Message from the President

Discovery Reform: THE TIME HAS COME

This Association has dedicated itself to making a difference on legislative issues in New York State and nationally. We are proud to be a state affiliate of the National Association of Criminal Defense Lawyers, and active in its efforts to support enactment of S. 2197, the Fairness in Disclosure of Evidence Act of 2012, co-sponsored by Sen. Linda Murkowski (R-Alaska) and Senator Daniel Inouye (D-Hawaii). NACDL leads a coalition supporting this bill, which includes the ACLU and the U.S. Chamber of Commerce. The bill would require federal prosecutors to disclose information and materials that reasonably appear to be favorable to defendants. It would mandate disclosure of this information without delay and as soon as reasonably practical after the government learns of it. You should write your Senators and Representatives to urge them to support discovery reform.

Here in New York State, NYSACDL had been active in lobbying legislators and the Governor for discovery reform by way of amending Criminal Procedure Law Article 240. We know all too well that state law is entirely inadequate to provide counsel with information necessary to defend a criminal case. A variety of proposals are being suggested, and a coalition has been forming to urge the passage of discovery reform this year. Since the public is learning that innocent people are sometimes convicted because favorable evidence has been withheld by prosecutors, people are becoming aware that steps must be taken to protect the process of criminal prosecution from prosecutorial zeal and to prevent trial by ambush. Members are urged to speak to their senators and assembly members to explain why discovery reform is critical. Each of you can probably tell a story of how the D.A. withheld favorable evidence from you, sometimes until it was too late for you to use it to secure an acquittal, sometimes until after the client pleaded guilty under pressure and fear of a longer sentence.

ACCESS IN ALBANY

It has been a real privilege for me to travel to Albany to lobby the legislature and the Governor’s office on criminal justice issues. With the invaluable assistance of our able lobbyist, Sandra D. Rivera, counsel at Manatt, Phelps & Phillips, LLP, Steven L. Kessler met in March with a variety of legislative leaders and staff counsel concerning our opposition to the Governor’s ill-conceived proposal to mandate criminal forfeiture in every criminal case. Mr. Kessler, who worked on the original state statute on civil forfeiture (CPLR Article 13-A) while he was in the Bronx District Attorney’s Office, spent many hours writing and speaking to people in Albany to express our concerns. The original proposal was to enact criminal forfeiture as part of the Governor’s budget. We–and our allies–succeeded in defeating that effort,
and yet we expect to have to resist further efforts from the prosecutors to enact this legislation which is designed, in part, to enrich District Attorney’s Offices.

Recently, Legislative Committee Chair Andrew Kossover, NYSACDL Past President Lisa Schreibersdorf and I traveled to Albany to meet with members of the state senate, the state assembly and the Governor’s counsel on a variety of criminal justice issues, discovery reform among them. We also promoted legislation to provide for discretionary sealing of non-violent felonies and misdemeanors. We supported Chief Judge Lippman’s proposal to raise the age of criminal responsibility. We received a warm reception from both sides of the aisle. The leaders with whom we met were interested to hear from us and wanted to understand our point of view. Credit for the access we now have goes to those who have worked on the Legislative Committee these last several years, and to NYSACDL’s lobbyist. We cannot promise the members that we will always stop repressive legislation, or that we will succeed in enacting positive criminal justice reforms, but we can say that our voice is heard in Albany.

JOIN US
The Association has a terrific new set of Board members, who volunteer their time to work on this magazine, create CLE programs, work on amicus curiae cases, defend members through the Strike Force, and hear complaints about misconduct in our Prosecutorial and Judicial Complaint Center. It is an honor to represent this Association on our Board of Directors and I remind you that you should consider volunteering to join. If you are elected, you will have an opportunity to help your colleagues and serve the cause of justice right here at home in a larger sense than just the individual cases on which you are already working. Any member can volunteer to become a member of one of our committees. You will find that effort to be well worth your time, because you will meet a new community of like-minded attorneys with whom you will be proud to work.

Richard D. Willstatter, NYSACDL President

Continuing Legal Education

**“SERVE YOUR CLIENTS; PROTECT YOURSELF”, PLEA BARGAINING AFTER MISSOURI V. FRYE & LAFLER V. COOPER**

Jointly with Suffolk County Bar Assn
October 16, 2012 &
October 30, 2012

**SYRACUSE TRAINER**
Syracuse, NY
October 2012

**BINGHAMTON TRAINER**
Binghamton, NY
September 2012

**FEDERAL PRACTICE SEMINAR**
November 1, 2012
SDNY Courthouse
500 Pearl Street
NYC

**WEAPONS FOR THE FIREFIGHT**
Fall 2012

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

The variety of articles and viewpoints expressed in this issue of ATTICUS highlights the involvement of NYSACDL in matters of importance to the criminal defense community. Support for NYSACDL’s ongoing efforts to impact legislation under consideration in Albany is best demonstrated by the growing membership of this organization. We encourage all of our readers to pass on a link to ATTICUS, www.nysacdl.org/atticus, to your contacts and others you believe would be interested in the work of NYSACDL. We also ask that when the opportunity arises, you remind your colleagues to join the effort by becoming a member of this organization, which remains the largest independent criminal bar association in New York State. We hope you enjoy this issue, and welcome your submissions for future publication.

Thank you for your continued support of ATTICUS,

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Events

NYSACDL 2012
Board Meetings

September 22, 2012
Albany

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.

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Join the Call for Discovery Reform!

New York’s current criminal discovery scheme has contributed to a justice system that leads the Nation not in fairness but in wrongful convictions. Under New York’s current discovery statutes too little information is required to be disclosed by the State too late in the process to be helpful to the defense. It is time to end this system of injustice. The current New York criminal discovery statutes have allowed “trial by ambush” for far too long.

Help end this injustice. Call, fax or email your representatives in the New York State Legislature TODAY urging them to support the following bills currently pending in the NYS Assembly:

- **A6907**: This is a total overhaul of criminal discovery in New York and would modernize the discovery statutes. It imposes automatic discovery obligations on the State, broadens the discovery required to be disclosed, and affords meaningful sanctions for non-compliance.

- **A8080**: This Bill would create a small but significant improvement to criminal discovery in New York by amending the existing discovery scheme to allow a judge to order discovery if the requested property is “material to the defense” and the judge determines that the request is “reasonable”.

Improving our criminal discovery statutes would:

- Reduce the instances of wrongful convictions
- Improve the efficiency of the criminal justice system by streamlining the discovery process
- Prevent the “trials by ambush” that currently happen throughout New York every day

The passage of either of these bills is vital to the well being of the criminal justice system by helping to make trials the search for truth they should be as opposed to the gamesmanship that sometimes prevails under current discovery law. Defense lawyers will be able to provide better advice and representation to their clients if they have access to all the relevant information needed to make intelligent decisions about how to handle their cases. This reform is about efficiency, effectiveness and fundamental fairness.

These bills are being debated in the Legislature NOW. We urge you to contact your State representatives in both the Assembly and the Senate and demand this long overdue reform. If you do not know who your representative is, please check the Assembly and Senate websites:

http://assembly.state.ny.us
http://www.nysenate.gov

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“I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned — as I thought, logical, coherent, complete. Second was the one actually presented — interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.”

Justice Robert H. Jackson, Advocacy Before the Supreme Court (1951)
In the News

June 28, 2012
NYSACDL member Chuck Keller obtains not guilty in homicide
An Onondaga County Court jury deliberated about three hours before finding Tyrone C. Loftin Jr. “not guilty” of second-degree murder and third-degree criminal possession of a weapon charges. Charles Keller, Loftin’s attorney contended he acted in self defense. Loftin testified in his own defense that he believed the alleged victim was armed with a knife when a confrontation occurred between the two men in front of the victim’s home.

June 27th, 2012
NACDL and NYSACDL Join to Urge Discovery Reform
NACDL President Lisa Wayne joined NYSACDL President Richard Willstatter in a letter to the New York State legislature urging the passage of bill A8080. While somewhat limited in scope, A8080 nevertheless permits a trial judge, in her discretion, to order the People to disclose to the defense documents and other materials regardless of whether the People intend to offer that evidence at trial. NACDL joins NYSACDL in continuing to support A6907, a comprehensive discovery bill.

June 13, 2012
NYSACDL Vice President Michael Shapiro awarded the New York Law and Jurisprudence Award
On June 13, 2012, NYSACDL Vice President Michael Shapiro was awarded the New York Law and Jurisprudence Award from Chabad Lubavitch of Westchester at their annual dinner at the Waldorf-Astoria Hotel in Manhattan. Chabad Lubavitch is one of the largest Jewish educational, humanitarian organizations with 4,000 Chabad Houses and Lubavitch Community Centers, in eighty countries.

June 12th, 2012
Court of Appeals issues Ruling in Support of Defense Counsel
June 2012 – The Court of Appeals issued an Opinion in favor of Todd Smith affirming Smith’s appointment as counsel and compensation for representation of a defendant charged with homicide even though, at the time of his appointment, Smith was not on the “list” for court appointments under the Assigned Counsel Plan. In the Matter of Todd M. Smith v. Hon. James C. Tormey, County of Onondaga, et al. NYSACDL submitted an amicus brief on Smith’s behalf.

June 11th, 2012
NYSACDL Supports Legislative Agenda Aimed at Curbing Wrongful Convictions
NYSACDL President Richard D. Willstatter writes in support of legislative initiatives aimed at making the criminal justice system fairer by curbing leading causes of wrongful convictions. “When innocent people are prosecuted for crimes they have not committed, our community is harmed. Families are torn apart. And the real perpetrators remain free to commit more crimes.”

Among the proposals being considered are videotaping of all custodial interrogations, employing procedures to ensure that lineups are objectively conducted, and importantly, discovery reform obligating prosecutors to reveal evidence to defense counsel at early stages in the proceedings. Read the full Letter to the Editor, Proposed Laws Will Prevent Wrongful Convictions, The Journal News, June 10, 2012.

May 23rd, 2012
President Obama Nominates Judge Lippman to State Justice Institute
May 23, 2012: President Obama nominated New York State Chief Judge Jonathan Lippman for a position on the 11 member board of the State Justice Institute. The Institute, formed in 1984, is a not-for-profit organization which works to improve the administration of justice in the state courts through innovative problem solving and coordination between state and federal courts. If confirmed, Judge Lippman will be the first New York State Judge named to the Board since the 1980’s. As Chief Judge of New York State, Judge Lippman has implemented an initiative to examine and rectify the causes of wrongful convictions and has been an outspoken proponent of expanding access to legal services by the poor. NYSACDL presented Judge Lippman with the Hon. William Brennan Award for Outstanding Jurist at its 2012 Annual Dinner. Judge Lippman also received the William Rehnquist Award for Judicial Excellence from the National Center for State Courts in 2008 among other distinctions.

April 18th, 2012
Senate Passes Bail Legislation
The State Senate passed legislation (on April 18, 2012) allowing judges to consider the safety of alleged victims and their families when setting bail. In opposing the bill, NYSACDL President Richard Willstatter notes that prosecutors routinely make bail applications that refer to defendants’ criminal histories and the nature of alleged crimes.
as well as the risk of harm to an alleged victim. Thus, judges are typically made aware of the same information covered by the bill when setting bail. “There is no pandemic of judges in New York failing to consider these factors,” said Willstatter, who practices out of White Plains. “If a judge thinks a defendant is dangerous, he can set higher bail or, in a felony case, deny bail.” NY Senate Green Lights Bail - Setting Proposal, Thomson Reuters News & Insight. 

http://newsandinsight.thomsonreuters.com/New_York/News/2012/04_-_April/NY_Senate_green_light_bail-setting_proposal/

April 12th, 2012

Forensic Science Accreditation Assessment Information Available
Materials provided to the New York State Commission on Forensic Sciences which include accreditation assessments, records of laboratory errors, problems with personnel proficiency exams, and how individual labs address problems are now available online: http://www.criminaljustice.ny.gov/pio/openmeetings.htm. Defense lawyers can access these materials to review issues about a lab involved in a particular case. Records indicating a specific problem in a lab in your case could form the basis of additional discovery requests that may have been otherwise been rejected by the court as not relevant. Lawyers are encouraged to check out the information that is now publicly available. Lawyers are REMINDED that this is a starting point in research but not a substitute for making specific demands for specific test reports and laboratory case files in a lawyer’s current case. 

April 12th, 2012

NYSDA Funding Restored
SUCCESS! The call for restoration of funding for NYSDA’s Public Defense Backup Center has paid off. Last week, NYSDA reported that it has received over $2 million in requested funding in the final budget. NYSDA’s Public Defense Backup Center, which performs New York State’s backup function under the Sixth Amendment has been added to the Indigent Legal Services Fund (ILSF) as a statutory purpose and so will continue to perform its vital services. NYSACDL joins NYSDA in thanking our members who wrote to their legislators urging that funding for NYSDA’s Backup Center be continued.

March 20th, 2012

NYSACDL Speaks Out on Sentencing Disparity

NYSACDL President Richard Willstatter responded to a recent New York Times article, “Wide Sentencing Disparity Found Among U.S. Judges” in a Letter to the Editor which was published recently in the Times. Imposing a sentence below that advised by calculations under the federal sentencing guidelines is based upon myriad circumstances such as cooperation, compelling personal circumstances or weakness of the case. Individual sentencing decisions made by the federal judiciary take into these and other factors and should be respected by prosecutors, defense counsel and the public.

We welcome information from all members concerning verdicts and results.

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

Letter Sent To New York State Assembly

June 26, 2012

Hon. Sheldon Silver
Speaker
New York State Assembly
LOB 932
Albany, NY 12248

Hon. Joseph Lentol
Chair, Codes Committee
New York State Assembly
LOB 832
Albany, NY 12248

Re: A.8080

Dear Speaker Silver and Assemblyman Lentol:

The National Association of Criminal Defense Lawyers and its New York affiliate, the New York State Association of Criminal Defense Lawyers, thank you and the Assembly for passing A.8080. As you know, we have been seeking criminal discovery reform nationally on the state and federal levels because of the unfairness of the current system. Everyone knows about the potential for wrongful convictions as a result of the withholding of information from the defense. The passage of A.8080 will at least permit state judges, in their discretion, to order the People to disclose documents and other materials to the defense even if the People themselves do not intend to offer that information into evidence. Often, the People have obtained evidence that the defense may wish to introduce so A.8080 permits a judge to order a District Attorney to produce it by granting a motion for disclosure. Thank you so much for making fairness in the criminal justice system a priority.

As you are aware, we also support A.6709 and hope it will be considered along with A.8080 later this year.

Very truly yours,
Lisa M. Wayne   Richard D. Willstatter
NACDL President   NYSACDL President
As Chair of the Legislative Committee of the New York State Association of Criminal Defense Lawyers, I am pleased to report that desperately needed Discovery Reform is no longer the centerpiece of our efforts alone, but that of virtually every other organization and commission devoted to improving the administration of criminal justice in New York.

Upon Seymour James becoming the 115th President of the 77,000 member New York State Bar Association on June 1, 2012, he immediately placed Discovery Reform at the top of his agenda. Chief Judge Jonathan Lippman’s New York State Task Force on Wrongful Convictions has created a Discovery Reform Subcommittee, on which I serve, to review and make recommendations for “responsible reform,” as New York County District Attorney Cyrus Vance, Jr. referred to it in his June 21, 2012 essay published by the New York Law Journal. It is noteworthy that District Attorney Vance acknowledges “that New York is among the most restrictive states in terms of providing criminal discovery,” and supports the expansion of criminal discovery through statutory reform, but like many prosecutors, remains concerned about the problem of witness disclosure possibly leading to witness tampering. The New York Office of Court Administration has in place a Subcommittee on Discovery Reform. The New York State Defenders Association and American Bar Association have also recommended meaningful reform. We strongly supported the State Defenders’ efforts to have the State Legislature pass a bill that would have allowed qualified defender organizations to have equal access to the criminal history of an individual as do prosecutors. Two versions of such a bill passed the Assembly and despite significant progress, the “rap sheet access bill” (S.7005) did not pass the Senate this past session. With the support of the Chief Judge, OCA, Judge Prudenti, and educational efforts going forward, we expect a more favorable result next session. A grassroots organization called “It Could Happen 2 You,” energized by exonerees like Jeffrey Deskovic, is lobbying Albany for discovery reform by providing specific examples of how true disclosure could have prevented wrongful convictions. And no discussion of Discovery Reform in New York would be complete without acknowledging the comprehensive research and proposal prepared by John Schoeffel of The Legal Aid Society of New York (the original 150 page report is available at www.legal-aid.org).

Based upon the efforts of these policy leaders, discovery reform is inevitable. Now the question becomes what will new discovery in New York look like. It is predictable that “demand discovery” will be eliminated. No more boilerplate motions by the defense or prosecution. Discovery will be automatic and prosecutors will be able to consent to indicated hearings within short time frames. Prosecutors will no longer be the “gatekeepers” of what they believe is exculpatory or material. Early disclosure of Rosario material including witness statements and police reports will become a reality. It is the identity and contact information of witnesses that presents the most perplexing problem. I see no reason why objective criteria cannot be thoughtfully arrived at in order to protect witnesses in particular designated types of cases (i.e., there have been threats of retaliation, gang related offenses, etc.). Future debate will also include
“presumptive disclosure” of witness information vs. “presumptive protection” of witness information. Finally, weak enforceability of discovery statutes has resulted in injustice and inefficiency. Any new discovery laws should include reasonable sanctions for noncompliance.

The limited disclosure in criminal cases when a defendant’s liberty is at risk stands in marked contrast to the full disclosure afforded parties in civil litigation. We acknowledge that discovery reform is a clash of law and politics and has its pitfalls, but we will continue to endeavor to achieve open discovery as has already been implemented in jurisdictions seeking greater fairness, reliability, finality, and efficiency in criminal case adjudications.

NYSACDL President Richard Willstatter has published numerous memos and letters moving discovery reform forward. It is also noteworthy that during this past session of the Legislature, President Willstatter, with the support of this Committee, most notably immediate Past-President Kevin O’Connell and member Steven Kessler, was responsible to a great degree, for defeating ill-conceived proposed legislation authorizing mandatory forfeiture at criminal sentencing.

I close with my usual reminder:

By your membership in NYSACDL, you become part of this pursuit of justice and well-reasoned legislation. We will continue to call on members to contact their respective representatives to address legislative issues of importance. By doing so, we not only serve our clients and members, but all the people of the State of New York.

If you have any specific issues you would like to bring to the legislative committee, contact the chair, Andy Kossover. If you have any relationships with your local politicians, or believe your local district attorney would support sealing or discovery reform, it would be helpful for the legislative committee to be aware of that as well. Feel free to contact any of the members above if you are interested in participating in legislative work. It is particularly helpful if you have an expertise that we can draw on in those final moments of the session when bills are being proposed and passed very quickly.
The documented failures of crime laboratories in the United States have reached epidemic proportions. False confessions, fraudulent evidence, junk science, and eyewitness misidentification have become all too common. Regrettably, law enforcement at best only grudgingly accepts the loss of a conviction and more often fights to sustain convictions even in the face of compelling demonstration of flawed evidence or expert testimony. The National Academy of Sciences issued a report in February, 2009 entitled, “Strengthening Forensic Science: A Path Forward (2009)”\(^1\). This report was the product of Congressional mandate to assess the present and future needs of the forensic sciences in the United States\(^2\). The report called for the creation of the National Institute of Forensic Science, (NIFS), with a stated purpose of “establishing and enforcing best practices for forensic science professionals and laboratories.” Congress appears to have recognized that the persistent failures in the forensic sciences grew out of a void in national policy and commitment to ensuring that bad science did not undermine our judicial system.

The publicity which has been generated by the exonerations championed by

\(^1\) [http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf)

\(^2\) Science, State, Justice Commerce and Related Agencies Appropriations Act of 2006
the defense community a seat at
the forensic system is by according
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these labs is little more than a means
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The rash of crime laboratory failures
incarceration of the innocent.
convictions come at a painful cost
perpetrator of the Mansville murder
could have been avoided had the true
nearly 19 years for a crime that he did
finally exonerated, having served
On April 28, 2010 Mr. Sterling was
the 1988 murder of Viola Mansville.
Christie confess to his responsibility for
years to life after being found guilty at
interrogation. In December of 1992,
Frank Sterling was sentenced to 25
years to life after being found guilty at
jury trial. Only after his confession to
the murder of Kali Poulton did Mark
Christie confess to his responsibility for
the 1988 murder of Viola Mansville.
On April 28, 2010 Mr. Sterling was
finally exonerated, having served
nearly 19 years for a crime that he did
not commit. The loss of Kali Poulton
could have been avoided had the true
perpetrator of the Mansville murder
been brought to justice. Wrongful
convictions come at a painful cost
to society that is not limited to the
incarceration of the innocent.

The rash of crime laboratory failures
makes clear that the certification of
these labs is little more than a means
of bolstering the testimony of the lab
personnel. The only hope of improving
our forensic system is by according
the defense community a seat at

In this context, the American Society
of Crime Laboratory Directors /
Laboratory Accreditation Board
(“ASCLD / LAB”), has presented
itself as an agency which can provide
oversight services. ASCLD / LAB is
perceived by some as the foremost
forensic laboratory accrediting agency
in the United States. ASCLD / LAB is
responsible for the accreditation of
385 crime laboratories, including 192
state laboratories, 129 local agency
laboratories, 23 federal laboratories,
16 international laboratories, and
25 private laboratories for a fee of
approximately $30,000.00 each.
Founded in 1974, ASCLD stated
goal was to “establish standards of
operation for crime laboratories and to
take appropriate steps to restore public
confidence in the work performed
by the nation’s crime laboratories.”
ASCLD / LAB’s stated goal is to
support these ideals by accreditation
procedures, in which labs seeking
to maintain their accreditation must
generate and maintain compliance
documentation each year, and
additionally must submit to on-site
inspections every 5 years. Some very
public failures in these procedures have
demonstrated that the peer review
process does a better job of bolstering
prosecution testimony by lab personnel
than in detecting flawed laboratory
procedure and policies.

With all of the accreditation
procedures in place by ASCLD / LAB,
why are ASCLD/ LAB-accredited
forensic crime laboratories across
the nation plagued with scandals
involving improper forensic analysis,
potential that material information was withheld from the defense. In the case of Gregory Taylor, reports of tests conducted by Duane Deever were introduced which revealed “chemical indications for the presence of blood,”6 on parts of Taylor’s vehicle. Deever’s final report in Taylor’s case and many others failed to indicate that this test was presumptive of the presence of blood, and that a more conclusive test for the presence of blood returned negative results. The absence of human blood was material to Taylor’s defense and undisputedly undermined a significant piece of prosecution evidence. Deever, reflected the same in his notes, but did not reflect the negative findings in his final report. The review of the North Carolina laboratory ultimately revealed that similar misrepresented results relating to blood serology tests had been reported in 229 cases, among which were seven executions, with others remaining on death row and still others serving lengthy incarceration terms.

It is unnerving to think that faulty forensic evidence could have resulted in the state’s wrongful exercising of its power to end a human life. The readily detectable flaws in the handling of forensic evidence points out the inadequacy of ASCLD / LAB accreditation of the North Carolina lab.

The trace evidence section at the Albany Crime Lab of the New York State Police was the subject of an investigation by the New York State Inspector General arising out of the misconduct of Garry Veeder, a lab scientist. The investigation commenced after State Police had confirmed that Veeder had admitted to falsifying test results in the hair and fiber section of the lab where he had served “with distinction” for over 15 years. While an ASCLD/LAB inspector first questioned Veeder’s competence the Inspector General never addressed how Veeder had escaped detection through at least two prior ASCLD / LAB certifications. During a 2008 re-accreditation audit, an ASCLD / LAB assessor discovered anomalous results in a proficiency test of fiber analysis conducted by Veeder. While conducting fiber analysis, Veeder had been backfilling a value for the refractive index of the subject fibers from a cheat-sheet containing a number value for specific types of fibers. However, the actual fiber analysis test required a “greater than” or “less than” value in comparing the refractive index of two fibers. Veeder’s test results contained information that was clearly not relevant to the type of test being conducted. As evidenced by the 2008 ASCLD / LAB re-accreditation assessment, a thorough investigation of Veeder’s lab work would have quickly revealed that his work was less than scrupulous. Veeder’s work had been subject to peer review which turned out to be a rubber stamp by an unqualified colleague.

Though Veeder’s abhorrent work was discovered by an ASCLD / LAB assessor in 2008, he escaped detection on prior lab assessments in 1998 and 2003, during which the crime lab attained full ASCLD / LAB accreditation. How, then, did Veeder’s work manage to go undetected on two separate occasions by ASCLD / LAB assessors? Are the assessors too cozy with the lab personnel to evaluate? Has it been in the interest of ASCLD / LAB to publicize deficiencies? In the case of the New York State Police Lab why, after the Veeder discovery, did the Inspector General confine its examination solely to the trace evidence section? The simple answer can be traced to the absence of the defense community from a seat at the table. ASCLD / LAB interests lie in granting accreditation certificates and collecting the assessment fees, which can be as much as $35,000 per year for a single lab.7 In 2008, ASCLD / LAB reported a total income of $2,192,134.00 on its Return of Organization Exempt From Income Tax Form 990 filing with the Internal Revenue Service.8 However, most ASCLD / LAB assessors work on a volunteer basis, thus the bulk of the organization’s work is done without cost. The question then becomes where does all of the revenue generated by ASCLD / LAB go?

Though officer salary information is undisclosed by ASCLD / LAB, one can speculate that officers in such a powerful organization are well-compensated.

How can the public be confident that ASCLD / LAB is ensuring that accurate and scientifically sound forensic analysis is being conducted by the nation’s crime labs when they have allowed scientists such as Garry Veeder and SA Deever to go undetected for years? The underlying problem is that the general public, particularly jurors, are not apprised of the shortcomings of ASCLD / LAB. Prosecutors seldom forget to ask their forensic scientists on direct examination about whether their labs are ASCLD / LAB certified and what the accreditation process entails. Such a question often warrants a well-scripted response such as:

“A team of inspectors from the accreditation board comes to our lab and examines our protocols, talks to our personnel, and our documentation, makes sure that we are following our proficiency tests. . . it’s to make sure that we are following all criteria that the accreditation board has set forth.”9 Such testimony is offered to bolster

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6 Report at page 5.

7 http://www.ascld-lab.org/fees.html

8 Schecter, Marvin, Memo the Members of N.Y.S. Commission on Forensic Science dated March 25, 2011 at Pg. 8 Fn. 22

9 P. v. Dennis Sweeney, Direct of Goble pp. 8 ln. 16, October 10, 2008, Orange County Indictment No.: 997/07
the credibility of the forensic evidence, and to foster the appearance that an ASCLD/LAB accreditation guarantees complete and accurate work. The fact that ASCLD / LAB accredited facilities have been known to produce less than stellar results is not often brought to light.

In 2005, a full investigation of the Houston Crime Lab was conducted by Michael Bromwich and his team. On May 31, 2005 Bromwich and his team released a report after 8 weeks of investigation which described the failure by the Houston Police Department and the City to provide adequate resources in support of the Crime Lab, problems related to the management of crime lab personnel, insufficient training and professional development, and the historical absence of quality assurance and quality control systems.10 Despite Bromwich’s findings, the Crime Lab was awarded ASCLD / LAB accreditation for the first time on May 10, 2005. The New York Inspector General’s examination of the Veeder case files was itself horribly flawed. In reliance upon an examination of Veeder’s files, the IG reported that 78% of Veeder’s work was within scientifically acceptable standards. The problem was that the volunteer examiners attached to the Ohio Bureau of Identification and Investigation had not been told that Veeder had admitted to “dry labbing” and had likely planted evidence. At a hearing conducted in Saratoga County Court11, Jeffrey Lynn, the Chief reviewer of Veeder’s work testified that Veeder’s admission rendered his examination “moot.” Prosecutors throughout New York State had received advice that the majority of Veeder’s cases were sound. Among these was Katherine Seeber, a 19 year old who pled guilty to a felony murder on advice of her counsel who concluded that despite her consistent version of events, her credibility would be severely undermined by what was only recently shown to be falsified test results and conclusions of Garry Veeder. Ms. Seeber’s conviction and plea were vacated on June 27, 2011 by the Saratoga County Court (Hon. Jerry Scarano JCC). The decision was affirmed by the Appellate Division 3rd Department following an appeal by the Saratoga District Attorney. The New York State District Attorney’s Association filed an amicus12 in support of the Saratoga District Attorney.

Pursuit of the publicized failures at crime labs in Houston, San Francisco, Nassau County and other locations is not contained within this article because of space limitations. The New York Inspector General has recently completed a report about the failings of the Nassau County Crime Lab and Monroe County Crime Labs. Nassau County remained open albeit on ASCLD/LAB probation before further disclosures resulted in the closure. A reading of the long-term deficiencies at Nassau Crime Lab raises questions about how the lab remained open for so long. The improper reporting and withholding of material evidence should not be viewed as isolated incidents. Where faulty forensics result in wrongful convictions the true perpetrator remains free a fact which is often overlooked when measuring the true cost to society.

Forensic evidence is often the strongest available circumstantial evidence in a criminal case. The frequency of misuse of forensic evidence and expert testimony makes it imperative that an accrediting body ensure that such evidence is based on sound scientific principles and is presented in a fair and accurate light. The breadth of the scandals involving the ASCLD / LAB certified crime labs strongly suggests that oversight should not be delegated to a private agency such as ASCLD / LAB until other options are examined.

Popular media has raised the awareness of the general public and our potential jury pools concerning forensic science. Prosecutors are now trained to condition jurors regarding the “CSI” effect heightening the attention to sometimes barely relevant forensics and to deflect from the absence of persuasive evidence in cases where the proof may rely upon more conventional material. The defense bar must be prepared to contest the validity of forensic evidence particularly in the current climate of laboratory failures.

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10 http://www.hpdlabinvestigation.org/pressrelease/050531pressrelease.pdf
11 People v. Seeber; Saratoga County Indictment, M 160-2000 The author was one of the pro-bono counsel on the CPL 440.10 proceedings and People’s appeal with Vernon Broderick, Corey Chivers and Tashanna Pearson of Weil, Gotshal & Manges LLP
QUANTIFYING EVIL:
The Depravity Scale As Junk Science
In 1982, professional evidence-based forensic psychiatry sustained a crushing setback. The iconic date is June 21st of that year, when a jury in Washington, DC, found John W. Hinckley, Jr., the profoundly psychotic young man who shot President Ronald Reagan and three other men, not guilty by reason of insanity. The verdict set off a firestorm of outrage that crossed the geographical and political divide; one day after the verdict was announced, an ABC News poll heard 83% of respondents opine that “justice was not done.” State legislatures across the country moved swiftly to ensure that justice would be done in the future by strangling their insanity defense laws, and four states (Idaho, Montana, Utah, and later Kansas) abolished the insanity defense altogether. In 1984 the federal government weighed in with its own Draconian insanity defense statute.

Jurisdictions that have not entirely abolished the insanity defense have since replaced it with standards requiring proof of such severe mental illness that many conditions, even some mood (bipolar) disorders, are not sufficiently severe to support a finding of insanity. The contemporary statutes give prosecutors a further advantage, by requiring the defense to bear the burden of proof on the question of insanity. These statutes make it easier for prosecutors to demonize defendants with dubious psychiatry; this is seen in starkest form in the blatant emergence of “evil” in psychiatric testimony, and in what seems to be growing interest in a “Depravity Scale” that death penalty defense lawyer George Kendall dismisses as “junk science,” but which may soon find currency in deciding who shall live and who shall die.

Many very prominent forensic psychiatrists are appalled by the introduction of “evil” into their specialty. James L. Knoll, IV, M.D., Director, Division of Forensic Psychiatry, State University of New York, Upstate Medical University has noted that “embracing the term ‘evil’ in the lexicon and practice of psychiatry will contribute to the stigmatization of mental illness, diminish the credibility of forensic psychiatry, and corrupt forensic treatment efforts.” Other psychiatrists, preeminently Michael M. Welner, M.D., of New York University (Psychiatry) and Duquesne University (Law), have embraced evil warmly. Welner has done so by conceiving the Depravity Scale, first presented at the annual meeting of the American Psychiatric Association in 2001 and fine-tuned in the ensuing years. The purported intent of the Depravity Scale is to help judges and juries mete out punishment in a fairer, more objective way, and in particular to identify, in a scientific manner, crimes that Welner calls “the worst of the worst,” i.e., crimes that he thinks deserve the death penalty. However, his research methods do not conform to recognized academic methods of psychological test construction. Instead, visitors to his web site are invited to fill out a quiz. Welner claims to be seeking a consensus within the general population for defining terms by which we recognize evil - words such as “cruel,” “atrocious,” “heinous” and “horrible.” However, a treatment of his data using the technique of factor analysis would reveal that these four words, for example, mean pretty much the same thing, so Welner’s Depravity Scale does not measure as many constituents of the concept of evil as a cursory glance might suggest; it is actually a pretty redundant test.

A second immediate problem is that Welner and his 27-member Forensic Panel serve the law enforcement community - the very people who are most likely to have business on his web site. They are certainly not representative of the general population. Will the use of such a scale diminish the credibility of forensic psychiatry and psychology? Richard D. Dieter, JD, Executive Director of the Death Penalty

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Robert Wilbur has been a consultant in clinical psychopharmacology for 28 years. He also engages in medical editing and writing as well as semi-popular writing on medical topics. In the past year he has been writing a series of articles against capital punishment. Robert Wilbur is a consultant in clinical psychopharmacology research and a writer/editor. He writes frequently on capital punishment issues. The views expressed in this article are the author’s, and not necessarily those of NYSACDL. He can be reached at petula10025@aol.com
Information Center, whose organization serves lawyers, academics, students, and journalists, reports that he has begun to get queries from attorneys about the Depravity Scale, and he is troubled that the deployment of such an instrument, by promoting it as being “scientific,” could have a “damning” effect on the defense.\textsuperscript{7} Dieter believes that attorneys, particularly capital defense attorneys who are most likely to encounter the Depravity Scale, must learn how to “fight fire with fire” starting with the notion on which it is predicated. “Evil,” Dieter observed, “is a subjective concept. You can wrap numbers around it, but that doesn’t make it any less subjective. The Depravity Scale attempts to quantify the unquantifiable.”\textsuperscript{8}

The defense attorney ought to be able to apprise the jury, in language free of jargon, about the questionable way in which Welner wraps numbers around his quiz. Furthermore, he or she must have a firm grip on the rules of scientific evidence. Federal jurisdictions, and about half the states, follow the Daubert\textsuperscript{9} formula for the admissibility of scientific evidence. The purposes of the Daubert criteria are to assess the acceptability of the evidence by scientists working in the field, and to estimate the error rate. The major criteria are the testability of the theory upon which the evidence is based, a determination of whether a test (like the Depravity Scale) has been peer reviewed by members of the forensic community, and whether it has been published. The Depravity Scale seems to collapse under the weight of all three prongs. It has no testable foundation for, as Robert L. Simon, M.D., the former Director of the Program in Psychiatry and the Law at Georgetown University points out, the concept of depravity is as imprecise and subjective as its synonym - evil. Dr. Simon goes on to observe that “when a concept is beyond scientific investigation, it is the province of the philosopher and theologian.”\textsuperscript{10} Now, it is true that the Depravity Scale has

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“**If you don’t know where you’re going, when you get there you’ll be lost.**”

Yogi Berra
been “peer reviewed” ... by Welner’s own hand-picked associates of his group practice, the Forensic Panel. And it is admittedly true that Welner has published his research on the Depravity Scale, but he has done so in The Forensic Echo, a journal that he personally bankrolls and edits. None of this practice is compatible with the anonymous collegial evaluation of scientific manuscripts, as practiced by professional publications like the Journal of the American Academy of Psychiatry and the Law. Why not? Dr. Knoll’s answer is that “in orthodox, mainstream American forensic psychiatry, Welner is not taken seriously.”

However, he is often taken seriously by juries, which is why it is imperative for defense attorneys to be able to convey to juries how the concepts of evil (and its synonym, depravity) are so profoundly flawed from an evidentiary perspective. These concepts, and instruments like the Depravity Scale, which purport to measure them, are uniquely pernicious because Americans are suckers for science, or what is pitched as science. This helps the prosecution to portray a capital defendant as too dangerous to live. It is true that evil has always been with us implicitly, as a prosecutorial weapon, but its emergence in the corpus of forensic psychiatry, in company with the Depravity Scale, is a recent development. Although New York State’s death penalty law was found unconstitutional in 2004, the federal capital punishment law is very much an unwelcome presence, especially in the execution belt in Brooklyn.

Acquittals by virtue of insanity are so rare that defense attorneys almost always have to make their case in the second, penalty phase of a capital trial, when jurors decide whether to impose the death penalty or opt for life without possibility of parole. Having challenged the prosecution efforts to demonize the defendant, the defense attorney must try to humanize his client, no matter how heinous the crime. Lisa Greenman, a capital defense attorney with the Maryland Public Defender’s Office and the Federal Death Penalty Resource Counsel Project, described the path that defense attorneys would do well to follow in the penalty phase of the trial. First, the jury must understand that the alternative to death really is life without any possibility of parole. The state has the means to ensure that, if the jury opts for LWOP, the prisoner will die behind bars. Second, the attorney should strive to persuade the jurors that their revulsion over the crime, and their entirely reasonable feelings for the victims, must not blind them to the fact that “they are deciding the fate of a human being. Essentially, the jury is entitled to know that the prisoner, however damaged, is also a son, a brother, an uncle, a father; in short, a member of the human family.”

We submitted the depravity scale for peer review to Deborah Davis, Ph.D., Professor of Psychology, University of Nevada, Reno. Professor Davis teaches and conducts research in social psychology, research design (i.e., rating scales), and forensic psychology. Her summary comment on Dr. Welner’s scale is that: “Psychometrically this is one of the worst things I’ve seen.” She arrived at this conclusion by taking the test herself, and then examining her impressions. She found its questions poorly defined, too vague or confusing, or so difficult that she had to guess at some of the answers. She deemed his methodology completely inappropriate and ridiculous (emphasis hers); she wrote that “a very damning issue for using this scale in practice is that it has no context,” i.e., motive (Is he a psychopathic serial killer, or a husband who came home and found his wife in bed with his best friend?) Having read Professor Davis’ three-page critique of the depravity scale, one can only conclude that it is unprofessionally conceptualized and ineptly constructed, and therefore open to attack by defense counsel.

Authors Note:
The author extends special thanks to Ms. Kathryn M. Kase, Executive Director, Texas Defender Service, for her help in every stage of writing this article, which would not have attained fruition without her patient and knowledgeable participation.
Orders Of Protection

and The Disappearance Of Due Process

On January 20, 2011 police officers arrested Andrew Yu1 for allegedly making harassing phone calls to his wife. The complaint alleged that Mr. Yu called his wife’s workplace several times, saying, “I want to take you out to lunch and I’m coming to your workplace.” Mr. Yu made no threats of physical violence, nor did the State allege any threats. Nevertheless, Mr. Yu was charged with Aggravated Harassment in the Second Degree.

At Mr. Yu’s arraignment, the judge issued a full temporary order of protection at the DA’s request, preventing Mr. Yu from seeing or interacting with his wife and barring him from returning home. The judge issued the order despite Ms. Yu being present in court and informing both the DA and the judge that she did not need or want the order. Though the judge issued it “subject to family court modification,” there were no family court procedures in place to modify the order, nor could Mr. Yu appeal the order, as it was not a final judgment. He and his wife worked alternating schedules, with Mr. Yu taking care of the children during the day and his wife taking care of them at night. The order forced Ms. Yu to find an alternate caretaker for the children during the day. It also forced Mr. Yu to sleep in his car as the order prohibited him from returning home.

1 Name changed for privacy of client.

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Defense counsel demanded an evidentiary hearing to contest the order’s necessity, which the court denied. However, a few weeks later, in response to a sworn affidavit from Ms. Yu reasserting her opposition to the order, the court modified the order of protection and allowed Mr. Yu to return home to his family. The court eventually dismissed the charge. Nevertheless, for the duration of the order, the State of New York unfairly deprived Mr. Yu and his family of some of their most important rights.

Unfortunately, this story is all too familiar to New York criminal defense attorneys. Counsel faces an uphill battle that involves far more than fighting clients’ criminal cases. The orders that arise out of these cases have immediate, devastating consequences to the lives of clients, even when the underlying criminal matters are successfully resolved. Unfortunately, there is currently little recourse that New York defendants or their attorneys can seek to mitigate these ramifications.

TEMPORARY ORDERS OF PROTECTION IN NEW YORK STATE COURTS

New York state criminal courts issue temporary orders of protection (TOP’s) pursuant to New York Criminal Procedure Law (CPL) §530.12(1). The temporary order of protection “may require the defendant… (a) to stay away from the home, school, business or place of employment of the family or household member or of any designated witness.” The statute mandates that courts “state [their] determination in a written decision or on the record,” but later provides “that failure to make such a determination shall not affect the validity of such temporary order of protection.” Though 530.12 does not specify the procedures for issuing the protective order, the CPL requires that courts provide defendants with an opportunity to be heard when issuing securing orders for recognition or bail. Since courts issue TOP’s “as a condition of any order of recognizance or bail,” the right to be heard extends to the issuance of temporary orders of protection.

Nevertheless, defendants are given little, if any, opportunity to be heard. The statute provides a non-exhaustive list of criteria for courts to consider in their determinations, including “conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons.” But the only determinative factor under the current system is whether the DA recommends the order. In nearly all cases where domestic violence is alleged, DA’s request full orders of protection. New York judges subsequently grant whatever conditions the DAs suggest, giving little to no consideration to the nature of the offense, relationship or the defendant’s criminal history. Courts rarely consider whether there have been prior domestic violence complaints, either by the complaining witness or the defendant. They seldom consider whether the complaining witness even wants the order of protection.

Moreover, the statute does not provide any guidelines for amending the orders. After the criminal court issues a full order of protection, the judge generally states that the order is “subject to family court modification.” But in practice, New York family courts have no procedures for amending criminal court orders. Family court judges generally decline to assert jurisdiction over those orders, instead implementing concurrent ones of their own. As a result, when Mr. Yu went to family court to seek emergency modification of the protective order, he was sent right back to criminal court. Defendants in his situation have essentially no remedy in either the criminal or family courts.

Though courts issue orders of protection in cases of alleged physical violence, 530.12 is extraordinarily broad in its application. It applies not only to cases where the DA alleges physical violence, but also to many offenses that few lay people would categorize as “domestic violence” crimes. The statute authorizes courts to issue temporary orders of protection in all criminal actions “involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household…” Though these actions sometimes involves allegations of physical abuse, they frequently involve allegations as minor as sending an angry text, pouring bleach on an intimate partner’s clothing after a verbal dispute, or, as in Mr. Yu’s case, making several calls to a spouse’s workplace.

PROCEDURAL DUE PROCESS AND TEMPORARY ORDERS OF PROTECTION

When states deprive individuals of protected “liberty” or “property” interests, the Fourteenth Amendment’s Due Process Clause mandates that state governments provide these individuals with adequate procedural protections. Though due process standards are flexible, defendants are generally entitled to a hearing “at a meaningful time and in a meaningful manner” before courts may deprive
them of a fundamental liberty interest.\(^8\) But if the government has a powerful emergency interest requiring swift action, the hearing may occur after the deprivation.\(^9\)

New York’s lack of procedural protections when issuing temporary orders of protection is a flagrant violation of defendants’ due process rights. Fundamental liberty interests are undeniably at stake here. Parents’ interest “in the care, custody and control of their children...is perhaps the oldest of the fundamental liberty interests recognized by” the Supreme Court.\(^10\) The Court has granted this interest far greater deference than property or economic interests.\(^11\) These orders substantially infringe on this interest, interfering with parents’ ability to interact with their children for extended periods of time. Temporary orders of protection implicate defendants’ property interests as well, as they often prevent defendants from returning to their homes, sometimes for months at a time.\(^12\) These orders also interfere with families’ due process right to make decisions regarding their living arrangements.\(^13\)

Since the government is infringing on protected liberty interests, defendants are entitled to procedural due process when courts issue and continue temporary orders of protection. In assessing procedural due process, the Supreme Court analyzes: 1) the government interest involved, 2) the deprivation’s length and severity, and 3) the risk of erroneous deprivation.\(^14\) When the government must act on a swift, emergency basis, procedural protections may be more limited. Conversely, when the length, severity or risk of erroneous deprivation is greater, defendants are entitled to greater procedural protections.

New York’s interest in protecting domestic violence victims is undoubtedly important. But no government interest warrants the indefinite disruption of the lives of defendants, complaining witnesses and their families by repeatedly continuing orders of protection without an evidentiary hearing. Though the deprivation may be temporary, terminating at the case’s final disposition, it is hardly short-lived. The average felony disposition time in New York, from indictment to jury verdict,

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11 “It is plain that the interest of a parent in the companionship, care, custody and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Stanley v. Illinois, 405 U.S. 645, 651 (1972).
12 See Forman, 145 N.Y.S.at 760.
14 Eldridge, 424 US at 334-35.
is over 300 days. For misdemeanors it is over 200 days. More importantly, it is no answer to a constitutional violation to say that the violation will ultimately be corrected. Once the government unfairly deprives citizens of their liberties without due process, it has violated the constitution regardless of any subsequent remedies.

The inherent risk of error in determining the necessity of protective orders makes this violation more acute. Where credibility determinations are crucial, the risk of error, and consequently, the need for an evidentiary hearing, is far greater. It is hard to think of a class of cases more dependent on credibility determinations than alleged domestic violence offenses. These cases can turn entirely on the credibility of the complaining witness and defendant, as there are often no hospital records, no other witnesses, and no sign of injury. Consequently, depriving defendants of an evidentiary hearing to contest an order of protection creates an enormous and unacceptable risk of error.

Exacerbating this risk are police procedures governing domestic violence arrests. In 1995, the Family Protection and Domestic Violence Intervention Act amended CPL § 140.10 to mandate arrest where there is probable cause to believe a domestic violence offense has occurred. This Act applies only to cases where the defendant and complaining witness share a family or intimate relationship. Where there is probable cause, the Act prohibits police from mediating a domestic dispute, or from asking the victim whether arrest is necessary. Officers are essentially required to make an arrest in response to every domestic violence complaint even where the officer does not believe there is any merit behind the complaint. Thirteen other states, as well as the District of Columbia, have passed similar laws. This policy has resulted in officers making arrests where there is little evidence, and where they would have made no arrest if the defendant and complaining witness did not share an “intimate or family relationship.” This policy also increases the already heightened risk of error and due process violations in determining the necessity of protective orders.

THE STATE COURT APPROACH TO TEMPORARY ORDERS OF PROTECTION

The vast majority of defendants that face domestic violence accusations fall into three categories: 1) those who present a genuine danger to the complaining witness, 2) those who have been falsely accused by the complaining witness, and 3) those who are being prosecuted contrary to the complaining witness’ wishes. Right now, the New York court system is simply unable or unwilling to distinguish between these three categories. In issuing orders of protection, courts assume that all defendants fall into the first category. It is crucial that courts acknowledge that not all cases are the same and that many defendants do not pose any danger to complaining witnesses.

Though New York judges have generally been cavalier about issuing temporary orders of protection, one decision notably went against the grain on this issue. In People v. Forman, the court held that procedural due process requires that defendants have access to a timely evidentiary hearing to contest orders of protection. In its decision, the court recognized the need to balance the government’s interest in protecting victims against defendants’ due process rights. It rejected the defendant’s argument that a hearing on the order’s merits is constitutionally required at arraignment, acknowledging “the emergency nature of the decision [to issue a temporary order of protection], as well as the practical difficulties inherent in convening an immediate evidentiary hearing...” But the Forman court also recognized that requiring a later hearing, at the defendant’s request, would not impair the government’s need to protect domestic violence victims. Though the decision focused on the defendant’s property interest in his home, the court’s reasoning also applies to defendants’ liberty interest in raising their children and determining adequate familial arrangements.

Unfortunately, subsequent New York decisions have failed to recognize the importance of these interests. Most decisions from courts in other states have similarly denied defendants’ requests for a hearing on the merits of protective orders. But in State v. Fernando A., the Connecticut Supreme Court held that defendants are entitled to a more extensive

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16 Id.
17 See Stanley, 405 U.S. at 647.
18 Eldridge, 424 U.S. at 343-45.
22 145 N.Y.S. at 766.
23 Id. at 765.
24 See Koertge, 701 N.Y.S.2d at 192-93.
25 See, e.g., Ex parte Flores, 130 S.W.3d 100, 106-07 (Tex. App. 2003); State ex rel. Williams v. Marsh, 626 S.W.2d 223, 230-36 (Mo. 1982).
26 981 A.2d 427 (Conn. 2008).
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hearing within a reasonable time after arraignment to determine the necessity of protective orders. At these hearings, defendants may testify, present witnesses on their behalf, and cross-examine witnesses the State presents at the post-arraignment hearing. The Fernando holding rested largely on the state legislature’s “desire to comply with the dictates of due process.” Though the court declined to address whether constitutional due process mandated such a hearing, the court’s reasoning indicates that due process did in fact mandate a hearing, and further, that the prevailing approach which New York courts take is a violation of defendants’ constitutional rights.

The importance of this issue cannot be understated. Families’ lives are being disrupted, parents separated from their children, spouses prevented from visiting each other in the hospital. When courts create this disruption, they must make a concerted effort to avoid unnecessary and unfair rulings. This will require substantial reform with initial protective order determinations at arraignment, as well as subsequent post-arraignment determinations to continue orders.

ARRAIGNMENT

At arraignment, there needs to be a good faith effort to determine probable cause for issuing full orders of protection. New York courts issue orders in conjunction with bail determinations, but are ignoring their obligation to undertake the same analysis with protective orders as they do with bail determinations. Under CPL § 510.30, judges must evaluate the following factors in applications for recognizance or bail:

“(i) The principal’s character, reputation, habits and mental condition; and
(ii) His employment and financial

resources; and
(iii) His family ties and the length of his residence if any in the community; and
(iv) His criminal record if any; and
(v) His record of previous adjudication as a juvenile delinquent…; and
(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
(vii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction…; and
(viii) If he is a defendant, the sentence which may be or has been imposed upon conviction…”

From these criteria, the New York City Criminal Justice Agency (CJA) has developed a checklist to determine whether to release defendants on their own recognizance.

Courts need to undertake a similar analysis when determining whether to issue full orders of protection. Along with the factors listed in 530.12, DA’s and judges should evaluate the following:

- Has a previous complaint been filed against either the complaining witness or the defendant?
- Did the complaining witness seek medical attention?
- Does the complaining witness want the Order of Protection?
- Do the complaining witness and the defendant have children in common?
- Is there a possibility for emergency visitation?
- Does the defendant have a property interest in the apartment/house from which he/she is being excluded?
- Is the complaining witness present in court and willing to state under oath and on the record that allegations are true, or that they are untrue and that he/she does not want the Order of Protection?
- What is the length of the relationship?
- Was there a 911 call?
- Was there a delay between the alleged incident and the report?

Though there may be ambiguous situations where the DA or judge will err on the side of caution, requiring the same effort here that goes into bail determinations is crucial to minimizing unnecessary deprivations of defendants’ and their families’ liberty interests. When courts move away from their policy of issuing full orders of protection in all cases where domestic violence is alleged, they will move closer towards fulfilling their obligation to protect the rights and interests of defendants, complaining witnesses and their families.

POST-ARRAIGNMENT

After courts have made a probable cause determination at arraignment, they should require DA’s to supplement information supporting the issuance of protective orders the same way they would a criminal complaint.

27 Id. at 442.
29 The checklist includes the following:
- Has the defendant lived at his/her current residence for 1.5 years or more?
- Does the defendant live with parent, spouse, C/L spouse of 6 months, grandparent, or legal guardian?
- Does the defendant have a working telephone in residence/cell phone?
- Does the defendant report a NYC area address?
- Is the defendant employed, or in school or training program, full time?
- Does the defendant expect someone at arraignment?
- Does Prior Warrant equal Zero?
- Does Open Case equal Zero?
Initial criminal complaints are generally based on inadmissible hearsay allegations. To mitigate the negative effects of unreliable hearsay, New York DA’s must submit sworn eyewitness affidavits to convert the hearsay felony complaint into a non-hearsay accusatory instrument. If conversion does not occur within 120 hours of defendant’s being taken into custody, courts must grant defendant’s applications for release on recognizance (ROR).30

No similar rule exists for orders of protection. Courts continue these orders for months, sometimes years, based solely on hearsay allegations.

Consequently, a judge may release a defendant ROR because the DA failed to convert the complaint, but that same defendant would not be able to return home because the hearsay-based order of protection is still in effect. To prevent this illogical and unfair result, courts should require DA’s to support their requests for order continuance with non-hearsay allegations.

Most importantly, defendants must receive a meaningful post-arraignment opportunity to contest the order. An evidentiary hearing, at the defendant’s request, and within a reasonable time after arraignment, is essential. The State should also have an opportunity to argue for a full order of protection where the court denied its request at arraignment. Furthermore, both prosecution and defense counsel should have post-hearing, pre-trial opportunities to contest or modify a protective order ruling where new evidence has come to light or circumstances have changed. Allowing these opportunities will not only protect defendant’s due process rights, but also ensure the State is adequately protecting domestic violence victims.

**CONCLUSION**

Criminal cases are inherently complicated. But domestic violence cases involve issues that make them even more complicated. Before the system can adequately handle these cases, before it can adequately protect victims while implementing safeguards to protect defendants’ rights, it needs to recognize and address these complications. It is the justice system’s responsibility to provide defendants and their families with an opportunity to be heard before disrupting their lives. Doing so will minimize the inherent problems with prosecuting family offenses. Without this opportunity, the system is failing to do justice to either defendants or victims.

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Robert F. Kennedy

> “Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope.”

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Footnote: 30 N.Y. Crim. Proc. Law §§ 180.80 and 170.70
Practitioners who frequent New York State criminal courts are probably familiar with DTAP courts, the drug treatment courts which operate in each of the thirteen judicial districts. The first such court was started in the early 1990s, and as of May 2012, 166 were operating throughout the State.

**THE STATE COURT EXPERIENCE**

A typical DTAP case involves a defendant with a demonstrated drug or alcohol addiction charged with a felony drug offense. Disposition of the case necessitates the defendant initially pleading guilty to the felony; sentencing is held in abeyance while the defendant undergoes comprehensive drug treatment.

The felony plea serves as a “carrot” and a “stick.” A defendant who successfully completes the prescribed course of drug treatment is rewarded with the guilty plea being vacated, and replaced with a misdemeanor or outright dismissal of the case. Conversely, a defendant who fails to complete treatment suffers the consequence of being sentenced on the felony guilty plea. Often, this means the defendant will end up incarcerated in state prison.

In the New York State criminal justice system, the successful use of drug treatment courts -- as an alternative to prosecution in the normal course -- is well documented. When these courts first began operation, a key component of their success was the willingness of local District Attorneys to participate in the process. This involvement was critical, as the initial felony guilty plea agreement included a promise by the District Attorney to consent to subsequent vacatur of the guilty plea and its substitution with either a misdemeanor or dismissal. This

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1 “Handbook: Guidelines and Program Information for Participants,” Manhattan Treatment Court (MTC)

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procedure, coupled with the reported success of drug treatment courts, led to the enactment of New York Criminal Procedure Law Article 216, entitled: Judicial Diversion Program for Certain Felony Offenders. Under Article 216, courts now have jurisdictional authority to refer cases \textit{sua sponte} for disposition in a DTAP Court.

For some defendants, arrest and prosecution in a DTAP court is a life saving experience. It provides them with access to drug rehabilitation programs which they would otherwise never have undertaken. Some defendants who have completed a drug court program report that, but for being prosecuted, they would have surely ended up overdosing or murdered as a result of their addiction.³

**THE FEDERAL PROGRAMS**

Until recently, compared to the New York state system, defendants prosecuted for drug offenses in Federal courts faced a far less enlightened criminal justice system. Generally, U.S. Attorney’s Offices will not offer dismissals or misdemeanor pleas as a reward to defendants who complete a course of drug treatment. Further, the Federal court system does not have specialized courts dedicated to rehabilitation of drug users. Finally, the United States Sentencing Guidelines recommend jail sentences for offenses involving even relatively moderate quantities of drugs.

Prior to 2005, the United States Sentencing Guidelines, which were established by the Sentencing Reform Act of 1984, mandated that, with few exceptions, drug offenders be sentenced within the jail term range prescribed by the guidelines. This meant offenses involving any quantity of crack, heroin or powder cocaine triggered Sentencing Guidelines calling for imprisonment.⁴ Generally, the only available relief from the mandatory application of the Sentencing Guidelines involved cooperation with the Government. However, many drug-addicted offenders were street level ‘pitchers’ who were not in a position to offer information sufficient to induce a prosecutor to offer a cooperation agreement. Judges who wanted to fashion a sentence aimed at providing drug treatment in lieu of incarceration found themselves frustrated and hamstrung by the Sentencing Guidelines.⁵

However, in a series of landmark cases, including \textit{Booker/Fanfan} and \textit{Rita}, the Supreme Court altered the landscape of the Sentencing Guidelines.⁶ These cases held that the Sentencing Guidelines were no longer mandatory. As a result, judges were empowered to sentence defendants on a case-by-case basis, pursuant to factors set forth in 18 U.S.C. §3553(a). This Statute requires judges to consider numerous factors and impose a sentence which is “sufficient, but not greater than necessary” to achieve the goals of sentencing set forth by Congress. Among other matters, §3553(a) requires judges to consider the history and characteristics of a defendant, as well as a defendant’s need for medical care or correctional treatment.⁷ Perhaps in response to their newfound sentencing flexibility, some Federal judges have taken it upon themselves to fashion sentences which, as a part

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⁴ The 2005 edition of the United States Sentencing Guidelines set a base offense level of 12 for offenses involving less than 5 grams of heroin, 25 grams of cocaine and 250 mg of crack. Under these guidelines, even defendants who pleaded guilty faced mandatory sentence ranges of 6 to 12 months.

⁵ U.S.S.G. §5H1.4 (Policy Statement) states, “Drug or alcohol dependence or abuse is not a reason for a downward departure.”


⁷ 18 U.S.C. §§3553(a)(1),(2)(D)
of the rehabilitative goal of sentencing, address the need for treatment of drug addicted offenders.

In New York City, in the Brooklyn Courthouse of U.S. District Court for the Eastern District of New York, two innovative programs -- the Pre-trial Opportunity Program (POP) and the Substance abuse Treatment And Re-entry (STAR) -- have begun to address this need.

The POP /STAR programs aim to break the cycle of recidivism through a comprehensive curriculum which provides the defendant/participant with the skills needed to live within mainstream society. Both programs are founded upon a premise that: a) there is a high likelihood of recidivism among addicts, as they will resort to criminal conduct, often selling drugs, in order to maintain their drug habit; b) due to their addictions, it is difficult for addicts to avoid engaging in criminal conduct; and c) but for their addictions, addicts have the potential to live a law abiding life. These programs recognize that the continuous cycle of jailing and releasing drug or alcohol addicted offenders is an exercise in futility which will never be broken unless the offenders are able to overcome their addiction. In providing a plan for rehabilitation, these programs employ a multi-faceted approach which includes substance abuse treatment, access to a broad spectrum of educational programs, and assistance in job placement.

One of the main differences between the POP and STAR programs is the timing and administration. The POP program is a pre-trial diversion program administered through the U.S. Pre-Trial Services Office. The STAR program is administered through the U.S. Department of Probation. STAR participants are sentenced defendants who are on probation or supervised release.

In the Eastern District of New York, both Probation and Pre-Trial Service Officers are specially trained to identify potential candidates for the POP/STAR programs. Candidates are screened either at the inception of the case during the pre-trial interview, or, following conviction, during the pre-sentence interview. Both programs encourage referrals of potential candidates from defense counsel, judges or even the Government.

To their credit, the programs do not limit their pool of candidates to the ones considered to be the “safest” bet (for example, young first offenders). Both programs recognize that many drug-addicted offenders have multiple arrests, often for drug sales, as they repeatedly commit crimes in order to maintain their supply of drugs. When defendants are notified of potential eligibility for the programs, they are informed that participation is entirely voluntary. Defendants who express interest in the programs are then further interviewed to determine whether they qualify and are willing to comply with the demands of the programs.

The STAR program began in 2002, while POP began in 2011. Although formal studies are not publicly available, during the past ten years administrators of the STAR program note a remarkably low level of recidivism amongst its graduates. One key to the success of these programs is the commitment of the Pre-Trial Services Agency and Probation Department, which have set up specialized units dedicated towards supervising participants in the POP/STAR programs. These agencies use their resources to: enroll participants in drug treatment programs;

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. Justice Felix Frankfurter, dissenting, United States v. Rabinowitz (1950)
provide for schooling including obtaining a GED, vocational training and even college degrees; facilitate job placement; and provide assistance with life skills such as finding a residence, opening bank accounts and paying bills.

The success of these programs is due in large part to the willingness of the overseeing District Judges [Hon. Dora L. Irizarry for the STAR program and Hon. John Gleeson for the POP program] who dedicate time to the successful administration of these programs. In comparison to New York State DTAP Courts, a unique factor of the POP /STAR programs is that these Federal judges are closely involved in the rehabilitation process. Once enrolled in a POP/STAR program, participants attend monthly group meetings with the judge as well as their supervising officer, their counsel and other participants in the program. During these meetings, participants take turns appearing before the judge. During the appearance, the supervising officer provides a progress report on the participant’s employment, education, drug treatment and other personal matters. Frequently, the judge and the participant will have candid conversations about the participant’s progress, positive or negative. This monthly meeting format represents a novel departure from the traditional judge-defendant relationship. Typically, in the normal course of a criminal case, in matters relating to probation (or pre-trial) supervision, a defendant only appears before a judge for a violation of supervision. Rarely, if ever, will a defendant appear before a judge simply to receive praise for an excellent ongoing progress report. These monthly interactions have developed into an integral component of the POP/STAR programs. By regularly appearing before the court, in the presence of their peers, participants in the POP/STAR programs develop accountability skills. In addition, the group dynamic fosters relationships amongst the participants. Frequently, they become informal “sponsors” who support each other in between meetings. Over time, participants develop a sense of self-worth as they come to realize that a judge, supervising officer and their co-participants all are pulling for them to succeed.

In order to graduate from a POP/STAR program, a participant must, at a minimum: 1) have a stable residence; 2) have a savings account or source of income; 3) be employed or enrolled in school or vocational training; 4) have spent a full year being drug and alcohol free. In essence, at the time of graduation, participants are ready to go “out into the world.” They are not likely to return to criminal activity, as they are no longer drug or alcohol dependent and they are equipped with the “tools” needed to succeed in modern society.

Show me the prison, Show me the jail, Show me the prisoner whose life has gone stale. And I’ll show you a young man with so many reasons why and there, but for fortune, go you or I. ”

Phil Ochs

“INVALUABLE RESOURCES FOR CRIMINAL DEFENSE ATTORNEYS
Log on to the Pace Criminal Justice Center
- A community of and for criminal law scholars, policymakers and practitioners
- Website offers 24/7 accessibility
- An excellent research resource
www.law.pace.edu/criminaljustice
Sienna, Publius and Atticus had settled into their favored cubbyhole at The Chambers. Sienna was plying the old curmudgeons with demon rum alcohol to have them wax eloquent on some approaches to handling the testifying rat. “When we last met, Publius suggested that because the average juror has no knowledge about ‘rats, snitches or liars for hire’ that we craft a cross-examination that immediately educates the jury, at the rat’s expense, regarding themes to be developed during the cross that will be echoed in summation - - what are some opening gambits to begin the cross of a rat?”

Atticus began, “A time honored technique for beginning a cross is to create an analogy that resonates with the average juror. Many people have a fear of heights. So why not begin:

Q. Mr. Rat, there are things in life that scare you?
Q. For example, falling from a high place is frightening?
Q. Standing on the edge of a high cliff is scary?
Q. Life as you know it could suddenly come to an end?
Q. What if there was a prison at the bottom of the cliff?
Q. A place which would catch you?
Q. Where you would be locked up for 25 years?
Q. When you were arrested, the cops told you that you were on a cliff?
Q. That your life as you know it was about to come to an end?
Q. But the cops gave you a choice?
Q. You could jump off the cliff?
Q. Or you could become a ‘cooperating witness’ to save yourself 25 years?
Q. And as you were standing looking over the edge at 25 years, the prosecution offered you a way out?
Q. So you would not have to make the leap into 25 years?
Q. As long as you found somebody else to take your place?
Q. Someone to take the fall for you?
Q. Either you were going over the cliff?
Q. Or someone else was going over the cliff?
Q. You needed someone else to take the fall for you?
Nothing in any existing court was ever more thoroughly proved than the charges of witchcraft and sorcery for which so many suffered death.

If there were no witches, human testimony and human reason are alike destitute of value.

Ambrose Bierce

Q. That 25 years hangs in the balance as you’re sitting there testifying right now?
Q. You are testifying in the hopes that this fellow human being will do your time for you?
“Not bad,” said Publius. “How about the time honored stunt man analogy?”
Q. Mr. Rat, you’ve seen movies with ‘Governor Schwarzenegger’ and Sly Stallone?
Q. Movies in which they appear to perform impossible stunts?
Q. Neither Schwarzenegger nor Stallone perform the stunts themselves?
Q. Stunt men are used as stand-ins?
Q. To take the plunge in place of Schwarzenegger or Stallone?
Q. Just like you’re trying to have my client take the plunge for you?

Sienna chimed in, “What about a ‘throwing the accused to the wolves analogy’?”
“Good idea - - let’s brainstorm some potential questions depicting the testifying rat as a ‘wolf in sheep’s clothing’.” How about:
Q. You’ve heard the expression “throwing someone to the wolves”, haven’t you?
Q. You know what it means to throw someone to the wolves?
Q. If you’re being chased by wolves, and you throw someone to them, while that person is getting torn to shreds, you have time to get away?
Q. That way you don’t have to outrun the wolves?
Q. You only have to outrun the other person?
Q. On the day you were arrested, the police chased you down?
Q. You were taken to the police station?
Q. But you got away?
Q. You threw my client to the police?
Q. While my client was being torn to shreds, you got away?

“There are varying themes that can be utilized in structuring your cross,” added Atticus. “For example, the word scapegoat comes from a biblical tradition of casting all sins of a community onto an innocent goat which either results in its slaughter or exiling it into the wilderness. The sinners go free, but the goat pays one hell of a price.”

Publius, signaling the bartender for another round, chimed in, “Most rats are or appear to be professional liars. But, before you develop your theme for cross, link it to your opening.”

Sienna gasped, “Opening? How does that help me impeach the Rat? My judge is a stickler for the traditional ‘the facts will show’ approach?”

“Remember” replied Publius, “to be an effective defense attorney, your trial must be an integrated whole – all of the parts must be consistent and mesh with your overall theme.”

Staring at her drink, Sienna paused and said, “This is getting complicated. I’m afraid I’ll ‘lose’ the jury early on.”

“Nonsense,” snorted Atticus. “Do it right and they’ll hate the Rat long before they even see him. Give her the drill, Publius, you’ve done it hundreds of times.”

Taking a healthy swig from his Merlot, Publius began. “Here’s the approach you take. If your judge is indeed a stickler for “the facts will show” style of opening, that’s easy enough to comply with. Here you go. The facts in this case will show:
Mr. Judas is a rat who will testify falsely if it will help him.
From that man’s lips you will learn that he is a professional liar.
From that man’s lips you will learn that he deceives people for his own benefit.
From that man’s lips you will learn that he and what he says can’t be trusted.
From that man’s lips you will learn that if he says what the prosecutor wants him to say, he gets a benefit for being a Rat.
You will learn from that man’s lips that he lied to his own wife about what he did for a living.
From that man’s lips you will learn that he cannot produce a pay stub for the last five years.
From that man’s lips you will learn that he drives a 2010 Lincoln Town Car.
From that man’s lips on a video tape, you will learn that when he was first questioned by the police that he told them under oath that he was in Ohio for a family funeral the night of the crime.
From that man’s lips you will learn that he gave the police a name of his alleged Ohio cousin who could verify his funeral alibi.
From that man’s lips you will learn that his alleged cousin was in fact, his cell-mate while he was in federal prison for an armed robbery.
From that man’s lips you will learn ....

“You get the picture” Publius concluded, “and you get to expose, and predispose the jury to, every lie you will confront the rat with on cross examination.
Now your case has structure, your chapters of cross are sequenced and there is congruence between message and messenger that this Rat is a liar and is lying again to save his own tuchus. Both the rat and the story are rotten.”

“This is hard work,” exclaimed Sienna, taking another pull from her drink.

“Nonsense” snorted Atticus, “it’s just preparation, thinking, thinking and more thinking.”

“Besides” interjected Publius, “it may give you the coup de grâce which will turn the jury against him for good. You have given them every reason to watch him like a hawk.”

“Huh?” blurted Sienna. “You lost me completely.”

Laughing, Atticus interjected. “A good point – no, an important point! Don’t be glued to your notes when you’re cross-examining. Watch the Rat. If he’s lying and you’re getting into his shorts, wait for him to lick his lips. When he does, drill him:

Q: Mr. Rat, is there something wrong with your lips?
Q: Would the truth help?”

“The ‘lips’ opening will never be forgotten by the jury,” concluded Atticus.

“Did I go to law school or not?” Sienna moaned as she sucked the last Scotch out of her glass.

“Ridiculous,” chortled Publius. “Atticus and I lost many a case early in our careers before we realized that ‘law school’ thinking doesn’t work defending clients in a courtroom.

“...They’re not going to catch us. We’re on a mission from God.”

Elwood Blues (1980)
Sienna asked, “How do I get on my feet and what’s the first question to ask so that I get my butterflies flying in formation in this high octane cross examination?”

“When you have a rat that has used a dozen aliases in committing crimes, how about beginning with:

Q. You didn’t like the name your mom gave you?
Q. You have used many aliases during your criminal career?
Q. You have used the name ‘Rat’ when committing prior crimes?
Q. You have used the name ‘Snitch’ when committing prior crimes?
Q. You have used the name ‘Liar-for-Hire’ when committing prior crimes?
Q. You’ve used so many names over the years you can’t remember all of the names you have used in your criminal career?
Q. You’ve lied about your name so many times that you can’t recall how many lies you’ve told on your name alone?

and then sail into the sequence of the chapters of your cross. You are in total control. When the rat has many prior convictions involving thievery, dishonesty and lying, you might abandon our law school training that says you never ask open ended questions on cross examination. For example,

Q. Mr. Rat, do you consider yourself to be a honest person?
Q. Mr. Rat, do you consider yourself to be a person of integrity?

to which the rat can answer ‘yes’ or ‘no’ both of which are good for you. If the rat answers ‘no’, s/he has self-impeached and then you set sail into the underlying acts of their prior convictions, prior bad acts and prior inconsistent statements. If the rat answers ‘yes’ then before you go into all the underlying acts upon which you are going to impeach, first ask:

Q. When lying helps you, you lie?
Q. When the truth hurts, you ignore the truth?
Q. When the facts don’t work, you change the facts?

Again, either a ‘yes’ or ‘no’ answer does not hurt you because if the answer is ‘yes’ the rat is self-impeaching and if the answer is ‘no’ then you weave all the underlying facts of the prior bad acts and convictions into a cross examination in which the rat has to admit that s/he just lied in living color in front of this jury when denying ‘when lying helps you, you lie?, when the truth hurts, you ignore the truth? and when the facts don’t work, you change the facts?’ And, pay attention to who the investigating and arresting police officers were on the rat’s prior convictions as they may be witnesses in this trial who can be used as reputation witnesses regarding the Rat.

“You mean you can get a police officer to bad mouth the rat from the stand?”

“When you’ve done your due diligence, consider the following:

Q. Officer, during the course of your career, you’ve had your superiors cut a deal with a perp that you disagreed with?
Q. And prosecutors have cut deals that turned your stomach?
Q. You’ve heard of instances where a very bad man may be cut loose because he’s agreed to testify about someone else?
Q. Some deals can be quite obnoxious?
Q. Sometimes it feels like you’re making a deal with devil?
Q. You know that Sammy “the Bull” Gravano cut a deal with prosecutors in which he received a 5 year sentence for having committed 19 murders?”

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Thomas Jefferson (1788)
Q. In order to buy testimony?
Q. It’s common knowledge that people in trouble lie to protect themselves?
Q. You’ve heard of crooks falsely blaming others to avoid jail?
Q. Let’s talk about the devil the prosecutor made a deal with in this case?
Q. You and the other members of the police department have known this rat for years, haven’t you?
Q. S/he’s been committing crimes since s/he was old enough to vote?
Q. During your long association with Mr./Ms. Rat you’ve come to know his/her reputation for truth and honesty in the community?
Q. Especially in the police community?
Q. And in the community in general?
Q. Regarding this rat, what is the reputation for truthfulness and honesty?
A. The rat is a well-known liar and thief.

“I’ve gotta go,” Sienna said. “I’ve got 10 pages of notes here, a spouse who will never believe that I was actually working on a case coming up for trial in three weeks and I’m about to have a panic attack on how to prepare, much less deliver a closing argument that incorporates everything you’ve told me so far.”

Laughing, Publius said, “Your closing is already 90% scripted if you follow our meager suggestions. Organize your notes, draft your chapters and themes and we’ll finish up with ‘closing argument’ at our next “bar” association meeting.

“Never speak ill of dead people or live judges.”

Edwin Edwards (ex Louisiana Governor who in 2011 after completing an 8 year sentence married his 32 year old former prison pen pal.)
Taking Liberties
Author: Susan N. Herman (Oxford University Press 2011)

Reviewed by Malvina Nathanson
practices in Manhattan, and is a long time member of NYSACDL.
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Maybe you thought you knew about government abuses in the war against terror because you knew about Guantanamo. Chances are you don’t know the half of it.

Professor Susan N. Herman (of Brooklyn Law School and president of the American Civil Liberties Union) lays out our government’s violations of the First, Fourth, Fifth, Sixth and Fourteenth Amendments and our rights to privacy, all in the name of national security, in “Taking Liberties” (Oxford University Press), a non-fiction page-turner that will keep you fascinated and horrified at the same time. The book is subtitled “The War on Terror and the Erosion of American Democracy,” and Herman demonstrates persuasively, and without relying on the Guantanamo abuses, that the former has resulted in the latter.

In chapters headed “Dragnets and Watchlists,” “Surveillance and Secrecy” and “American Democracy,” Professor Herman discusses the many programs, regulations and statutes that have caused us all, sadly Muslim-Americans more than most, to be in danger of unfounded suspicion, interrogation and even imprisonment. Her real-life examples of individuals and organizations (libraries, charities, internet service providers) caught up in the war against terrorism should cause everyone to start looking over their shoulders.

“Dragnets and Watchlists” starts with the story of Sami, a Muslim doctoral student at the University of Idaho. While the government was trying to build a terrorism case, Sami was detained on charges of violating his student visa requirements by working as well as studying. Eventually he was charged with terrorism-related offenses because, as a volunteer web master for the Islamic Assembly of North America, he created webpages in support of its educational program that turned out to include links to speeches by Muslim clerics advocating criminal activity. After a five-week trial and only two or three hours of deliberations, the jury acquitted him of most charges and hung on the rest. Meanwhile, though, he had been in solitary confinement for seventeen months. His wife “self-deported” and returned to Saudi Arabia under threat of being imprisoned herself. With the possibility of a retrial on the remaining counts, Sami dropped his appeal from the immigration court’s deportation order and rejoined his family.

The Sami investigation ensnared another student at the University of Idaho, this one an American who had converted to Islam. He was arrested as a material witness at the airport on his way to take advantage of a scholarship to a Saudi university, and was held in isolation under harsh conditions in high-security prisons. He was released after two weeks on condition that he surrender his passport, move to Nevada, and meet with a probation officer regularly; all this because he was said to have known that Sami violated the visa requirements. Then there is the Iranian who had been imprisoned and tortured in Iran because of her membership in a political organization opposed to the Ayatollahs, was given political asylum in the United States, and was then arrested by our government for providing material support to the same political organization that was the cause of her persecution in Iran.

The other two chapters contain similar stories. Some of them we all know about: the courageous librarians who opposed the National Security Letters seeking information about the books their library patrons had checked out, the Oregon lawyer investigated and prosecuted based on a mistaken
reading of fingerprints even after the mistake was called to the attention of the FBI, Senator Ted Kennedy being singled out for questioning at the airport on numerous occasions because his name was on a watch list. And some we do not: the non-Muslim, non-Arab student learning Arabic in college who was subjected to detention and interrogation because he was studying his Arabic-English flash cards on the plane, the Arab-American disabled Marine Corps veteran living with his family in Egypt who lost his veterans’ disability benefits when he was not permitted to fly to the States to complete the necessary procedures to secure them, the American veteran who almost lost his job because he was placed on a watch list after a fellow-worker saw him remove a broken car seat from his car and reported to the police that the veteran was remodeling the car to carry bombs.

Professor Herman exposes the Kafkaesque nature of these events as government decisions are made in secret, the accused is denied access to the evidence, and government agents are impervious to reason, logic or common sense. The heart of the book is a discussion of the litigation engendered by these governmental policies and programs that impinge upon our privacy and liberty. Herman is, of course, intimately familiar with the litigation handled by the ACLU, but her knowledge of cases brought by others is equally comprehensive. More important, her discussions of the cases is remarkably lucid, a characteristic not often found in writings by lawyers. She intends that her book be read and understood by lay people, and she has succeeded remarkably well. Happily, that approach also makes a more readable book for lawyers.

Herman makes a strong case that many of the anti-terrorism policies are ineffective and even counter-productive. She dams Congress and the courts for failing to provide even the most limited oversight. By and large, Congress has acceded to legislative proposals put forth by the executive branch in this area, and the courts have accepted, without question, claims of “national security” and declined to consider challenges to the excesses and abuses of our terrorism establishment. There are all too few heroes willing to buck the establishment: the librarians already mentioned, a few district court judges, fewer circuit judges, and quite a few journalists. Significantly, in the last chapter, Herman places the ultimate blame on us, and urges Americans to become educated about the issue and work for change. As she says, “[The Constitution] provides multiple layers of protection for its fundamental structures so that even when the courts and representatives fail us, we can keep democracy alive if we have the will” (emphasis added).

Americans have not yet stepped up to the plate. Part of the reason may be that it is primarily immigrants, Muslims and Arabs who are suffering the brunt of the damage. Also, Americans may be all too willing to trust the executive branch to know what’s best when it comes to national security. The track record thus far makes it hard to be optimistic about whether these assaults on our liberties can be stalled, but it is certain that if we do not try, nothing will be achieved.

Members wishing to submit articles for inclusion in Atticus should submit them via email to atticus@nysacdl.org. Questions regarding submission may be directed to:

Margaret Alverson, Executive Director, NYSACDL
212-532-4434, malverson@nysacdl.org

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.
“Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years.”

Hon. Joyce Hans Green
As I frequently say, “the more we do together, the stronger we are individually.”

NYSACDL held our annual Spring Seminar for criminal defense attorneys at Syracuse University Law School on April 28. The seminar featured great speakers on important areas such as parole and civil commitment (Gregory B. Flynn, Senior Parole Attorney at Frank H. Hiscock Legal Aid Society, and Craig P. Schlanger, Senior Attorney at Mental Hygiene Legal Service), areas in which defense counsel’s representation in the pre-trial, trial or plea and sentencing phases impacts clients.

Peter A. Dumas, a private practitioner fresh off a murder acquittal in People v. Oxley upon the third trial of that case, addressed investigative and preparation techniques, such as subpoena practice, which some lawyers leave to the last minute at trial. For instance, through subpoena work, I helped Pete have a federal inmate produced by the Bureau of Prisons and brought from Mississippi to New York. John Ingrassia, Partner at Larkin, Axelrod, Ingrassia and Tetenbaum, LLP, a noted DWI Practitioner and Lecturer, instructed on the nuances of ignition interlock devices and policies, and matters of practical application. Hon. Thomas Miller, a local judge, spoke on best practices before local criminal courts.

As an invaluable ethics piece, and complimenting Peter Dumas’ talk on the importance of pre-trial subpoena and investigation practice, a panel consisting of two attorneys and a private investigator covered the ethics of investigation (Andre Vitale, Special Assistant Public Defender, Monroe County Defender’s Office; Lisa Peebles, Federal Defender for the Northern District of New York; and Richard Hauman, Senior Investigator for the Federal Defender of the Northern District of New York).

In short, the seminar covered immensely relevant matters of which trial counsel should be cognizant, so that we do not practice law in a bubble, oblivious to the consequences to our clients. We should never think “someone else will handle that part”, as if representation of people charged by the government with crimes is compartmentalized and discreet and separate from any other effects on our clients’ lives. In fact, these are organic and intertwined considerations and elements, all necessary to the overarching achievement of justice.

I love presenting my friends to my friends to share their work and experience, and for us all to help each other get justice for our clients. This seminar provided an excellent opportunity to expand upon our knowledge and the resources at our disposal in order to provide the best representation possible to our clients. I urge all our members to take advantage of the many and varied CLE programs NYSACDL presents each year; it’s a great way to get your mandatory credits, learn useful information, and network with others; after all, who knows what we do better than all of us?
Checklists save lives in hospitals and on factory floors. In criminal cases, they can save years of lives. Take Judge Weinstein’s E.D.N.Y. sentencing checklist, distributed to counsel prior to a sentencing, which asks such basic, but sometimes overlooked, questions as “was the right guidelines manual used” and “should the defendant be recommended for a prison drug treatment program.” Of course, a check mark on a list is no guarantee of quality performance, but the many appellate decisions applying a “plain error” standard of review demonstrate that defendants often suffer less from their lawyers’ lack of knowledge than from a failure to use it.¹ Like surgeons and airline pilots, even the most skilled lawyers can commit unforced errors, and checklists are a brilliantly-simple mechanism of reducing their incidence.

To be most effective, obviously, these checklists should be updated as the law changes, and to Judge Weinstein’s list, we can now add the “to be sure, to be sure” objection, inspired by the Court’s decision in United States v. Wagner-Dano.² In this article, I also discuss the Court’s latest contribution to its hall of 404(b) fame, United States v. Scott,³ and I address a notable victory by NYSACDL Board Member Marc Fernich in United States v. Cain.⁴

TO ERR IS HUMAN, TO PRESERVE IS DIVINE
Wagner-Dano raises a common dilemma for defense lawyers: what to do with bad facts in the presentence report (PSR) that do not affect the guideline calculation but will negatively dispose the judge towards the defendant? The effort to defuse them without precipitating a potentially damaging Fatico hearing or, worse, a revocation of acceptance points, can involve delicate negotiations and phrasing. Alternatively, a defense lawyer might go on the offensive, claiming a breach of the plea agreement. Or she might choose to minimize their impact by saying nothing. Wagner-Dano makes clear, however, that if the defendant wants to challenge on appeal a court’s failure to address factual objections to the presentence report, she will be limited to the forgiving “plain error” standard of review⁵ if she does not specifically alert the district court to her procedural objection.

Wagner-Dano, a bookkeeper for a town and two dairy cooperatives, pled guilty to embezzling over $1M, which she spent on her two hobbies, truck pulling and gypsy-horse breeding, and improvements to her home. Her lawyer filed a lengthy sentencing memorandum that did not take issue with the guideline calculation of 63-78 months in the PSR, but objected to several of its factual statements, including whether certain repayments were for purposes of restitution or to cover-up her thefts, and whether the precipitous transfer of her home to her parents was an effort to shield assets from her creditors. The PSR was revised to reflect some of these objections, and others were appended in an addendum. At

¹ See Atul Gawande, The Checklist Manifesto (1999) at 8 (noting that most professional errors occur where “the knowledge exists, yet we fail to apply it correctly”).
³ 2012 WL 1143579 (2d Cir. April 6, 2012).
⁴ 671 F.3d 271 (2d Cir. 2012).
⁵ As the Supreme Court recently articulated, “plain error” review permits an appellate court, in its discretion, to correct an error not raised at trial, where the appellant demonstrates (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant’s substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. United States v. Marcus, -- U.S. --, 130 S.Ct. 2159, 2164 (2010). To be “plain,” an error must be so obvious that “the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it.” United States v. Frady, 456 U.S. 152, 163 (1982).
sentencing, in response to a query from the district court, the
defense counsel advised that his factual objections to the PSR
were “summarized in the addendum.” After hearing from
victims, defense counsel and the defendant, the court noted
that it was “adopting the factual information contained in
the presentence report” and sentenced the defendant to 78
months, the top end of the applicable range. The defense
counsel made no further objection (perhaps for good reason,
since clarification of the record may not have inured to the
defendant’s benefit).

On appeal, the defendant argued, inter alia, that the district
court had violated Fed.R.Crim.P. 32(i)(3)(B) by neglecting
to address several of her objections to the PSR. This rule
requires a court either to rule on “any disputed matter in
the presentence report or other controverted matter,” or
determine that such a ruling is unnecessary. Noting that
its precedents were unclear, the Court determined that
unpreserved Rule 32(i)(3)(B) violations should be reviewed
only for plain error. Here, the Rule 32(i)(3)(B) error was
unpreserved, since the defendant had filed a series of factual
objections to the PSR, but “failed to alert the district court of
her procedural objection that the court had not adequately

6 Wagner-Dano, 2012 WL 1660956 at *4.
addressed her disagreements with the PSR.”

Notably, this objection can be made after sentence has been pronounced, so as not to force scrutiny of potentially adverse information while the nature and length of the sentence is still up in the air. It should also be added that defense counsel may want to pursue the issue of correcting factual errors in the PSR for reasons beyond preservation of appeal issues. For example, the Bureau of Prisons relies on the PSR to determine an inmate’s security classification and eligibility for programs. Factual inaccuracies in the PSR, particularly relating to the inmate’s history of violence, use of weapons and substance abuse history, can seriously impact the quality of the inmate’s incarceration, and eligibility for early release.

JUST TO TELL YOU ONCE AGAIN, WHO’S BAD

If I were to isolate the one evidentiary rule that most threatens the presumption of innocence at trial, it is Fed.R.Evid. 404(b), which permits the introduction of “other act” evidence – sometimes more damning than the evidence of the charged offense. The arsenal for opposing this evidence has a new addition: United States v. Scott, a must-read decision in which the Court both held that RICO’s pattern of racketeering under RICO.

Scott was convicted after trial of drug distribution, based on evidence that the arresting officers had observed him conducting a hand-to-hand sale at a “high narcotics prone location.” At trial, over the defense objection, the government had elicited testimony that the arresting detectives knew the defendant and had spoken to him on several occasions in the past, once for twenty minutes. On appeal, the Court made several notable rulings. First, the Court rejected the government’s argument that the evidence did not come within the ambit of Rule 404(b), holding that “[n]othing about [the terms in 404(b)] implies that the ‘other acts’... must be ‘bad.’” Rule 404(b) “prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor’s character,” and evidence of prior interactions with the detectives “indicates to a jury that [the defendant] is, at a minimum, the sort of person who warrants a level of police observation to which law-abiding citizens are unaccustomed.” Second, applying the factors in Huddleston v. United States, the Court found no “proper purpose” for the evidence, noting that the government had not provided “any credible explanation sounding in common sense or science about why a person is better able ‘to follow the action’ or physically see an event because he is familiar with the person involved” and “nothing in the defense case... even remotely raised the issue of identity.” Third, the Court “simply [found] no probative value to this testimony;” a jury hearing this testimony “would not believe that Scott ‘was just saying hello and asking about the officer’s family life.’” Finally, the error was not harmless, where the prosecution’s case “was not particularly strong” and the recognition testimony was clearly important to the prosecutor, who referenced it at opening and at length in summation.

Kudos to the defense lawyer, Curtis Farber, who did not just preserve the error, he practically mummified it, and so eloquently that the Court quoted his objections at length and adopted their reasoning. This case is a great companion case to United States v. Curley, discussed in my column last summer.

ELEMENTALLY YOURS

NYSACDL Board Member Marc Fernich secured a rare reversal of RICO convictions in United States v. Cain, a case that illustrates the importance of checklists when it comes to jury instructions.

The Cain brothers and a cousin were convicted after trial of racketeering and various related offenses in connection with a tree service and logging business in western New York. On appeal, one of several challenges concerned the district court’s failure to instruct the jury on the relatedness and continuity showings required to establish a pattern of racketeering under RICO. The Court agreed that that the instructions were error. Here, contrary to the Court’s holding in United States v. Indelicato, the district court had instructed that RICO’s pattern requirement required only proof that the defendant committed two of the charged racketeering acts within ten years of each other. Indelicato requires, in addition, that the racketeering acts be related to each other (horizontal

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7 Id. at 9. The Court further found that the district court did not commit plain error.
8 Id. at 6.
9 2012 WL 1143579 at *1.
10 Id. at 5 (emphasis added).
11 Id.
14 Id. at *10.
15 Id. at *5.
16 Id. at *11.
17 639 F.3d 50 (2011).
18 865 F.2d 1370 (2d Cir. 1989) (en banc).
relatedness) and that there is “continuity or a threat of continuity.”

The error was only subject to plain error review, however, since the defendants had failed to object adequately to it at trial. They had neither included the relatedness or continuity language in their own proposed charge to the court, nor objected to its omission from the court’s draft charge. While the relatedness element was referred to by defense counsel in passing in one colloquy, “no one called the court’s attention to the fact that it had omitted a key portion of the RICO charge.”

Ultimately, the Court concluded that the error was only plain as to Chris Cain, represented by Marc Fernich on appeal (but not at the trial level). Persuaded by Fernich’s impressive briefs, the Court viewed the evidence connecting Chris Cain’s unlawful activities to the criminal association charged in the indictment as “remarkably thin.” He had not been charged in the three tree-service extortions that made up the core of the RICO case against his brother. Rather, he had been implicated in what was essentially a six-week crime spree, the acts of which did not involve his brother and “were not so clearly linked to each other or the enterprise itself” that a properly instructed jury would likely deem them a pattern of racketeering activity.

Accordingly, Chris Cain’s substantive and conspiracy RICO convictions were reversed.

19 Id. at 1381.
20 671 F.3d at 286.
21 Id. at 289.
22 Id.
On Tuesday, July 10, NYSACDL hosted a very successful and well attended CLE program on The Business of Criminal Law, at New York Law School in Manhattan. President Willstatter introduced three separate distinguished panels, who led a discussion of the business of practicing law.

The leadoff panel consisted of “Don’t Worry Murray” Richman, the “dean” of the Bronx bar, along with Maurice Sercarz and Roland Riopelle, both experienced and well versed criminal defense lawyers. The three panelists discussed how to get and keep clients, and how to handle the myriad issues that arise in client relations which have nothing to do with the case itself, but the sometimes difficult job of keeping our clients happy.

They were followed by Michael Ross and Sarah Diane McShea, who presented an in depth look at retainer agreements, including what they can and cannot contain. Michael Ross is a frequent lecturer on ethical ramifications of practice, and Sarah McShea has represented lawyers in disciplinary proceedings for many years. Together, the two provided significant information, in a format even lawyers were able to understand.

The third and final panel discussed the relationship between lawyers and the media when involved in a high profile case. The panel consisted of Brandy Bergman, a publicist, William Taylor, a Washington, D.C., criminal defense lawyer, and William Rashbaum of the New York Times. The lively discussion was thought-provoking, and gave us good insight in dealing with the media.

NYSACDL thanks Chase and AXA Advisors for their sponsorship of this event and the provision of refreshments. Plans are in the works to replicate this CLE program around the state, with distinguished panelists and experts from all areas.
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