerge from such debts, criminal forfeiture should not be expanded. Further, if the proposal is enacted, there would and should be litigation over its applicability to particular defendants and their assets and third-party claims as well. Public defenders – whose resources are being stretched thinner every day – would need to represent defendants in such cases and judges – who are already busy managing criminal calendars – would need to hold hearings in such cases. Those litigation costs would be born by New York counties and by the judiciary’s budget. So, any gains purportedly enuring to prosecutors would be more than offset by losses to the indigent defense and judicial budgets, both of which come from the same “pocket” that would benefit from the alleged financial gains for the DAs.

The claim that prosecutors need to be ‘incentivized’ to litigate forfeiture cases themselves instead of handing them off to federal authorities is, at best, disingenuous. In such “adoption” forfeitures, state law enforcement may retain as much as 80 percent of the property recovered. In other words, the federal authorities do the work and state law enforcement gets most of the money. In addition, the concept of prosecutors needing financial “incentives” to do their jobs is inherently problematic. Even assuming the truth of the questionable proposition that many state prosecutors will only litigate forfeiture cases if their statutes provide inadequate constitutional protections for innocent property owners, that is not a legitimate basis for throwing out an existing statutory scheme that has passed constitutional muster. Criminal proceedings have extensive constitutional safeguards. Yet, prosecutors have no choice but to litigate them within the existing constitutional framework. There is no basis for making an exception for forfeiture cases. Their job is to seek justice within the bounds of the law, not to destroy those boundaries because, otherwise, they will not feel sufficiently “incentivized” to do their jobs.
In New York we already have at least 14 forfeiture statutes on the books. The Governor appears to seek a new law as a way of balancing the budget on the backs of innocent people. Given the real numbers involved in most Criminal Court cases, how much will these misdemeanor cases really financially benefit prosecutors? Do these cases include enough money to warrant the effective repeal of Article 13-A and the enactment of two new laws? Certainly not those cases where the defendants are represented by public defenders, Legal Aid or appointed counsel. And, clearly, the next Bernard Madoff will not be prosecuted for a misdemeanor. So, if not, the purpose of these proposals is to require innocent individuals to spend time and money, retain attorneys and carry the burden of proof to prove that they were not involved in a crime.

Interesting, indeed, that CPLR Article 13-A – the very statute which this proposal would effectively repeal – was the product of years of work by the Legislature which, at the affirmative requests and encouragement of the state prosecutors, carefully crafted a statute which was not like the federal statutes and those of the other 49 states. New York’s law is constitutional, with protections built into it for defendants and innocent third parties alike, and brings multiple millions of dollars annually into the State’s coffers. This commendable approach protects people from unfair seizures of their property. Dismantling the constitutionally upheld statute that has been an example for forfeiture statutes around the country is not the way to balance the budget.

“\n\nThe ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy. The true neighbor will risk his position, his prestige and even his life for the welfare of others."

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BRADY VIOLATIONS:
Suppressing Evidence and Preserving the Integrity of the
Criminal Justice System — A View from the Bench
Yes, indeed it is the era of *Brady* violations in the oftentimes misunderstood world of criminal law. One need only look at the Second Circuit Court of Appeals very recent decision reversing the convictions of six federal defendants found guilty of conspiracy and related fraud. It mattered not that some of the material was inadmissible or tended to support the prosecution; nor did a defendant’s knowledge of a potential witness identity render suppressed *Brady* material unsuppressed. The court stated, The government’s failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or conclusively avoided its responsibilities under *Brady*....The two trials were unfairly skewed against the defendants, who were forced to mount their defenses without the benefit of material exculpatory and impeaching sworn testimony.

The most misunderstood by prosecutors violating *Brady* is that malice aforethought, which is almost never at issue is a non-issue. Whether a violation is intentional or inadvertent is irrelevant. In New York, while a prosecutor does not have an obligation to investigate a case to obtain exculpatory or impeaching evidence, the Court of Appeals has held that an individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.

While many cases deal with *Brady* violations on appeal, how does it all shake out in the average courtroom when defense counsel becomes aware of a violation during trial? After trial and a conviction, when the courtroom sparring is over and the media report the District Attorney has put another bad guy in a place no one really wants to think about, everyone can go to sleep at night and feel safe..., but how safe are they? How safe is anyone if prosecutors ignore or flagrantly violate one of the most basic and important tenets of criminal procedure law? How does it reflect on the judicial system when a trial court must dismiss a case or declare a mistrial, or when an appellate court must reverse and remand due to a technicality as most media pundits call it, when in reality yet another prosecutor has disregarded this almost 40-year-old common law obligation to fight fair and fight clean?

It was on a hot July afternoon in 2012 in Sullivan County Court that a defense attorney was surprised during cross-examination of a witness. The defendant had been indicted for Course of Sexual Conduct Against a Child in the Second

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3. *Id.*, at 46.
4. *Id.*, at 42-43.
5. *Id.*, at 46.
7. *People v. Wright*, 86 NY2d 591, 598 [1995], citations omitted; emphasis is added.
The court ordered stipulated discovery and defense counsel subsequently timely filed an omnibus motion, which included a request for Brady material; the People acknowledged their current and ongoing obligation to disclose, as they always do. Discovery and hearings proceeded accordingly and at all times, defense counsel believed he was in possession of all of the materials generated in the case by all police and social services agencies.

The trial began in July, 2012. The People’s witness, a very experienced and trained New York State Police sex crimes investigator was on the stand. She had already testified about her interrogation of the defendant, and during her testimony the jury viewed and heard lengthy controlled calls and an audio/video recording of the investigator’s interrogation of the defendant, which was in excess of two hours.

During cross-examination, however, defense counsel, as well as the District Attorney, learned for the first time there existed a report from a Sullivan County Sheriff’s deputy concerning his and a detective’s investigation of the case, which preceded the New York State Police and Sullivan County Child Protective Services (hereinafter CPS) hotline investigation of the sexual allegations. The defendant contended the report contained Brady material gathered by the deputy as well as a Sheriff’s Department detective. According to the investigator’s testimony, the information was obtained by the deputy during the July 6 and 12, 2011 telephone interviews of the defendant’s father-in-law and wife. Defense counsel immediately demanded production of the Sheriff’s deputy’s notes and reports in connection with those interviews, as well as the missing person report filed by the defendant with the Sullivan County Sheriff’s Office on July 6, 2011. Although defense counsel was aware his client contacted the police in July 2011 regarding his wife, he was unaware any written report existed prior to cross-examining the investigator regarding the interview of the wife and father-in-law, now in Kentucky; it was at that time defense counsel found out the Sullivan County Sheriff’s deputy spoke to the defendant’s wife on July 6, and again on July 12, 2011. The People maintained it was during those interviews that the deputy first learned of the wife’s criminal allegations and told her to file a complaint with social services, which resulted in the indictment. It was the People’s position that because Defendant made the missing person call, he knew a report probably existed, so the People had no obligation to disclose the report generated as a result of that call.

The People further contended that the police report of the telephone interviews with the defendant’s wife and father-in-law contained no Brady material, and in any event was not in the People’s possession prior to July 13, 2012; they nevertheless produced the report within an hour in the courtroom. Defense counsel then requested an adjournment so he could review the contents of the report, since, for the first time, both the District Attorney (purportedly) and defense counsel learned that a Sullivan County Sheriff’s deputy and detective spoke to the complainant. The Court granted the adjournment and also ordered

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9 PL §130.80(1)(b).

10 In early July of 2011, the defendant called the Sullivan County Sheriff’s Office to report his wife was missing. The defendant, who works in New York City, returned home from work on July 6, 2011 and found his wife and three children were gone. They failed to return after some time. Neither the defendant nor defense counsel were aware a written report had been generated from that call.
production of the police investigative notes.

In the interim, the Sullivan County District Attorney reviewed the entire file, and instructed the Assistant assigned to the case to obtain any notes in the CPS case file regarding the matter. The People had previously turned over the child abuse hotline report generated by a CPS caseworker in Kentucky as well as the Sullivan County CPS caseworker’s handwritten notes on the New York hotline report, but did not turn over any of the caseworker’s other notes or her final report of her investigation into the matter. They claimed they had no knowledge of any report from Sullivan County CPS.

After receiving an 11-page document from the Sullivan County CPS caseworker, the People faxed the document to defense counsel. Defense counsel presently submitted a motion for a mistrial based on alleged Brady violations due to the People’s failure to turn over, prior to trial, the Sheriff’s Department’s investigative report, which contained exculpatory and impeachment evidence, and the CPS report, which also contained exculpatory and impeachment evidence. Defense counsel pointed out that the caseworker, as part of the Sullivan County Domestic Violence Response Team (SCDVRT) conducted her interview on July 26, 2011, which was finally memorialized on November 1, 2011, nine months prior to the trial. It was the defendant’s position that the People had to have been aware of the CPS investigation, failed to disclose the November 1, 2011, CPS report from the caseworker, which contained exculpatory statements made by the alleged victim/complainant (the now 12-year old daughter), and therefore violated Brady. The District Attorney’s office claimed it was never aware of the CPS report despite the New York State Police investigator’s knowledge of the

“When the state withholds from a defendant evidence that is material to his guilt or punishment, it violates his right to due process of law under the Fourteenth Amendment.”

_Cone v. Bell_, 556 US 449, 469 [2009]

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12 *Id*.
13 *Id*.
14 *Cone v. Bell*, 556 US 449, 469 [2009].
confidentiality to the defendant because it is exculpatory or impeaching in nature, was suppressed by the prosecution willfully or inadvertently, and such failure to disclose the evidence prejudiced the defendant, there exists a Brady violation.

When a defendant makes a specific request for discovery, the materiality requirement is met if the defendant can show there was a reasonable possibility that timely disclosure of the evidence in question would have changed the result of the proceedings. The specific request need only specify Brady material, not actual specific documents. Prejudice to a defendant may be shown if untimely disclosure or non-disclosure of Brady material adversely affected defense counsel’s strategy. Most important, not only do the People have a duty to disclose that which they know is Brady material, but they also have an obligation to inform the trial court of the “existence of material not believed by them to require disclosure but as to which there may exist an element of doubt.” When an alleged violation is discovered during a trial and defense counsel makes a motion for sanctions or a mistrial, if the Court finds there was a disclosure violation,

15 Smith v. Cain, 132 S.Ct. 627, 630 [2012], citations omitted; see also, United States v. Bagley, 473 US 667, 682 [1985], in which the Court stated that a prosecutor’s failure to fully respond to a defendant’s Brady request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.


17 People v. Alonso, 91 AD3d 663, 664 [2nd Dept. 2012].

18 Id; People v. Williams, 50 AD3d 1177 [3rd Dept. 2008].


20 People v. Garcia, 46 AD3d 461, 467 [1st Dept. 2007].

21 People v. Sosa, 255 AD2d 236 [1st Dept. 1998], lv denied, 93 NY2d 979.

22 People v. Gonzalez, 74 AD2d 763, 765 [1980], emphasis added.
the determination of what [sanction] is appropriate is committed to the trial court’s sound discretion... The court’s attention should focus primarily on the overriding need to eliminate prejudice to the defendant.23

The Sullivan County Court had no doubt there were Brady violations in People v. Maldonado, but it was faced with a difficult question could those Brady violations be cured through cross-examination of witnesses or other trial maneuvering by defense counsel? The People claimed the CPS caseworker report, as well as the deputy’s report, were not in their possession prior to July 13, 2012. Even if true, however, the Court held it was irrelevant to the Brady issue, since negligence or good faith were not in issue.24 Defendant made a convincing and also disturbing argument that the District Attorney’s Office had to have known about the report: the investigator testified that she was part of the Sullivan County Family Violence Response Team (SCFVRT) and as such, conducted joint interviews with CPS workers.

Both government agencies routinely, and in the Maldonado case, worked with the Sullivan County District Attorney’s office when investigating a criminal matter. A review of the arrest report prepared by the investigator, along with the CPS report, showed the agencies conducted joint interviews in this matter and the State Police investigator knew of the deputy’s written report. Also, both the investigator and CPS caseworker participated in joint conferences and interviews at the Sullivan County District Attorney’s office with an Assistant District Attorney present!

While the People put forth a host of excuses as to why [the information sought by the defendant and the reports were] not Brady material, the Court determined none of those excuses relieved them of their obligations under Brady.25 The Court found it unbelievable that the People had no knowledge of the CPS caseworker’s notes and report or the deputy’s report; that position was not supported by the trial testimony of the investigator, or the hearing testimony of the CPS caseworker. The people knew of an out of state CPS report, which did not contain exculpatory or impeaching evidence, and they obtained and disclosed that report promptly. They obtained and disclosed the hotline report with the CPS caseworker’s handwritten notes upon it, but did not request all of her notes or her final report from her investigation into the matter, even though she had been at the District Attorney’s office for the aforementioned conferences and interviews.

The Court ultimately held that the People had an obligation of due diligence to request and disclose all of the CPS notes and reports.26

The Court reviewed the police reports, police notes and CPS report. The deputy’s report and the CPS report contained Brady material. The deputy’s notes from his July 6, 2011, conversations with the defendant’s wife and father-in-law indicated neither had any concern for the safety or welfare of the children, that everything was fine, and that the defendant’s wife was not in any fear of the defendant. Such information could have led defense counsel to investigate the matter differently and would likely have led to additional evidence that would have greatly assisted defense counsel for example, that the reasons for defendant’s wife leaving him

23 People v. Martinez, 71 AD2d 937, 940 [1988].
24 People v. Wright, supra.
25 United States v. Mahaffy, supra at 36.
26 People v. Wright, supra.
evolved over a period of time and were unrelated to their children. That such statements might have been inadmissible was not relevant under 

Brady. The Court determined the information would likely have lead to exculpatory evidence. Given the policy underlying 

Brady, the Court concluded if the inadmissible evidence itself could be so promising a lead to strong exculpatory evidence, there could be no justification for withholding it.

The Court noted that while the District Attorney’s office did not have an obligation to hunt down every lead to find exculpatory or impeaching evidence, it obviously was aware of the deputy’s and detective’s investigation, and with due diligence would have known they made notes and wrote a report. Therefore, the District Attorney’s office was under an obligation to obtain the material and disclose it to defense counsel after counsel specifically requested disclosure of 

Brady material. Notwithstanding the trial prosecutor’s claim that he lacked knowledge of exculpatory information in the possession of the local police, CPS, and the SCDVTF, the Court charged the People with knowledge of the exculpatory information. Moreover, even if after reviewing the information, the People did not believe the notes or reports constituted 

Brady material, they were under an obligation to disclose those documents because they contained at least one inconsistent statement by the defendant’s wife concerning her knowledge of the alleged abuse.

Caution, prudence, and justice require there be full and prompt disclosure of all official reports.

As for the CPS report, it contained a clear and unequivocal statement by the alleged victim (the daughter) that the mark on her neck was the result of horseplay with her father, and not a hickey. The People’s assertion that this was not 

Brady material was disingenuous and demonstrated to the Court, the great lengths to which the prosecutor’s office would go to make its case. The alleged victim’s statement contradicted the People’s position and prosecutorial strategy that defendant gave his daughter a hickey while inappropriately kissing her neck. Not only did the statement bear on the credibility of the alleged victim, but defense counsel validly pointed out that disclosure of the report containing the statement would have caused him to further investigate how the mark may have appeared on her neck, an opportunity that was long gone. The CPS report also contained time frames of events that were inconsistent with other reports also 

Brady material.

The People used the explicit sexual import of a hickey at trial, having mentioned it in their opening statement. For hours the jury heard the audio-video recording of the investigator grilling the defendant repeatedly about the hickey. Could this be cured by further crossexamination, or was the jury already prejudiced by having heard much about the hickey during the People’s opening statement, but nothing from the defendant’s attorney during his opening statement?

The Court recognized that untimely or late disclosure of 

Brady material did not necessarily violate due process if it could still be effectively used at trial. The Court ultimately determined, however, that the suppression of the evidence adversely affected voir dire, defense counsel’s opening statement, and the jury’s interpretation of the record.

As the above case demonstrates, the non-disclosure of 

Brady material had numerous consequences. Not only did the People deprive the defendant of his due process rights; they caused undue hardship and cost to the jurors, witnesses, and alleged victim and her family, who had traveled from Kentucky for the trial. The prosecutor’s failure to adhere to the most basic rules of discovery also cost the taxpayers they ultimately paid for the court officers, court personnel, and other costs associated with the jury and courthouse facility.

It is never acceptable to withhold evidence, even in the most disturbing or challenging cases. The criminal justice system has suffered and continues to suffer damage to its public reputation due to prosecutorial errors and violations that result in dismissals, mistrials and reversals. While prosecutors, the lay public and mass media revel in prosecutions and convictions of the bad guys, the defense bar and judicial system bear the burden of grappling with burden of upholding the magnificent common law that serves to protect everyone, guilty or not.

There is...only a single categorical imperative and it is this: Act only on that maxim through which you can at the same time will that it should become a universal law. It is better for a prosecutor to disclose everything from an abundance of caution and respect for the American Justice System.

27 People v. Sosa, supra.


29 Id. at 10. Emphasis is in original.

30 People v. Garcia, supra; People v. Santorelli, 95 NY2d 412 [2000].

31 People v. Santorelli, 95 NY2d at 420.

32 People v. Gonzales, supra.

33 Smith v. Cain, supra.

34 Kant, Immanuel. Fundamental Principals of Ethics (1785).
People V. Deyoung:
Lessons In The Scope Of Judicial Diversion Programs and Effective Defense Lawyering

This past March, in People v. DeYoung, 95 A.D.3d 71 (2nd Dept. 2012), the Second Department reversed a trial court’s denial of the defendant’s request to participate in the Judicial Diversion Program (set forth in Criminal Procedure Law Article 216). People v. DeYoung is a wonderful example of persistent and effective defense advocacy. It is also rich with helpful conclusions and practice tips for defense counsel to use when arguing that a defendant should be offered the opportunity to participate in the Judicial Diversion Program (JDP).

Mr. DeYoung, who was charged with Criminal Possession of Marijuana in the First Degree, initiated the process of seeking participation in the JDP by requesting a substance abuse evaluation pursuant to CPL § 216.05(1). The court evaluator determined that Mr. DeYoung was addicted to marijuana and alcohol, but used the profits from selling drugs “to cover expenses beyond just his cannabis and alcohol addictions” such as rent for his apartment. Ultimately, the court evaluator concluded that Mr. DeYoung was not appropriate for participation in the JDP because his “admitted criminal act was for the purpose of financial gain” and not just to support his substance abuse and dependence problems.

Upon receiving this evaluation, Mr. DeYoung’s counsel submitted a written request for a hearing, attaching to this request a letter from a psychologist who had evaluated the defendant and found him to be in need of treatment for cannabis dependence and substance abuse. The evaluator also determined that Mr. DeYoung had a mental health disorder that could be better managed with medication. Because the psychologist had referred Mr. DeYoung to the Veterans Administration (VA) for treatment, defense counsel was also able to attach to his hearing request a letter from a licensed clinical social worker at the VA, who said that Mr. DeYoung was engaged in and compliant with treatment. During the hearing, the court evaluator testified, reiterating his belief that Mr. DeYoung’s criminal activity was motivated by financial need beyond his addiction. However, on cross-examination the court evaluator conceded that treatment would
“absolutely” help Mr. DeYoung, and that incarceration was not necessary. Upon completion of the hearing, the trial court turned to the five factors listed in CPL § 216.05(3)(b) (i)-(v), and seized upon factor (iii), to deny Mr. DeYoung participation in the program, concluding that his “alcohol and substance abuse and dependence were not contributing factors to his criminal behavior.”

Mr. DeYoung pleaded guilty to the indictment in exchange for a sentence of five years probation, but defense counsel was careful to preserve his right to appeal the denial of his application to participate in the JDP. On appeal, the Second Department reversed, ultimately concluding that the record did not support the trial court’s finding that Mr. DeYoung’s “alcohol and substance abuse and dependence were not contributing factors to his criminal background” and that therefore, Mr. DeYoung should have been offered the opportunity to participate in the JDP.

The following are some of the lessons to be gained from the DeYoung decision:

1) Though CPL Article 216 does not explicitly provide for a right to appeal, a trial court’s denial of JDP participation can be appealed even if the defendant pleads guilty.

In opposing Mr. DeYoung’s appeal, the prosecution argued that the appeal was foreclosed by Mr. DeYoung’s guilty plea. The Second Department summarily rejected this argument, stating that Mr. DeYoung had carefully and explicitly preserved his right to appeal the JDP denial.

2) The Judicial Diversion Program is available to statutorily eligible defendants who have a history of substance abuse or dependence, regardless of how the defendant used the drug sale profits and regardless of the amount of money involved or drugs sold.

The trial court’s decision illustrates what defense counsel around the State have experienced since enactment of CPL Article 216 – that is, many courts are reluctant to permit defendants charged with drug sales to participate in the JDP program. But, as the appellate court emphasized in DeYoung, CPL Article 216 explicitly includes defendants charged with drug sales. Indeed, other courts have recognized as much, and in making this point, the DeYoung court quoted from People v. Jordan, 28 Misc.3d 708 (Weschester Co. Ct., 2010), in which the court emphasized the ameliorative nature of the 2004 and 2009 Drug Law Reform Acts and noted that both Acts applied equally to those defendants who sell drugs and those who possess drugs.

Just as importantly, the DeYoung Court summarily rejected the trial court’s conclusion that since Mr. DeYoung used profits from his drug sales for purposes beyond his substance abuse and dependence, it followed that his substance abuse and dependence were not contributing factors to his criminal conduct. DeYoung, 95 A.D.3d at 79 (“The fact that the defendant also used some of the proceeds for other purposes does not detract from the conclusion that his alcohol and substance abuse and dependence were factors contributing to his criminal behavior.”)

Finally, the DeYoung Court easily dispensed with the trial court’s undue emphasis on the amount of marijuana and money involved in the transactions, stating: “While some County Court and Supreme Court cases suggest that diversion is appropriate only for low-level offenders (see e.g. People v. Coco, 28 Misc.3d 563, 565), the Legislature specifically made defendants charged with crimes up to class B felonies eligible for judicial diversion (see CPL 216.00[1]). Class B felonies involve relatively large quantities of drugs (see e.g. Penal Law 220.16, 220.39), and people who sell such quantities of drugs are unlikely to spend the entire profit on drugs. Nevertheless, the Legislature made such persons eligible for judicial diversion.” DeYoung, 95 A.D.3d at 79-80 (emphasis added).

3) The value of taking full advantage of the opportunity for a JDP hearing.

There is no question that the Second Department’s decision hinged upon the information that Mr. DeYoung’s counsel elicited and made part of the record through the hearing held pursuant to CPL § 215.05(3)(b). Defense counsel effectively utilized a combination of reliable hearsay (the letters from the retained psychologist who evaluated Mr. DeYoung and the VA treatment provider), and live witness testimony to make the point that treatment could be an effective means by which to address Mr. DeYoung’s criminal conduct. Indeed, during the hearing, defense counsel was able to effectively use cross-examination to elicit incredibly helpful information from the court evaluator, including his concession that treatment could “absolutely” address Mr. DeYoung’s substance abuse and dependence problem and that it was not necessary to incarcerate Mr. DeYoung (a factor a court must consider under CPL § 216.05(3)(b)).

4) The value of obtaining and using defense experts.

While defense counsel did a wonderful job of eliciting favorable information from the court evaluator during the hearing, there is no question that his own experts set the stage for doing so. In this regard, DeYoung illustrates the effective use of retained experts and non-retained, “treating” experts. The retained expert, the psychologist who conducted a
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The nineteenth century was naïve because it did not know the end of the story. It did not know what happens when dedicated idealists come to power; it did not know the intimate linkage between idealists and policemen, between being your brother’s keeper and being his jailkeeper.

Eric Hoffer - Before the Sabbath (1974)

Though he was denied JDP participation, Mr. DeYoung was sentenced to five years probation. So why appeal the JDP denial? There are several possible reasons, the most important of which is the possibility of having the conviction vacated, dismissed, and sealed after successful participation, or reduced to a violation and sealed. Either result would ensure that Mr. DeYoung does not have to endure the life-long stigma of a criminal conviction and that his ongoing recovery will be promoted by a fair chance at employment, housing, and education. Even if successful JDP participation were to result in a conviction, there would still be the possibility of conditional sealing, as set forth in CPL § 160.58.

The result in DeYoung is a vindication of dedicated, innovative lawyering, and clearly shows why one should never back down from advocacy. The Second Department’s well reasoned decision will go far in helping defense counsel advocate for treatment outcomes for their clients who would benefit from treatment, and push back against courts that continue to frustrate full implementation of CPL Article 216 by failing to honor the statute’s legislative intent. DeYoung is a strong endorsement of the notion that CPL Article 216 is to be interpreted as broadly as possible, and that the Legislature meant what it said when it designed a diversion program that includes defendants charged with drug sales – even those involving relatively large amounts of money and drugs. The legislative intent, underscored by DeYoung, to provide treatment in order to break the cycle of drug abuse, dependence, and crime, is a firm rejection of the failed policy of punishment based upon motive and quantity of drugs. The DeYoung opinion should be in every criminal.
Sienna was brainstorming her summation. "What can I say to offset the prosecution's defense of their use of rat testimony with their time-worn 'you can't expect angels to be witnesses to plots hatched in hell'?"

Publius looked over the top of his wine glass, muttered, “hatched in hell,” and then retorted: “Fight fire with fire! When they pop out the ‘hatched in hell’ argument, you respond with ‘all lies are hatched in hell! The first recorded lie was Satan disguised as a slimy snake in the grass, lying to Eve that it was OK to eat the apple. If Eve had known the truth about that snake, she wouldn’t have eaten that apple. Snake! Rat! The one and the same!”

Atticus counseled "Your cross-examination of the rat has fleshed out the base motive of 'life as s/he knows it forever ending' if the rat were to have a sudden pang of conscience regarding your client’s innocence. Your cross has answered two 'why' questions: (1) why the rat is pointing the finger of accusation at your client and (2) why the rat is not currently in jail. You have traced the rat's decision to cooperate and the number of rehearsal debriefings that were needed to tailor the incourt testimony. You have exposed the time-line of the rat's sudden recall of events. You have made eminently clear to the jury that the rat is only looking out for himself. The rat doesn’t care who does his time in jail as long as it is not him. Your cross-examination has exposed and reinforced the rat's life of dishonesty and deception. The rat has lied in living color in front of this jury especially when asked questions as to whether he is upstanding, honest and a person of integrity. And, the rat has admitted on cross that s/he has to testify in a manner which is consistent with what the prosecution believes to be the truth in the case. Your thrust now is the messenger is rotten and so too is the message.”

“And don’t forget,” Publius interjected, “if you wouldn’t trust your wallet on pay-day with this rat, you can’t trust him with anything else, period.”

Sienna mused "Your suggestion for a cross chapter that the rat 'formerly hated but now loves the police and prosecution' adeptly showed the rat's hospitality
both to my client and the defense theory of the case. The rat’s mentality of ‘me first, the end justifies the means’ was evident throughout the cross-examination. Now I need to put it all together. Do you have any summation tidbits?”

Atticus looked deep into Sienna’s eyes and sensed her passion for the cause. “Try these but remember the only limit is your own imagination.”

• “Whose bread I eat, his song I sing.”
• “A person with whom the truth hasn’t visited in years.”
• “When you have succeeded in having the rat lie in living color to this jury then the ‘fact that you lied is not so important, but now we (i.e., the jury) can’t trust you.’ ”
• “Shakespeare’s ‘a great lie is best - the bigger the lie the more apt it is to believed.’ ”
• “The rat’s story is like ‘nailing jello to a tree.’ ”
• “Immunity/plea/cooperation agreement is like cocaine - it has few proper uses and should not be used indiscriminately.”
• “This case has been constructed at the ‘gravesite of truth.’ ”
• “Teaching this rat the truth is like teaching an elephant to type.”
• “Sit in a sewer and destroy the quality of the neighborhood.”
• “The fail safe test re: whether the rat is truthful when pointing the finger of accusation - ‘if his/her lips are moving, s/he is lying.’ ”
• “CATCH-22" - at this trial, the question was put to the perjurer "which is the perjury?" and of course the perjurer says "what I said earlier is a lie but what I said here today is the truth." Thus, the only way to find out whether the perjurer is being perjurious is to ask the perjurer - and we simply say to you "is that not a classic CATCH-22?”

Dealing with the deal:
In life you can bargain for and buy most anything including mansions and villas and precious works of art. But you can’t bargain for and buy some things: you can’t buy a bargain for wisdom for all you get is foolishness; you can’t buy a bargain for justice, for injustice is what you get; and you can’t buy a bargain for truth, for it isn’t truth that you get. You get a cup of lies under an immense cloud of reasonable doubt. That’s why you can’t bargain for and buy testimony as the prosecution did in this case. This is the reason why the prosecution’s case is in the mess it is now. If our constitution is indeed a living document, it must be weeping with shame at this prosecution. The highest endeavor to which we all aspire is to free the burden of one unjustly accused. That window of justice is now open to this jury - let these rats do their own time and allow this human being to resume his/her life.

“Finally, remind the jury of your request to charge regarding rat testimony in which the judge will advise the jury that when a rat testifies, that testimony must be examined with greater scrutiny than the testimony of an ordinary witness. Remind the jury of the promises and benefits that the prosecution has provided in return for the rat pointing the finger of accusation. Remind the jury that the judge will charge them that the testimony of a rat should be viewed with extreme caution and weighed with great care before deciding whether to believe the rat and what weight, if any, should be given to the testimony.”

Publius again interjected. “If your rat is the perjurer, then why did he lie to the police when he was busted?”

• “If your rat is so honest, why did you have to buy his testimony?”
• “If your rat is so truthful, why did you have to debrief him 13 times and go over his testimony three more times? The ‘truth’ is easy to remember.”
• “If your rat is so honest, then why was his sentencing delayed until after this trial is over?”
• “If your rat is so truthful, then why did he lie to the police when he was busted?”
• “If your rat is so honest, how do you explain his lengthy rap sheet, how do you explain the charges he’s currently facing?”
• “If your rat is so truthful, then why did the cops make him wear a ‘wire’ so that they could record what he said?”
• “If your rat is so honest, then why is he in jail?”
• “If your rat is so truthful, then why did he give 4 versions of what supposedly happened before he decided to become a rat?”

“Take your facts, take your investigation and take your cross,” counseled Publius, “and tailor them to your closing and put the burden where it belongs, on the DA’s shoulders.” Sienna toasted Atticus and Publius with “The plot for this rat’s testimony was hatched in hell.”

A
“Liberty is the most jealous and exacting mistress that can beguile the brain and soul of man. She will have nothing from him who will not give her all. She knows that his pretended love serves but to betray. But when once the fierce heat of her quenchless, lustrous eyes has burned into the victim’s heart, he will know no other smile but hers.”

Clarence Darrow
UNEQUAL JUSTICE: Distinctions Between Federal & State Practice

The purpose of this article is to demonstrate the difference in the administration of criminal law in federal court as compared with the state law, for the benefit of practitioners in both courts.

The Supreme Court has said, in *Wood v. Georgia*¹, that the grand jury acts as a buffer between the prosecution and potential criminal defendants, protecting the innocent from unfounded accusations. There is no vehicle under federal law to test this proposition; on the other hand, a motion exists in the state law to ensure grand jury protection to a citizen against a charge based on insufficient, incompetent or suppressed evidence, or inadequate grand jury instructions by the prosecutor.

The Court in *United States v. Costello*,² held that the grand jury will not protect against an accusation where there is insufficient, incompetent or suppressed evidence, or inadequate grand jury instructions by the prosecutor. There is no provision in federal law to test pre-trial whether the proof before the grand jury was appropriate. New York, as earlier noted, does provide such a remedy against improper proof.

In New York, the grand jury became a part of the New York colony in 1683, and it truly has acted at all times to vindicate the pre-trial rights of the citizenry by the availability of a motion to test the appropriateness of proceedings before the grand jury. So too, the state appears to treat jury deliberations as an extremely critical time when only exhibits in evidence are allowed to be presented to the deliberating jury, which, at times, can be entirely contrary to federal law.

In *Esso v. United States*,³ a case of first impression, the Second Circuit ruled that the learned district judge, with a proper limiting instruction, did not commit error in allowing members of the jury to take a redacted version of the indictment home to review. The opinion does not indicate whether the initial turnover of the indictment was

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Jay Goldberg is a trial attorney and one of the deans of the defense bar in New York. He is the author of two books: Preparation and Trial of Criminal Cases Within the Second Circuit (2009) and Preparation and Trial of A Federal Criminal Case (2010). Jay’s client list includes many high profile personalities such as Donald Trump, Bess Meyerson, Waylon Jennings and Johnny Cash. He is a frequent contributor to the New York Law Journal and other periodicals. He can be contacted through his firm’s website www.jaygoldberg.com.
At the outset of its opinion in *Esso*, the court wrote that it has been “long recognized that trial courts may, in their discretion, permit the jury to take a copy of the indictment into the jury room, after taking care to instruct the jury that the indictment [is] not to be considered evidence.” While, as noted, the Second Circuit writes of it being a matter of discretion, it cites no authority for the factors to be considered, and the court cannot draw on any textual rule that we view would authorize submission, *sua sponte*, of the indictment during jury deliberations.

Practitioners recognize that often the indictments are “speaking indictments,” which means that they are lengthy and contain the government's complete version of the alleged facts, containing powerful charging words, well beyond what is required under the *Hamling v. United States* analysis, which requires an indictment only to set forth the essential elements of the crime charged. If more is needed to prepare for trial, it should be secured by a bill of particulars. In one case, the court upheld the act of pre-signing indictments by the assistant United States Attorney even before testimony was presented to the grand jury against a claim of undue influence.4

The fact that cautionary instructions in *Esso* stating that the indictment was merely an allegation and it was not “evidence in any way, it is just a charge by the government,” may well be, in our opinion, insufficient.5 With respect to such sensitive material, cautionary instructions may not be enough. It is well to keep in mind Justice Jackson's statement: “the naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.” Other courts have recognized the limited value of a cautionary instruction.6

There are times, in federal prosecution, when misconduct before the grand jury comes to light even though there is no availability of a motion pre-trial to inspect the minutes. This often arises when material is turned over in the middle of trial pursuant to the *Jencks Act*, 18 U.S.C. 3500 et seq. So too, there are circumstances where a motion to dismiss pretrial under F.R.Cr.P. 12(b)(2) can succeed, i.e. double jeopardy, misleading the jury into believing that hearsay testimony is based on firsthand knowledge, use of immunized testimony or lack of jurisdiction. *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).7 The foregoing action of the court is based on its supervisory role over the action of the prosecution. *Costello* makes clear that constitutionally, there cannot be a pre-trial court ruling for dismissal of an indictment for insufficient, incompetent or suppressed evidence, or inadequate grand jury instructions by the prosecutor, for this would delay the intention of the grand jury to have a speedy trial on the charges contained in the indictment. It is too late to question *Costello*. A properly executed indictment, with insufficient, incompetent or suppressed evidence, or inadequate grand jury instructions by the prosecutor, warrants the trauma of a trial.8 This seems to contradict what the court said in *Wood, supra*.

We submit that the jury should be told more than simply that the indictment has no significance. If one thing is clear from *Esso*, it is that some jurors may give a certain degree of significance to the indictment when the charges are repeatedly put before them.9 A jury should be instructed that the court lacked the power (in federal cases) to determine whether there was sufficient evidence to support the indictment, that the prosecutor is not required to place before the grand jury any exculpatory evidence, if same exists, whether previously insufficient, incompetent or suppressed evidence, or inadequate grand jury instructions by the prosecutor were used to secure the indictment, and that neither the defendant nor his counsel was present during grand jury sessions, so there was no opportunity to cross-examine any witnesses.10 The petit jury should be told that the Grand Jury hears a one sided version of the controversy. This proposed instruction is not given in any criminal case, federal or state, though it seems more than fair.

It is only after a costly trial that the trial court possesses the power, under F.R.Cr.P. 29, to dismiss the indictment after the government’s case or at the end of the entire case based on the proof at trial. So too, if there be a conviction that is infirm, the Court of Appeals may, after a conviction, reverse and dismiss the case for insufficiency of trial evidence. One need not tarry too long to understand what a defendant goes through as he has to experience the trauma and expense of a trial that may be founded on insufficient evidence before the grand jury.

***

It is essential for the lawyer practicing criminal defense work to understand the Grand Jury procedure in the Courts in which he or she practices. The New York State system differs substantially from the Federal. The State chooses not to follow the dictates of the Supreme Court in *Costello* with respect to its own proceedings, relying instead on Article 1, Section 6 of the New York State Constitution establishing the role of the grand jury. Courts recognize that the true purpose of a State grand jury is to establish a bulwark, protecting citizens against inadequate accusations of criminal activity. It is not enough to return an indictment on insufficient, incompetent or suppressed evidence, or inadequate grand jury instructions by the prosecutor, and the proof must be in accord with the rules of evidence and
the instructions of the prosecutor must in all respects be proper. The matter of instructions before a state grand jury by prosecutors is far different than that required of prosecutors before a federal grand jury, for the court is not concerned with the propriety of the federal instructions.

If the state court finds that the proof is better suited to a lesser charge, it can order that the charge against the defendant be reduced or it may dismiss the indictment.13 CPL 210.30 affords enormous protection to an accused. There is no federal analog. Of further importance to practitioners in this State, it has been held in the case of People v. Mathis,16 that reversal is mandated when the trial court, sua sponte, and over the defendant’s objection, submits a copy of the indictment to the jury.17

The New York rule, at first relevant to the action of the trial court in sending material into the jury room during deliberations, is CPL 310.20.18 It provides in subdivision 1 that the jury should be furnished with all exhibits received in evidence at the trial, which the court, affording the parties an opportunity to be heard upon the matter, in its discretion permits them to take. Subdivision 1 became part of the procedural law in New York in 1970 and was last amended in 1999. From time to time, the section has been amended at the request of the Chief Administrative Judge, based on the recommendation of the Advisory Committee on Criminal Law and Procedure,19 but never has the section, the Advisory Committee or the Chief Administrative Judge authorized sua sponte action of the court in sending the formal indictment into the jury room during deliberations, and at no time has there been criticism with court rulings that find that such action to be error. Obviously, the drafters of any amendment were aware of the federal practice. CPL 310.30 provides that if requested, the court is to provide the jurors with a list of witnesses from whom the jury has heard, exhibits, a verdict sheet, and if the parties agree, the relevant statute, but nothing is said expressly authorizing the submission of the indictment.

In People v. Moore, 71 N.Y.2d 684 (1988), the court relied on CPL 310.30 to respond affirmatively to the jury’s request for a copy of the indictment, but Judge Kaye filed a strong dissent with the concurrence of two judges so that the court’s decision was split 4-3.

Judge Kaye wrote “[n]o point in a trial can be more critical than jury deliberations. Materials taken into the jury room at those crucial moments may well influence the verdict.”20 One commentator noted that both the legislature and the court have circumscribed what may be properly furnished to a deliberating jury.21 It appears that state trial judges adhere to Judge Kaye’s ruling on what may be sent into the jury room during deliberations.

It is not to say that the jury is kept in the dark with respect to the indictment, for it is read in the final instructions, but in state court, it is not sent into the jury room.22 If need be, the jury may return to the courtroom and the indictment portion of the final charge is read to them again.

In commenting upon Judge Kaye’s decision, it has been written: “[j]urors faced with the conflicting assertions of counsel and the frustrating neutrality of the trial judge may be hard-pressed to ignore these powerfully worded official accusations of guilt [particularly in speaking indictments] especially when the words are physically before them in the jury room…the majority’s decision in Moore was ‘incongruous and incomprehensible’ especially when then considered in light of the court’s recent rulings.”23

We agree with Judge Kaye, the two other dissenting judges and the New York state practice that the jury should not be provided with the grand jury indictment, even when requested. After all, the traditional rule is that a jury should have before it during deliberations only exhibits that were received in evidence at trial.

There must be a check and balance with respect to prosecutorial activity before a grand jury to ensure pretrial that the version of events prepared by the prosecutor and approved by the grand jury is supported by sufficient evidence. As noted, the supervisory authority in the federal court is essential, but it cannot save a defendant from the expense of a trial even when there is insufficient evidence. Recent events, particularly with respect to the action of some assistant U.S. Attorneys’ compliance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972)24 should lead a court to conclude that there must be judicial oversight with respect to the actions of any prosecutorial office when a defendant’s rights are involved. It is a mistake to simply rely on the proposition that all prosecutors will comply with the role outlined for them in the language of Justice Sutherland in Berger v. United States.25 Few, if any, will deny that a prosecution founded on inadequate proof or suppressed evidence hardly vindicates the ends of justice.

It is not possible to justify the divergence of authority between the federal government and the states. There are just too many differences between state and federal procedure.26 The “go it alone” approach does not foster the ends of justice. A
Author’s Note:
Alex S. Huot, an associate at the firm, assisted in the preparation of this article.
Sarah Burns has written a very controversial book about one of the most vicious and heinous crimes in the recent history of New York City. Burns presents a compelling argument that the five young men, all of whom were arrested, tried and did time, were not guilty of the rape and assault. All the defendants were black or Hispanic. The victim was white.

Burns takes the reader through a social and cultural tour of New York City in the 1980s, complete with a description of the racial tension and violence that plagued the City in that decade. She points to some horrifying crime statistics, including that in the course of just a single year during that period, the City was averaging 36 murders a week; a little over 5 murders a day! It was a time of double and triple locks, fear, distrust, and skepticism about the workings of the New York City criminal justice system. Indeed, two days after the rape, New York City Mayor Edward Koch said “I think that everybody here — and maybe across the nation — will look at this case to see how the criminal justice system works. This is, I think, putting the criminal justice system on trial.” From the author’s point of view, the criminal justice system failed miserably.

On April 19, 1989, Tricia Meili, a 28 year old white woman, a graduate of Yale and employed by Salomon Brothers as an investment banker, was raped and savagely beaten while jogging in Central Park. Her injuries included broken bones, severe brain and eye damage, and impaired motor skills. When brought into a hospital after being discovered the morning after the rape, she was not expected to live.

On that same night, a number of Black and Hispanic teenagers entered Central Park for a night of “wilding,” a term that caught the attention of the mainstream press and became a code word to describe minority youths going on a rampage of violence against persons and property. Burns claims that the ensuing media coverage gave rise to visions of marauding black youths raping white women, and that the media contributed to rifts between races and classes.

To be sure, the teenagers did engage in a number of serious robberies and assaults. While this fact is not ignored by Burns, she focuses on the rape of the jogger. Five of the youths were arrested within days after the crime; four were black, one Hispanic. All were from Harlem. All confessed to the rape, which became the only evidence against each of them.
Most unfortunately, the five convicted teenagers all served their entire prison term before they got any legal relief.

The Office of the New York County District Attorney and the NYPD each undertook their separate investigations into the previous investigation and trial to try and determine what had gone wrong. Not surprisingly, each agency came to a different conclusion. The Manhattan DA, Robert Morgenthau, the same DA who had brought the original prosecution, moved to dismiss all the counts against the 5 defendants. The NYPD and at least one of the prosecutors (Linda Fairstein) involved in the original prosecution took the position that, while Reyes committed the rape, the others assisted him, making them guilty as well under New York’s acting-in-concert law.

In this book, Ms. Burns, who, with her father, the documentarian Ken Burns, is making a film about the case, explores the investigation and prosecution in the case and asks whether racial stereotyping of black and Hispanic teenagers contribute to a miscarriage of justice (the actual perpetrator, who conducted a yearlong rampage of rape, happened to be Puerto Rican).

The New York Times Book Review called the book “An important cultural document, and unquestionably worth reading…Burns’s gripping tale may serve as an allegory for some of the most pressing criminal justice issues of our time.”

About the reviewer: During the 1980s Dick Barbuto was a homicide prosecutor in New York City and also served as a special prosecutor for the investigation and prosecution of corruption in the New York City Criminal Justice System. He is also a past president of the New York State Association of Criminal Defense Lawyer.

The views expressed are those of the reviewer and not necessarily those of the NYSACDL.

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Questions regarding submission may be directed to:

Margaret Alverson,  
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The editors reserve the right to modify any submission for style, grammar, space and accuracy. Authors are requested to follow these guidelines:

1. Use footnotes rather than endnotes.
2. When a Case is mentioned in the text, its citation should be in the text as well.
3. Articles longer than 4 pages may be edited or serialized.
Judges write for other judges and for lawyers. It is axiomatic that when laypersons read judicial writings, their eyes often glaze over within minutes, and they are soon lost in obtuse verbiage and arcane principles. Having practiced law for more than 37 years, I was prepared for typical judicial writing when I cracked open my copy of Disrobed.

What a pleasant surprise! Judge Block, who sits on the United States District Court for the Eastern District of New York, has written a highly readable and extremely interesting account of his career, from local trial lawyer in Suffolk County through his elevation to the federal bench in 1994, and on to the present, after 18 years on the federal bench.

Judge Block is not writing for his colleagues on the bench or for those of us who toil at the Bar. Rather, he writes to educate the general public; to give laypersons, who have little or no experience with the law, an inside look at the federal court, just as the subtitle intimates. It takes a little while to get there, because he spends considerable time recounting his experiences at the bar before his appointment, but get there he does. The reading public will certainly learn a great deal from this tome.

I have known Judge Block personally for many years now, and I have appeared before him in numerous federal criminal matters. I have broken bread with him, lifted a glass or two with him, and proudly served alongside of him on CLE panels. Even so, I learned a significant amount when I read DISROBED.

The book is organized, as most books are, into chapters, but the chapters are subdivisions of three parts, which he calls “Getting There,” “Being There” and “The Big Cases There.” Part one, “Getting There” begins by laying out for us the high school, college, and law school background of the future judge, along with some personal and family background.

He goes on to talk about his practice from the 60s through the 90s, and describes in detail some of the more significant cases that he handled as a practicing lawyer. Those of us who practice criminal law in the state courts in New York are familiar with the principles of People v. Clayton, the case that first described the factors to be considered on a motion for dismissal in the interests of justice. As we all know, the Clayton case has been codified in the Criminal Procedure Law. What I didn’t know was that Judge Block, as a practicing lawyer, made the motion and handled the Appellate brief and argument that resulted in the decision we’ve all come to know and love.

Judge Block discusses his flirtations with local politics in Suffolk County, and his relationships with local, regional, and state politicos. Throughout all of these “growing pains” Fred Block maintained his independence and his integrity, to his everlasting credit. His book describes several instances and some relationships which shed light on the career of a solo and small firm practitioner in the suburbs of New York City.

When you read the book (and you must) pay some attention to the chapter on the 80s, when the author discusses his musical theater talents. Suffice it to say that Rodgers and
Hammerstein have little to fear from the competition of Fred Block, but nonetheless, he is quite accomplished in fields besides the law.

His description of the vetting process which led to his appointment to the federal bench by President Clinton in 1994 is quite enlightening. The process itself is daunting, and you feel his pain when his first go-round with Senator Moynihan’s committee ends in the nomination going to another.

In his chapters discussing his time on the bench, Judge Block’s intelligence, devotion to the law and compassion for people easily come across from the pages of his book. It is obvious from his discussions of newsworthy cases that he is a man committed to providing justice for all, and that he is committed to ensuring that all who enter his courtroom leave with the feeling that the judge really does care. Jurors, lawyers and defendants all get a fair shake.

I could go on, and describe in great detail the cases that Judge Block discusses, but that would defeat my purpose. This review is meant to whet your appetite, not to summarize his writings. For that, you will have to read Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge. It is almost required reading for every criminal trial lawyer, and certainly is required for those practicing in Judge Block’s court.

However, just because it is written in a humorous way, don’t get the idea that it is not packed full of substance. Indeed, some of the chapters are very relevant to issues we talk about today. A perfect example is chapter 3, 5 and 7, The Recess-Appointments Clause, The Natural-Born Citizen Clause and the ever popular Letters of Marque and Reprisal Clause. Say, who was the first natural born citizen American president?
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The Hon. William Brennan Award for Outstanding Jurist will be presented to
The Hon. Jeffrey G. Berry, Acting Supreme Court Justice and County Court Judge
(Orange County).

The Honorable Jeffrey G. Berry was first elected to the County Court in 1991. He was
named as Acting Justice of the Supreme Court, by the Chief Administrative Judge in 2000
and serves as the Supervising Judge for the City Courts within the Ninth Judicial District.
Judge Berry previously served as Judge in the Newburgh City Court from 1984 to 1990.
Prior to his judicial service he served as the Law Clerk to the Honorable Paul F. Murphy of
the Orange County Family Court. He was admitted to Practice in 1975 and is a graduate of
University of Tulsa Law School and S.U.N.Y. New Paltz.

The Hon. Thurgood S. Marshall Award for Outstanding Criminal Practitioner will be
presented to Susan R. Necheles, a practitioner based in Manhattan.

Susan Necheles is a partner in the law firm Hafetz Necheles and Rocco. She has tried
dozens of cases as a defense attorney and repeatedly has been among the 5% of lawyers
chosen by her peers for a listing in "New York Super Lawyers." From 2001 through 2006 Ms.
Necheles headed the New York Women’s Criminal Defense Lawyers’ Group. She was
elected to and served on the Board of New York Council of Defense Lawyers. She was a
Master in the Federal Bar Council’s Inn of Court and is a member of the Federal Bar
Council, the National Association of Criminal Defense Lawyers, and the Association of the
Bar of the City of New York. Ms. Necheles graduated from Yale Law School in 1983, where
she was an Editor of the Yale Law Journal. Ms. Necheles is married and has three children
and two dogs.

The Justice Through the Arts Award will be presented to Ken Burns, Sarah Burns, and
David McMahon for their documentary film The Central Park Five.

The Central Park Five, a new documentary co-written and co-directed by the legendary
filmmaker Ken Burns, his 23-year-old daughter Sarah Burns, and her husband David
McMahon, revisits what widely became known as the “Central Park Jogger Case”, the
brutal rape and assault of a 28-year-old white jogger in Central Park in 1989. Five young
black men were arrested, prosecuted, convicted and imprisoned for the crime only to be
exonerated years later when the true perpetrator, Matias Reyes, a serial rapist whom the
NYPD overlooked, confessed and was linked to the rape through DNA evidence.
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OUR MEMBERSHIP IS OUR GREATEST STRENGTH!

NYSACDL continues to grow in strength as a respected voice for the criminal defense bar and the clients we represent. We are the only voice in New York for all criminal defense lawyers, be they private lawyers practicing primarily in New York state or federal courts, white collar practitioners, public defenders, or others. Our Atticus publication contains scholarly articles on topics germane to the criminal defense practice, our statewide CLE programs are for those of you who are “in the trenches” daily. We are recognized in Albany on legislative issues ranging from new forfeiture law proposals to the steady and increasing call for discovery reform. Legislators receiving proposals from District Attorneys now seek NYSACDL’s feedback. Our Listservs, our Website, e-news, and our helpful staff are all supported primarily by membership dues and are there to help you in your defense of the accused.

NYSACDL WELCOMES NEW MEMBERS

ALBANY
Matthew Smalls

BROOME
Michael A. Garzo, Jr.
Thomas D. Jackson
Remy Perot

ERIE
Thomas Eoannou

GREENE
Baldwin Maull

KINGS/BROOKLYN
Christopher Madiou

MONROE
Leticia Astacio
Anne Burger
Gilbert Perez

NASSAU
Francis Quigley

NEW YORK
Nick Hentoff
Igor Kotlyar
Eli Koppel
Janet Lipinski

ORANGE
Conrad Pasquale

QUEENS
David Guy
Ali Najmi
Chandra Whalen
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<td>Thomas J. Melanson</td>
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<td>Michael Jacobs</td>
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**AND WE THANK OUR RENEWING MEMBERS**

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**A COMPLETE MEMBERSHIP LIST IS AVAILABLE ON THE WEBSITE**

www.nysacdl.org/member-directory/
NYSACDL standing committees are chaired by members in good standing who are appointed by the President. Committee membership is a rewarding opportunity for members to network with colleagues throughout the state and to explore various issues in depth. Members are invited to join committees to further the important work of our association. If you are interested in joining a standing committee (listed below), please contact the committee chair or the Executive Director's office: Malverson@nysacdl.org 212-532-4434, for more information.

**AMICUS CURIAE COMMITTEE**
**Chairs:** Marshall Mintz (mmintz@minopp.com), Marc Fernich (maf@fernichlaw.com)
**Members:** Richard Willstatter

**ANNUAL DINNER COMMITTEE**
**Chair:** Benjamin Ostrer (ostrerben@aol.com)
**Members:** Andrew Kossover, Deborah Colson, Richard Willstatter

**CONTINUING LEGAL EDUCATION COMMITTEE**
**Chairs:** Andre A. Vitale (avitale@monroe county.gov), Michael T. Baker (mbaker@co.broome.ny.us), Deborah Colson (dcolson@colsonharris.com)

**CONTRACTS**
**Chair:** Andrew Kossover (ak@kossoverlaw.com)
**Members:** Donald Rehkopf, John Wallenstein, David Goldstein

**FINANCE AND PLANNING COMMITTEE**
**Chair:** Aaron Mysilwiec (amysliwiec@joshuadratel.com)
**Members:** Jane Byrialsen, Michael Shapiro, Kevin D. O’Connell, Benjamin Ostrer, Richard D. Willstatter

**LAWYERS STRIKE FORCE ASSISTANCE COMMITTEE**
**Chair:** Richard Willstatter (willstatter@msn.com)
**Members:** Michael Dowd, Marc Fernich, Timothy Hoover, Lawrence Goldman

**LEGISLATIVE COMMITTEE**
**Chair:** Andrew Kossover (ak@kossoverlaw.com)
**Members:** Michael Baker, James Baker, Wayne Bodden, Andrew Correia, Timothy Donaher, Greg Lubow, Ray Kelly, Aaron Mysilwiec, Alan Rosenthal, Lisa Schreisbersdorf, Aaron Mysilwiec, Donald Thompson, Bruce Barket, Timothy Hoover, Andre Vitale

**MEMBERSHIP COMMITTEE**
**Chairs:** Michael G. Dowd (mdowd@mgdowdlaw.com), Aaron Mysilwiec (amysliwiec@joshuadratel.com)
**Members:** James A. Baker, Bruce Barket, Mitchell Dinnerstein, Danielle Eaddy, James W. Grable, David Goldstein, Timothy Hoover, Aaron Mysilwiec, Lisa Peebles, Robert Wells

**PROSECUTORIAL AND JUDICIAL COMPLAINT COMMITTEE**
**Chair:** James P. Harrington (jharrington@harringtonmahoney.com)
**Members:** Benjamin Ostrer, Lawrence Goldman, Donald Rehkopf, Michael Shapiro, Jane Byrialsen, Thomas O’Hearn

**PUBLICATIONS COMMITTEE**
**Chairs:** Benjamin Ostrer (ostrerben@aol.com), John S. Wallenstein (jswallensteinesq@aol.com)
**Members:** Jane Anne Murray, Andrew Patel
NYSACDL Member Benefits

**NYSACDL LAWYERS PROFESSIONAL LIABILITY INSURANCE PROGRAM** – This new Program designed for NYSACDL members provides lawyers professional liability insurance coverage for firms and individuals. For more information, contact Mark Kovler (914) 923-1160 or Couch Braunsdorf (800) 233-5433 x. 364.

**MEMBER BIOGRAPHICAL INFORMATION IN OUR MEMBER PROFILE** – Members can now include brief biographical information (positions held, bar admissions, schools attended, honors or publications) in our online searchable Membership Directory. This directory is available to the general public and is referenced by those seeking counsel and assistance throughout the state.

**NYSACDL LISTSERV** – NYSACDL offers both a Federal and State Practice Listserv which provide members with invaluable forums in which to pose questions, seek information, exchange ideas and share resources with members statewide.

**CLE SEMINARS** – NYSACDL is an Approved Provider accredited by the New York State CLE board. We sponsor numerous CLE seminars during the year throughout the state at reduced rates for members. Practical nuts and bolts topics alongside cutting edge issues make our CLE programs invaluable to new members as well as those with years of trial experience. Our speakers are among the most respected and experienced criminal defense attorneys and leading experts in the country.

**NCDC SCHOLARSHIP PROGRAM** – NYSACDL members in good standing are eligible to apply for the Twelve Angry Men scholarship to the annual National Criminal Defense College in Macon, Georgia.

**LEGISLATIVE ADVOCACY** – NYSACDL’s Legislative Committee, working with a retained lobbyist, develops and pursues positions on legislative issues relating to the criminal justice system thereby providing a respected voice of the defense bar in Albany. Members have an avenue to become involved and stay informed. Our members were involved in the recent reforms of the Rockefeller Drug Laws.

**AMICUS BRIEFS** – NYSACDL provides amicus assistance on issues of particular import.

**COMMITTEE MEMBERSHIP** – NYSACDL committees are active in areas throughout the state and work on issues vital to strengthening the criminal defense community. Membership on a committee provides an excellent opportunity to pursue specific interests, serve the criminal defense bar and to network with lawyers throughout the state.

**MENTORING AND STRIKE FORCE ASSISTANCE** – NYSACDL members provide mentoring and assistance for other members. If a question or need arises, a member will be there to give assistance. NYSACDL members are ready to step in to help other members who are subpoenaed, threatened with contempt, or otherwise under attack for the vigorous representation of the accused.

**HEALTH INSURANCE PLANS** – NYSACDL members are eligible for specifically tailored health insurance plans at affordable rates which may not be available if purchased on your own. Some plans are available for solo practitioners and others are open to firms with two or more employees.
Membership Application

Please print or type.

Name: ____________________________________________

Firm Name: ____________________________________________

Address: ____________________________________________

City/State/Zip: ____________________________ County: ____________________________

Phone: ____________________________ Fax: ____________________________

Email: ____________________________________________

Website: ____________________________________________

Bar Admission State: ____________________________ Year Admitted: ____________________________

Please circle membership type.

Lifetime Member $2500

President’s Club $500

Sustaining Member $300

Regular Member $200

Income over $50,000

Income under $50,000

In practice over 5 years

In practice less than 5 years

Full-time public defender

Regular Member $125

Associate Member $175

Non-lawyer

Law Student $50

School: ____________________________

Graduation date: ____________________________

Membership dues can be paid by check or charged to American Express, MasterCard or Visa.

Please make your check payable to NYSACDL and send it to:

NYSACDL Office
2 Wall Street
New York, New York 10005

Phone: 212-532-4434
Fax: 888-239-4665

Please charge my credit card.

Credit card #: ____________________________
Exp. date: ____________________________
Signature of applicant: ____________________________
Date: ____________________________

Our Mission

- To promote study and research in the field of criminal defense law and the related arts.
- To disseminate and advance by lectures, seminars, and publications the knowledge of the law relating to criminal defense practice.
- To promote the proper administration of criminal justice.
- To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases.
- To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby
- To protect individual rights and improve the criminal law, its practices and procedures.
### Registration Fees

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<tr>
<td>NACDL Members</td>
<td>$699</td>
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<tr>
<td>Non-member</td>
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<td>All New York Lawyers</td>
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<td>State &amp; Federal Defenders</td>
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<td>Firm Group Discount (4 or more registering at same time; 1 payment; no changes)</td>
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<td>Fordham Law Alumus</td>
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<td>NACDL Membership &amp; Seminar (1st Time Members only)</td>
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<td>Paralegal/Legal Assistant</td>
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<td>One-Day Rates:</td>
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### Seminar Materials

- Hard Copy Course Materials at seminar for attendee **Add $30**
- Audio CD-ROM **$350** (audio and text)
- Hard Copy Course Materials **$150**

I cannot attend; please send me

### Credit Card Payment Information

- American Express
- Visa
- Mastercard
- Discover

### Seminar Attendee

- Name
- Badge name (if different)
- CLE State(s)
- Bar # (s)
- Address
- City
- State
- Zip
- Office
- Phone
- E-mail
- Fax

### Seminar Total

- Materials Total
- TX fee add $10.00* $
- IL, NE, UT CLE fee add $15.00* $
- PA CLE fee add $21.00* $
- NC CLE fee add $40.00* $
- GA CLE fee add $60.00* $
- Seminar Total $

*State fees must be paid in advance to receive CLE credit. If left blank, you will not receive credit.

### Questions?

Call 202-872-8600 x632 or visit us online at www.nacdl.org/cle

Feel free to copy this form and pass it along to your colleagues.
Since 2000 Legal Audio has been providing Audio and Video Forensic services for the U.S. Attorneys, FBI, Law Enforcement, Private Law Firms, Private Investigators, Insurance Companies, Legal Aid Society and others. We’ve seen and heard it all - including wiretaps, interviews, surveillance video, 911 calls.

Please visit [www.legalaudio.com](http://www.legalaudio.com) to find samples of our work, CV and additional information about our background and experience. I look forward to hearing from you this fall/winter season and hope to have an opportunity to assist you on your next case.

Sincerely,

Frank Piazza

**212.873.8772**

204 West 84th Street • New York, NY 10024

email: info@legalaudio.com

[www.legalaudio.com](http://www.legalaudio.com)