ATTICUS
Publication of the
New York State Association of
Criminal Defense Lawyers

INSIDE this ISSUE

6 Legislative Report
by Andy Kossover

7 Influencing the
Legislative Process
by Sandra Rivera

9 In Search of a Workable
Sentencing Model
by Alan Rosenthal and
Patricia Warth

19 Right to Appear before
a Lawyer Judge
by Greg D. Lubow

24 Leveling the Playing Field
by Michael T. Baker

26 Parole Reform
by Alan Rosenthal, Patricia
Warth and Andy Correia

30 Second Thoughts
by JaneAnne Murray

36 You as the Central
Persuasion Equation Part II
by Ray Kelly

47 Sealing Statute
by Lisa Schreibersdorf

Trial by Reason and not Surprise
By Timothy Donaher and Andrew Correia – Page 14

Stop & Frisk | By Aaron Mysliwiec
Page 33

MARK YOUR CALENDAR!
April 15th, 2011
Cross to Kill Seminar
Brooklyn, New York

See page 35 for details.
Message from the President

This Legislative Edition of ATTICUS is a new and interesting concept. We intend it to be an annual event. NYSACDL has over the years been actively involved in lobbying and advocating on criminal justice issues. Whether it has been a controversy over assigned counsel rates or the creation of model legislation for the expungement of criminal convictions or a statewide public defender system, this Association has worked diligently to ameliorate the lot of our members and our clients.

In the last few years, this effort has increased in scope and effectiveness. Our Legislative Committee, working with our lobbyist, has engaged with numerous legislative and governmental leaders on many issues. As a result, NYSACDL has played a part in the discussion and formulation of criminal justice and legislative policy. In these days and times, given the power of the Prosecutors’ lobby and the public’s fixation on crime, that is no small achievement. This edition of ATTICUS is meant to contribute to and enhance that effort in a number of ways.

Firstly, this is to inform our membership of the issues that the Association and the Legislative Committee have been working on over the past years. It is also meant to indicate the areas that the Committee has identified as important and that should be addressed in the coming legislative sessions. Each of the articles herein devoted to issues that are current and should be considered carefully by legislators and policymakers. As our members become more aware of the issues that we are working on, they become more able to contribute to that effort. I urge any member who is interested in any of the issues raised herein, or who has legislative experience, or who would just like to get involved, to contact any of the members of the Legislative Committee.

In addition, we hope that this issue of ATTICUS will be seen by the legislators and staff people that we will seek to engage on these issues. We believe that it will clearly and forcefully press the arguments that need to be made in the criminal justice policy arena. It can be used to further the discussion of these issues and suggest solutions to problems within the criminal justice system. In the years to come, as more of these publications come out, they will create a body of opinion, research, and analysis on criminal justice issues that will be invaluable.

Finally, and perhaps most importantly, this publication will delineate the positions and policies of The New York State Association of Criminal Defense Lawyers. It will state clearly, forcefully and with conviction who we are and where we stand. It will unequivocally identify us as THE organization that defends those who cannot defend themselves and is proud to do so!

Kevin D. O’Connell, NYSACDL President
NYSACDL Welcomes 2011 Directors & Officers

Kevin D. O’Connell of the New York County Defenders was sworn in as NYSACDL President for 2011 at the Annual Dinner on January 27. Richard D. Willstatter of White Plains assumes the role of President – elect and Benjamin Ostrer of Chester is First Vice President. Joining Donna Newman and Matthew Kluger as returning Vice Presidents are Michael Shapiro (Manhattan) and Andre Vitale (Rochester). John S. Wallenstein of Garden City will serve as Secretary while Aaron Mysliwiec will continue as Treasurer.

Continuing Legal Education

**Brooklyn – Cross to Kill**
April 15, 2011
The Annual NYSACDL Cross to Kill Seminar will focus on trial preparation and strategies and will provide 2 CLE Credit Hours
This is traditionally one of our most exciting programs.

**Syracuse Spring Trainer**
April 30, 2011
NYSACDL’s Annual Syracuse Spring Trainer will cover various criminal defense topics and will provide 6 CLE Credit Hours

**Corning CLE**
Spring, 2011
This 4 hour seminar will cover DWI / Interlock Ignition issues as well as developments in sentencing practices under the new drug laws.

**Ithaca CLE**
Plans are underway to bring an interesting program to Thompkins County later this year.

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

The Winter Issue of Atticus marks the fourth issue of the revised print format. The contributions of our members and supporters are greatly appreciated. Winter Atticus 2011 is our first attempt at dedicating an issue to a particular topic of interest. In keeping with the efforts to impact upon legislation we have collected a variety of articles from our members to inform and educate our readers regarding matters presently being considered by the New York State Legislature. Our Legislative Committee has made our presence known in Albany and our organization is frequently called upon to comment upon legislative proposals. This is an effort in which any member can participate. Contact information for Andy Kossover, the chair of the Legislative Committee is included in this issue and comments and suggestions can always be forwarded to our Executive Director Meg Alverson or to the editors via email to Atticus@nysacdl.org.

We continue to rely upon our membership for material. Please don’t be shy about submission of an article, quote, point of interest, verdict, reversal or honor bestowed. These items help make ATTICUS our magazine. We look forward to your comments and contributions. We invite you to download additional copies via the nysacdl.org website.

Co-Editors
Cheryl Meyers Buth
cmeyers@tomburton.com

Ben Ostrer
ostrerben@aol.com

Events

NYSACDL 2011
Board Meetings

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

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

AWARDS & RECOGNITION

Jill Paperno
NYSACDL Congratulates Jill Paperno on being awarded the Jeffrey A. Jacobs Memorial Award. The Award was established in 2010 by the Monroe County Public Defender’s Office and was bestowed on Jill Paperno, Second Assistant Public Defender with the Office in recognition of her outstanding trial work. See page 21 for the details.

Thomas F. Liotti
An attorney in private practice, has just been appointed by Professor Bruce Green, Chair of the American Bar Association’s Criminal Justice Section, to a Special ABA Task Force on The Collateral Consequences of Pleas. See page 34 for the details.

ATTICUS
ADVERTISE in

Statewide print & electronic distribution
Enamored readership
Affordable rates

Contact us for details & rates! 845.856.1266
atticus@nysacdl.org
Legislative Committee Report

At our December, 2010 New York State Association of Criminal Defense Lawyers (NYSACDL) Board of Directors meeting, we were all admiring the renewed magazine format of ATTICUS and discussing articles for the Winter, 2011 edition. It was suggested that we dedicate the edition to a single subject: our Legislative Agenda. A number of members volunteered, and others were drafted, to write articles on various legislative issues of importance and in some instances, even include proposed legislation. After a short five week submission deadline, voila, welcome to the first Annual Legislative Edition of ATTICUS. We expect to publish this edition each winter and make it available to the New York State Legislature and Governor for their consideration.

Before I speak to the content of this publication, it is significant to note that over the past several years, the Legislative Committee has become more active. Gubernatorial staff and legislators from both sides of the aisle have sought our input on prospective legislation. We continue to provide valuable insight on a wide variety of proposals that significantly affect our clients and the delivery of criminal justice services. When discussing criminal justice legislation, we generally think about balancing individual freedoms and due process rights with public safety. We know from experience that headlines and fear can lead to laws which fail to accomplish their intended objective. It can take years to refine such legislation. Just as all of you find the courage to act when faced with injustice, NYSACDL takes action when bad legislation is proposed or existing law requires reform.

Your Legislative Committee has developed legislative priorities for the 2011 session of the New York State Legislature. The articles in this inaugural legislative edition reflect our statewide membership’s concerns ranging from justice courts to sentencing reform.

SENTENCING AND PAROLE REFORM  Pages 9 & 26
Alan Rosenthal and Patricia Warth, Co-Directors of Justice Strategy at Center for Community Alternatives (CCA) and Andy Correia, Senior Project Manager at CCA have contributed articles on Parole Reform and a Workable Sentencing Model. The authors warn that “with the advent of a predominantly determinate sentencing model and criticism of the Parole Board on the rise, the future of the Parole Board may be in doubt.”

DISCOVERY REFORM  Page 14
Monroe County Public Defender Tim Donaher advances the need for discovery reform in New York and updates us on current proposals.

JUSTICE COURTS  Page 19
Attorney Greg Lubow, longtime Board member from Tannersville, makes the case for the right of an accused to have their case heard by a lawyer-judge.

PENAL LAW BURGLARY STATUTE  Page 24
Broome County Senior Assistant Public Defender and President of the Broome County Bar Association Michael Baker argues for needed reform to the Violent Felony designation of particular burglary statutes and the complexity of cases wherein a defendant is charged with a “dwelling” burglary even though the accused is caught in a street level commercial space of the same building.

Legislative Committee:

Andy Kossover, Chairman
(New Paltz)
Wayne Bodden (Brooklyn)
Andy Correia (Wayne)
Tim Donaher (Rochester)
Ray Kelly (Albany)
Greg Lubow (Greene)
Aaron Mysliwiec (New York City)
Alan Rosenthal (Syracuse)
Lisa Schreibersdorf (Brooklyn)
Don Thompson (Rochester)

Andy Kossover
Chief Public Defender, Ulster County, NY
Chairman
NYSACDL Legislative Committee
ak@kossoverlaw.com
STOP AND FRISK  Page 33
Aaron Mysiliwiec, Board Member and Treasurer of NYSACDL, discusses issues raised by the recent Stop & Frisk legislation and Senator Sampson’s recent proposed legislation which would prohibit law enforcement from using racial and ethnic profiling, establish a collection of data on traffic stops and create a cause of action based on racial or ethnic profiling.

SEALING STATUTE  Page 43
Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services and Past-President of NYSACDL, has submitted an article on the need to create a meaningful sealing statute in New York.

In addition to these important initiatives, NYSACDL will be focusing on bail reform. We will also be monitoring and supporting legislation this year designed to reduce wrongful convictions. It is expected that a series of new legislative proposals arising from common issues in wrongful conviction cases, some of which relate to the NYSACDL initiatives set forth above (e.g. Discovery Reform) will be introduced. Significant measures may be taken to eliminate junk science in forensics such as standardized accreditation of labs, certification of scientific expert witnesses, the collection, preservation, and retention of evidence, and pre-trial and post-conviction access to forensic evidence. The Legislature will also undoubtedly examine the reliability of admissions (the possible implementation of recording of all custodial interrogations), identification procedures, and testimony by biased and interested witnesses. Reform in these areas will be designed to restore integrity and faith in our criminal justice system.

Lastly, NYSACDL supports judicial pay increases. The creation of the Commission on Judicial Salaries is an important step in obtaining adequate levels of compensation for judges and justices in New York. Chief Judge Jonathan Lippman, celebrating the establishment of the Commission, correctly stated that this “takes judicial salaries out of the political arena.” Many judges, however, are still in that arena due to flaws in the judicial selection process. Whether it be proposals like appointed judges or public funding of judicial elections, additional efforts should be explored to move the courts even farther from the political arena. In order to have an independent and well-qualified judiciary, not only should judicial compensation reflect the excellence we require and are entitled to expect of the judiciary, but the selection process requires similar reform to maintain the independence and integrity of the judicial branch of our constitutional government.

I believe our efforts perform an important public service, not only for our clients, but also for all the people of the State of New York. To paraphrase Michael J. Sandel, a professor of government at Harvard University and author of Justice – What’s the Right Thing to Do?, conservatives rush in where liberals fear to tread. Without membership support your Association would not be able to provide this service. In a very real sense, by joining NYSACDL, each of you becomes part of this pursuit of justice and well reasoned legislation. Our success cannot be accomplished by the Legislative Committee and Board of Directors alone. We will call upon all members to call, write to, or meet with your representatives to discuss the legislative issues raised in this edition of ATTICUS. With your support, good ideas will prevail.
Anyone who has paid even the slightest bit of attention to media accounts about the law making process in Washington, D.C. and in New York State surely has a healthy dose of cynicism about our legislative process. As Otto von Bismark aptly stated in the quote above, the process may not be very pleasing to witness in action. Add to this the increased attention by the media on “special interests” this leaves one with the impression that there is no room for the average person to participate in the process. Moreover, some of the laws “on the books” seem so out of touch with the real world that one has to wonder how the law got enacted in the first place. However, law making is a very dynamic process. Each year new laws are being created while current laws are amended, or even repealed altogether. The process can be a bit unappealing at times, but the average practicing attorney can get involved and have an impact on the laws that are being created.

When NYSACDL first decided to actively engage in the public policy discussions taking place in the New York State Legislature on criminal justice issues, it may have seemed like a futile effort to try to influence the outcome. While it is true that there are so many more interest groups walking around the New York State Capitol these days, it is still possible to have your voice heard, and impact the direction of state public policy. This article provides some simple steps to advise you how you can engage in the process, and how you can lend your voice to this effort and influence it along the way.

THE INTRODUCTION — WHO ARE YOU?

Each year, in the New York State Legislature, thousands of bills are introduced by legislators. Generally, for each bill that gets introduced, there is at least one interest group supporting its enactment into law. Also, there are likely other groups opposing that bill. For legislators, it can be a bit overwhelming to try to sort through all of these bills and keep track of who is supporting or opposing each bill. Therefore, it helps if the legislators understand who you are and what experience you bring to the discussion. If you can become a key person for your legislator on a particular subject area, you have a better chance they will remember you and listen a little more carefully to what you have to say.

One way to start this process is by contacting your own legislators in the New York State Assembly and Senate. Reach out to them and let them know your thoughts about particular public policy issues or even any legislation that you may have heard about. The idea is to let them know that you are a constituent who is interested in certain issues that are being discussed in the State Legislature. The information you provide to your legislator may be just what he or she was looking for.
Other legislators may also be interested in your perspective, as well. When a bill is introduced, it is referred to a standing committee based on the substantive area of law addressed in the bill. The committee will have an opportunity at some point to review the bill and determine whether to vote it out of committee and allow the bill to keep moving along in the legislative process. Your input at this crucial stage might advance a bill you support, or kill a bill you oppose.

When members of NYSACDL’s Legislative Committee first started engaging in the legislative process, they introduced themselves to their own legislators as well as to the legislative committee members who would be interested in criminal justice issues. They explained the mission of the association and the criminal justice expertise of its members. Not surprisingly, some legislators found that this voice was absent from the discussions about criminal justice issues taking place in the Legislature, and that it was helpful to hear what NYSACDL has to say about criminal justice issues.

THE ASK — WHAT DO YOU WANT?
As a practicing attorney, you have a wealth of knowledge about your practice area. You know which laws are beneficial to your practice and clients and which ones are detrimental to your practice or clients. This expertise is valuable in that it can be the impetus for changing laws in New York State. Legislators come from all walks of life. They have different experiences and ideas about legislation and will eventually have to decide how they will vote on a particular bill. Sometimes they will want to introduce their own legislation. Usually, they will look to those who are knowledgeable about an issue to help them deliberate on bills and get ideas for new bills. Your expertise can help them decide whether certain legislation should be supported or opposed, or it can provide the source for new legislation.

As an example, when NYSACDL members met with legislators, they offered a proposal for new legislation — sealing of criminal records. Although this idea had been discussed in the Legislature in the past, NYSACDL members explained the need to address this issue. They met with members of the legislature and presented arguments that reflected the expertise of their membership. As a result of NYSACDL member efforts key legislators in the area of criminal justice now know that sealing of criminal records is an issue that should be addressed.

THE PLAN — HOW CAN WE GET THIS DONE?
Once you have established who you are and what you want, the next step is to figure out how to get it done. Is there legislation that already exists that would suit your goal? Does new legislation need to be drafted? Are there other interested parties who share the same position as you do on this bill?

When NYSACDL was deciding how to approach the Legislature to address sealing of criminal records, they reviewed any relevant, pending legislation. While there were proposals that addressed the issue, they wanted to present a more comprehensive approach. Thus, they drafted their own proposal and looked for a legislator to sponsor it. To build support, they have contacted other interested groups that would want to support the proposal. Although NYSACDL is at the beginning stages of this process, they are hopeful that with persistence the legislation will become law.

NYSACDL started this process of taking positions on pending legislation, and contributing ideas for new legislation, because several of its members wanted to participate in the public policy discussion on criminal justice taking place in Albany which has impacted their practices across the State. You can help NYSACDL in this effort. If you are interested in a particular piece of legislation or proposing an idea for new legislation, you can contact Andrew Kossover, Chair of NYSACDL’s Legislative Committee, ak@kossoverlaw.com.

Despite popular depictions by the media, the average practitioner can influence public policy in New York State. The key is persistence. Legislators have multiple issues competing for their time and attention. In order to keep issues alive and moving along in the process, there needs to be momentum. Momentum is created only if there are interested groups actively supporting the issue. Also, keep in mind that if you choose not to participate in the process, chances are someone else, perhaps with a very different opinion from yours, will be working to have an impact on the lawmaking process in New York State.
On October 13, 2010, Chief Judge Jonathan Lippman announced the creation of the New York State Permanent Sentencing Commission. The Permanent Sentencing Commission is “charged with conducting a comprehensive and ongoing evaluation of sentencing laws and practices and recommending reforms to improve the quality and effectiveness of statewide sentencing policy.”1 Its creation was prompted, at least in part, by the temporary Commission on Sentencing Reform established in 2007 by Executive Order, which recommended the creation of a permanent sentencing commission.2

Among other responsibilities, the Permanent Sentencing Commission is charged with the task of examining ways to “simplify[] New York’s increasingly complex sentencing statutes.”3 This task comports with the temporary commission’s similar recommendation. Noting that “determinate sentencing has been the unmistakable trend in New York” the temporary commission stated that “it makes sense to continue this positive trend by moving even closer to an all determinate felony sentencing structure in New York.”4 It seems inevitable that the Permanent Sentencing Commission, like its predecessor, will recommend that the trend be continued and that New York adopt a mostly determinate sentencing scheme.

While a determinate sentencing scheme certainly promotes the goal of simplicity, there are substantive benefits of an indeterminate sentencing scheme that determinate sentencing simply fails to realize. Chief among these benefits is promoting successful and productive reentry and reintegration, an important statutory sentencing goal in New York since 2006.5 Indeterminate sentencing provides incarcerated people several opportunities, well in advance of their maximum sentence, to be evaluated for release. These early release opportunities promote successful reentry and reintegration in two ways: first, they provide natural incentives for incarcerated people to rehabilitate themselves through programming and a positive disciplinary record; and second, they increase the likelihood that individuals will be released when they are ready to live law-

---

3 Press Release, supra note 1.
5 See Penal Law 1.05(6) providing that the purpose of our criminal justice system is to “insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.”
Releasing people when they are ready to be released rather than simply holding them to a date certain (or 85% of a date certain) minimizes the long-term negative impact of prison, which significantly impairs a person’s ability to successfully reintegrate into the community. It is also more cost-effective because individuals are not needlessly imprisoned — at the cost of about $44,000 per year — after they have proven their readiness to be safely released.

Thus, determinate sentencing tends to favor simplicity over reintegration and cost-effectiveness. This raises the question: is there a way for the Sentencing Commission to fashion a determinate sentencing scheme that still preserves the important goal of promoting reintegration while also saving New Yorkers needless tax dollars imprisoning people who are no longer a danger to the community? The answer is “yes” if the Sentencing Commission is willing to roll back fifteen years of tough-on-crime policy-making to revitalize New York’s languishing Temporary Release program.

The History of New York’s Temporary Release Program

To understand the untapped promise that the Temporary Release program holds in both promoting successful reentry and reintegration and saving over-stretched tax dollars, it is important to know what the Temporary Release program is and its history in New York. Initiated in 1970, the Temporary Release program allows incarcerated people nearing the end of their sentences (usually about two years from release) to be released to the community for rehabilitative programming. The most utilized and best-known Temporary Release program is work release, which allows participants to work in the community during the day, initially returning to the facility at night, then on weekends until they need only report once per week. By facilitating a structured transition from incarceration to release, the Temporary Release program reduces recidivism and enhances public safety. Even better, it accomplishes this while simultaneously saving New Yorkers millions of dollars each year.

Despite the program’s reentry promoting and cost-saving benefits, the eligibility criteria have been severely restricted over the past 15 years so that now any person in prison serving a sentence for a violent felony is essentially barred from participation. This restricted eligibility came by way of two Executive Orders: Executive Order 5, issued in 1995, which generally bars those convicted of violent felony offenses; and Executive Order 9, issued in 2007, which tightens

6 Admittedly for the past few decades, the full value of indeterminate sentencing has not been realized because parole release decisions have focused more on punishing the parole applicant than on genuinely evaluating the applicant’s readiness for release. As a result, in New York the indeterminate sentencing scheme has not lived up to its ideal. This issue is addressed in the article in this issue entitled “NYSACDL Supports Call for Parole Reform,” which explains why the NYSACDL is supporting a legislative proposal to amend Executive Law 259-i.

7 The long term impact of prison and how it impairs a person’s ability to successfully reintegrate into the community is aptly described in a working paper by Craig Haney entitled, The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.” This paper was prepared for a 2002 “From Prison to Home” conference sponsored by the U.S. Department of Health and Human Services. It is available at: http://aspe.hhs.gov/hsp/prison2home02/Haney.htm.


9 This Executive Order can be found at 9 NYCRR 5.5.

10 This Executive Order can be found at 9 NYCRR 6.9.
These Executive Orders have all but gutted the Temporary Release program. At its peak in 1994, 27,937 individuals participated in the program; by 2009, program participation had plummeted to 2,191, a decline of more than 90%. As a result, today the Temporary Release program is one of New York’s most underutilized resources for cost-savings and enhanced public safety.

The program’s drastic reductions did not result from a thoughtful weighing of its costs and benefits, but instead from the political turmoil generated by a few isolated, high-profile arrests of participants who committed crimes while in the program. In response to these high-profile arrests, and soon after being elected, Governor Pataki issued Executive Order 5 barring people convicted of violent felonies from participating in the program. In so doing, he overlooked the best available evidence at the time, set forth in the Department of Correctional Services’ own 1995 report, \textit{Comparison of Temporary Release Absconders and Non-Absconders: 1993-1994}. This report established that allowing people with violent felony convictions to participate in the program did not increase crime rates among program participants. Indeed, when those convicted of violent felonies were permitted to participate in Temporary Release, a very small percentage of program participants — approximately 3% — were arrested for new crimes. This report also revealed that participants who were imprisoned for violent felonies absconded or committed new crimes at lower rates than other program participants.

Nonetheless, it was the politically-driven policy of restrictive eligibility criteria that led to the more than 90% reduction in program participation. While it is undoubtedly true that fewer participants overall means that fewer participants will abscond or be arrested while in the program, by adopting this restrictive policy the State has lost a significant opportunity to promote the successful reentry and reintegration of incarcerated people in one of the most cost-effective manners available.

\textbf{The Promise of a Revitalized Temporary Release Program in a Determinate Sentencing Scheme}

Any discussion about a shift to determinate sentencing must also include a discussion about revitalizing the Temporary Release program. A vibrant Temporary Release program is the best way to compensate for the shortcomings of determinate sentencing in promoting the successful reentry and reintegration of incarcerated people.

Like the prospect of being released to parole, the opportunity to participate in Temporary Release provides incarcerated people incentives to engage in positive programming and behavior throughout the course of their incarceration. Moreover, participation in Temporary Release in and of itself is a best reentry practice. This is best illustrated by comparing the transition of those who do not have the opportunity to participate in Temporary Release with the fortunate few who do. Lacking the opportunity to participate in Temporary Release, most people are abruptly discharged from prison with $40 and a bus ticket; they have no savings, little work experience, few job skills, and little hope of finding living-wage employment. In contrast, those who participate in the Temporary Release program gradually transition from prison, initially leaving for work during the

\textbf{They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.} \hspace{1cm} Benjamin Franklin

\textit{Historical Review of Pennsylvania 1759}

\textsuperscript{11} For a discussion of the few available exceptions to these exclusions by way of a Violent Felony Override, see www.communityalternatives.org/pdf/temporaryrelease.pdf.
day and returning at night, then leaving for the week and returning on weekends, until eventually they need only report on a weekly basis. During this transition, they work regular hours and earn a living wage, gaining job skills, experience and confidence. The program also requires that participants save a percentage of their wages in their inmate account, helping them to develop better financial discipline. Most participants also use this transition time to re-connect with family members and build supportive relationships in the community. As a result, by the time Temporary Release participants are discharged from prison, they have financial savings, a living-wage job, a stable home, and often positive supportive relationships in the community. Thus, it is no surprise that research shows that Temporary Release programs are effective at promoting successful reentry, thereby reducing recidivism.

A full commitment to revitalizing the Temporary Release program should also include an investment in staff needed to counsel participants on the common problems experienced in transitioning from prison to the community and to provide participants career counseling, soft-skill development, and job coaching. Such an investment would go far in ensuring that most participants succeed in the program, thereby reducing the potential that participants will re-offend while in the program or after their discharge from DOCS custody.

Even with this investment, the Temporary Release program is an exceptionally cost-effective program; indeed, a vibrant Temporary Release program is a sure way to reduce the staggering cost of our prison system. The Temporary Release program - particularly work release - saves state taxpayers money in two important ways. First, it costs significantly less to house work release participants than to house “traditional prisoners.” For example, in 2007 it cost state taxpayers $31,000 per year to house each traditional prisoner, but only $7,500 per year to house each work release participant, resulting in a $23,500 per year savings for each work release participant. Second, because individuals involved in the work release program earn a taxable income, this program generates local, state and federal tax revenues. A 2008 working paper issued by the Center for Community Alternatives explored the cost-savings of the Temporary Release program, concluding that between 1995 and 2007, the diminished use of the program cost New Yorkers at least $1.25 billion.
Conclusion
Given the remarkable reentry potential and cost-saving benefits of the Temporary Release program, it is unfortunate that the politics surrounding a few high-profile cases have effectively decimated the program over the past 15 years. The formation of a Permanent Sentencing Commission provides an opportunity to re-examine the reentry potential of the Temporary Release program. This is particularly true if the Commission is inclined to recommend the adoption of a mostly determinate sentencing scheme.

In examining sentencing in New York, it is hoped that the Permanent Sentencing Commission will be mindful of the sage advice of Hon. Michael A. Wolff, who has lectured and written on sentencing policy. In a 2008 Brennan Lecture, Judge Wolff noted that while “we must acknowledge that the reason for sentencing is to punish,” sentencing policy must be achieved with a considerable amount of information and thoughtfulness because “if we chose the wrong punishments, we make the crime problem worse, punishing ourselves as well as those who offend.” Judge Wolff went on to offer this advice:

If we are to think rationally about what is in our own best interest – that is, public safety – we should try and determine what reduces recidivism.17

Determinate sentencing may promote the goal of simplicity, but such sentences do little to meaningfully reduce recidivism by promoting a person’s successful reentry and reintegration into the community. Revitalizing the Temporary Release program is a proven means to address the shortcomings of determinate sentencing. It is a way to heed Judge Wolff’s advice and to rationally and effectively promote what is best for our communities.

---

As a young attorney in a firm that concentrated in civil litigation, I embraced with gusto the robust civil discovery provisions of the CPLR. In suits involving no more than a few thousand dollars, I could employ numerous discovery devices to ascertain volumes of information about the case and the opposing party, months – in some cases years -- before the trial commenced. The methods of obtaining discovery in a civil action are numerous for a reason, for the CPLR\(^1\) states that a party shall be required to make “full disclosure of all matter material and necessary in the prosecution or defense of an action”. The Court of Appeals long ago held that “material and necessary” matter is simply evidence that is “relevant”,\(^2\) and that liberal discovery of all relevant evidence is necessary “to advance the function of a trial to ascertain truth . . .”.\(^3\)

After joining the public defender’s office, I learned that the criminal discovery statutes are as frustrating to criminal defense attorneys as the civil discovery statutes are empowering to civil attorneys. Unlike in civil litigation where neither party can conceal any material fact, in criminal cases the amount of information prosecutors are required to disclose is minimal, at best. Additionally, the scant information that is provided is not done so until months after the criminal action has commenced, which makes providing an effective defense of the accused difficult, and in some cases, impossible. As United States Supreme Court Justice William J. Brennan observed, such limited criminal discovery inevitably leads to “trial by ambush”, not a search for the truth.

New York State Association Criminal Defense Lawyers member Bruce Barket testified about this problem at the New York State Bar Association Task Force on Wrongful Convictions in February of 2009:

Discovery in criminal cases is abysmal. New York provides for only narrow disclosures by prosecutors. Prosecutors are permitted to withhold the identity of most witnesses, most witness statements, almost all police reports and almost all investigative leads. As an attorney in private practice I’ve had the opportunity to try some civil cases...Before I pick a jury, I will have seen every single witness statement that exists. I’ll have had an opportunity to depose the witnesses. I’ll certainly know the names of every single witness. Literally there will be no surprises...when I stand up to pick a jury in a murder case it is very likely that I will not have seen a single police report; that I will not have seen a single witness statement. I will have deposed no one, unless there would happen to be some kind of pretrial hearing. Worse, once I receive the statements, literally at the beginning of the trial, I won’t have the time to investigate what the witnesses have to say. I won’t have the time to determine whether or not what they claim to have seen or heard is accurate. The sad reality is that trial by ambush in criminal cases is a harsh reality, and every single person who has represented a criminal defendant in New York State knows it. This ought to end. We ought to bring discovery in criminal cases into the 21st century.\(^4\)

Why does the State mandate liberal discovery in civil cases, but simultaneously allow prosecutors to withhold material evidence from a criminal defendant? Isn’t

---

1. CPLR § 3101(a)
the ultimate goal of a criminal action the same as that in a civil case, and if so, shouldn’t our criminal discovery statutes serve the same function as the civil discovery statutes: “to advance the function of a trial to ascertain truth”?

The unfortunate reality is that New York’s criminal discovery statutes actually inhibit the search for truth. The discovery required to be produced by the prosecution is best characterized as “too little, too late”. Minimal discovery is provided too late in the action to allow an effective defense of the client. Too much latitude is provided prosecutors to delay the production of evidence favorable to the accused, and when the existing discovery rules are violated, there are no meaningful sanctions to be imposed.

Currently, felony criminal defendants are entitled to minimal discovery only after being indicted by a grand jury, which may be months after their initial arrest. The implications are obvious: the current statutory discovery scheme intentionally keeps defendants uninformed about the evidence against them until well into the criminal action. This requires defendants to make numerous strategic decisions about their case while being kept in-the-dark, such as whether to invoke their right to testify at grand jury, or accept a plea bargain offered by the prosecutor.

What little information that is required to be disclosed by the People is not only untimely but also grossly insufficient. In the vast majority of felony criminal cases, the People are obligated to provide only: a copy of the defendant’s statement made to a public servant (and co-defendant if they are being tried jointly) and any testimony provided by the defendant or co-defendant; any written reports concerning scientific testing or mental/physical examination done relating to the criminal action; any photograph or drawing relating to the criminal action; property obtained from the defendant (or jointly tried co-defendant); any tapes or electronic recording which the People intend to introduce at trial; and the approximate date, time and place of the offense charged and the defendant’s arrest.5

What is most notable about the above list is what is not produced in a timely manner. Information commonly disclosed in civil cases, such as the names and address of witnesses, is not required to be disclosed by the prosecutor at all. Police reports, or other reports prepared by agents of the State, are only provided if the person who prepared the report will be called at trial or a pre-trial hearing – and only then once they have already testified. Evidence that is favorable to the accused (Brady material)6 is produced only if the prosecutor feels it is “material” and only then at a time of the prosecutor’s choosing.

These are but a few examples of vital information that is either not disclosed at all, or disclosed too late in the process to provide any assistance to the defense.

The lack of meaningful criminal discovery has serious consequences not only for individual criminal defendants, but also for the overall integrity of our criminal justice system. As noted recently by the Innocence Project, New York leads most states in the number of wrongful convictions.7 Although there are many possible causes of wrongful convictions, chief among them is New York’s archaic criminal discovery scheme.

The lack of effective discovery rules inevitably leads to substandard defense of criminal defendants by defense attorneys, and this leads directly to wrongful convictions. As noted by the New York State Bar Association’s Task Force on Wrongful Convictions a significant number of the wrongful convictions the Task Force examined stemmed from “one or more errors by an attorney representing the falsely accused, usually a failure to fully investigate or to offer alternative theories and/or suspects.”8 As observed by Professor Jenny Roberts, “[i]f adequate investigation can help protect against wrongful conviction, then courts must give the constitutional duty to investigate real meaning by giving defense counsel the discovery they need in order to investigate.”9

Not only is the lack of meaningful discovery patently unfair to criminal defendants, the resultant delay in disclosure of criminal discovery in New York violates the American Bar Association Standards for Criminal Justice. ABA Discovery Standards mandate discovery initiated “as early as possible in the process” so that each party has “sufficient time to use the disclosed information adequately to prepare for trial.”10 By contrast, New York allows even the minimal discovery required to be withheld until the very last moment in criminal cases.

Equally disturbing was the finding by the New York State Bar Association’s Task Force on Wrongful Convictions that the failure of prosecutors to deliver favorable information to the defense contributed to a significant number of wrongful convictions.11 The failure of timely disclosure of evidence favorable to the defense is another direct result of New York’s criminal discovery statutes. Too much discretion

---

5 CPL § 240.20
6 Brady v. Maryland, 373 US 83 (1963)
8 Final Report of the NYSBA’s Task Force on Wrongful Convictions, April 4, 2009, pp 6-7
10 ABA Discovery Standards 11-4.1(a)
is given to prosecutors to determine what constitutes evidence favorable to the accused and when that evidence should be disclosed.

A recent ABA ethical decision emphasizes the importance of early disclosure of information in criminal cases. The decision states that a prosecutor’s ethical obligation to disclose favorable information to the defense is broader than that set by the Brady v. Maryland decision alone. The Committee on Ethics and Professional Responsibility noted that: “In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.” The Committee also pointed out that “[a]mong the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty,” and that the “defendant’s decision may be strongly influenced by defense counsel’s evaluation of the strength of the prosecution’s case…” 12

Unfortunately, District Attorneys and other law enforcement entities oppose broader discovery, and frequently make two claims in opposition to proposals for expanded and early criminal discovery. First, the cost of enhancing discovery for criminal defense would be too burdensome upon the police and prosecution, and second, the enhanced discovery would lead to a greater amount of witness intimidation.

As to the first claim, the fairness of the New York criminal justice system should not be dependent upon budget constraints. For too long defendants have been saddled with a discovery statute which places significant burdens upon their ability to conduct a defense by preventing them from engaging in a meaningful and knowing evaluation of the case against them. As a result, in New York defense attorneys and prosecutors spend an enormous amount of time litigating access to information that the other side possesses. This is costly and counterproductive to the search for the truth.

Many jurisdictions around the country, including large states with big cities (Florida, Massachusetts), and smaller states with small cities (New Hampshire) have open, early discovery and recognize the benefits of doing so. In these jurisdictions, defendants are able to make informed decisions and often recognize that it is in their best interest to accept a plea bargain early in the process. On balance, it seems reasonable to conclude that the minimal costs of providing early, complete discovery in New York would be offset by an increase in early plea bargaining, a decrease in unnecessary litigation and a reduction in the number of wrongfully convicted.

Not surprisingly, the claim that enhanced discovery will lead to greater witness intimidation is not supported by the facts. In New York there are ample ways to deal with any potential witness intimidation issues and they have been in place and effective for many years. Discovery can be redacted if good cause is shown, and a reformed discovery scheme should continue that option. Courts can hold hearings to determine if witnesses have been intimidated, and upon a showing of witness intimidation, order that the witness’s grand jury testimony be admissible at trial in lieu of live testimony. 13 Persons who actually engage in witness tampering or intimidation could be charged with applicable crimes. The current provisions under New York law are sufficient to deal with what few witness intimidation issues exist.

Indeed, the evidence fails to show that witness tampering or intimidation is a problem in New York. In 2008, according to records from the Division of Criminal Justice Services, there were a total of 341 arrests across the entire state for either tampering with or intimidating a witness. Compared to 575,221 total arrests during the same time period, witness tampering cases constituted .00059% of overall arrests in New York in 2008. There is no reason to believe there would be a significant change in that percentage even with true open discovery.

Liberalizing the criminal discovery statutes would not result in any increase in witness tampering. In 1991 the New York State Assembly Codes Committee commissioned a study of national criminal discovery practices, in comparison to those of New York State. In calling for expanded criminal discovery in New York, the Report debunked the myth that greater pre-trial discovery leads to an increase in witness intimidation or tampering. The Report concluded that “the link between criminal discovery and witness intimidation is extremely weak”. 14

Recently there has been greater recognition of the need to expand criminal discovery in New York. For a number of years the Chief Administrative Judge’s Advisory Committee on Criminal Law and Procedure has advocated changing the current discovery system to allow meaningful discovery, and the Committee continues to do so. 15 The

12 ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 09-454, July 8, 2009, Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense.


New York State Bar Association has recently called for legislation to address systemic problems in our criminal justice system revealed by the NYSBA Task Force on Wrongful Convictions, including requiring prompt disclosure of evidence favorable to the defense. The New York Legal Aid Society has prepared a thoughtful and comprehensive proposal to reform the criminal discovery statutes to allow more liberal discovery, and a more efficient system.\textsuperscript{16} The motive of each of these initiatives is the same—remedying a criminal discovery scheme that results in systemic injustices throughout New York.

It is time for New York to end a criminal discovery scheme that promotes “trial by ambush”. As a noted jurist once observed, “[t]he truth is most likely to emerge when each side seeks to take the other by reason rather than surprise.”\textsuperscript{17} Real discovery reform will lead to a criminal justice system in which a criminal trial is a forum to ascertain the truth, not “a sporting event where each side remains ignorant of the facts in the hands of the adversary until events unfold at trial.”\textsuperscript{18} In such a system, everyone wins, including prosecutors, law enforcement and the citizens of New York State.

\textsuperscript{16} See \textit{Criminal Discovery Reform in New York}, The Legal Aid Society, April 1, 2009

\textsuperscript{17} Traynor, \textit{Ground Lost and Found in Criminal Discovery}, 39 NYU L. Rev. 228, 249 (1964)

\textsuperscript{18} \textit{People v. Copicotto}, 50 NY2d 222, 226 (1980)

---

\textbf{Letter to Governor Cuomo}

January 11, 2011

The Honorable Andrew M. Cuomo
Executive Chamber
State Capitol
Albany, NY 12247

\textbf{Re: Executive Budget funding for Prisoners Legal Services}

Dear Governor Cuomo:

The New York State Association of Criminal Defense Lawyers strongly urges you to include adequate funding for Prisoners Legal Services (PLS) in the Executive Budget for 2011-2012.

For 34 years Prisoners Legal Services, has provided vital assistance to the inmate population of the New York State Department of Correctional Services and indeed to the entire criminal justice system. By insuring that inmates have access to representation to get programming and adequate medical care, PLS has helped facilitate their re-entry into productive society. Their work has made the prisons safer, more humane and less violent. It is quite probable that the work of PLS has protected the state from litigation and judgments for faulty jail time calculations or sentencing errors. This agency and the important work it does should be part of the regular budget allocation of the state for criminal justice matters. Please restore funding for Prisoners Legal Services to the budget at a level that will allow them to continue providing their assistance.

Yours Truly,

Kevin D. O’Connell
President-Elect
New York State Association of Criminal Defense Lawyers
Brilliance

I would like you all to know that I was the legal advisor to a 44 year old defendant with 56 misdemeanor convictions and 4 felony convictions. He threatened to spit on me several times so I sat as his legal advisor (pursuant to the judge’s directive) next to the prosecutors.

He asked me not one single question. He opened, crossed all 6 of the people’s witnesses and did closing arguments. He buried himself each and every time he cross examined a witness and told the jury in his summation that he has a long criminal history but never raped, murdered, stabbed or shot anyone.

He was granted a Trial order of dismissal on 4 of the 5 counts of the indictment. He was acquitted in 45 minutes of the one misdemeanor count remaining.

I was brilliant.

Edward J. Muccini, Esq. 
Attorney at Law, Criminal, Real Estate, Litigation, Marine Douglaston, New York 11363

Justices who decide that prohibitions against flag burning are unconstitutional are not in favor of flag burning. A lawyer who represents a person charged with murder is not in favor of murder.

The current campaigns seem to suggest that the sins of the client are to be visited upon the lawyer. Defenders of free speech do not necessarily endorse its content; defenders of the accused do not condone the crimes with which clients are charged.

Our freedoms will be endangered if judges and lawyers who champion Constitutional rights are identified with the conduct, not the principle protected.

Hon. H. Lee Sarokin, USDCJ (Now retired) 

Editors Note:
Judge Sarokin has joined the ranks of bloggers and can be found at The Huffington Post online. His thoughts have always been interesting and his take on issues of importance to the Criminal Defense Bar are worthy of discussion. Feel free to contact him.
“At Runnymede in 1215, King John pledged to his barons that he would “not make any Justiciaries, Constables, Sheriffs or Bailiffs excepting of such as know the laws of the land…” Magna Carta 45.¹

New York’s justice court system needs to be reformed. As it currently exists there are approximately 1,800 town and village justices in the more than 1,250 individual local, criminal courts located in the 57 counties outside of the City of New York. More than half of these judges are lay persons, not attorneys. This unwieldy “justice court system” lacks economy of scale, provides overlapping and duplicated services, and raises serious concerns over the quality of justice system-wide. Realistically, changing the entire system may prove to be an overwhelming enterprise, even in these dire fiscal times, when municipal services should be consolidated for effectiveness and efficiency. However, there is one deficiency of the justice court system that can be changed without changing its entire structure: the failure of the justice court system to provide a judge who is an attorney in criminal cases.

New York’s justice court system allows a non lawyer judge to preside over criminal cases from arraignment through trial, including jury trials, even in misdemeanor cases where a one year jail sentence is possible. New York’s current system of having lay judges preside over such cases violates the constitutional guarantees of the right to counsel and the right to have a lawyer-judge preside over criminal cases where a jail sentence may be imposed. The Legislature should amend the Criminal Procedure Law (CPL), and various other statutes, to clearly provide that defendants charged with a criminal offense have the right to have their case presided over by a judge who is an attorney admitted to practice law in the State of New York.

The 6th Amendment to the United States Constitution guarantees, in part that “[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel in his defence”.² This right is also guaranteed by Article I, §6 of the New York State Constitution.³ No one would dispute that this fundamental right to counsel means the right to be represented by a person educated and duly

---

¹ North v. Russell, 427 U.S. 328 at 346; dissent of Justice Stewart
² 6th Amendment to the United States Constitution
³ “…in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil action…”

Greg D. Lubow, Esq. practices in Tannersville, NY. His general practice includes representation from murder trials to simple traffic tickets throughout the Hudson Valley over the past 33 years. He can be reached at gdlubow@gmail.com.
admitted to practice law. Indeed, no one would wish to be represented by a person who had not been educated in the law, or who had failed to be admitted to the Bar.

The right to assistance of counsel, however, becomes meaningless if the person presiding over the criminal proceedings does not understand the law or statutory procedures. As observed by Supreme Court Justice Stewart in *North v. Russell*:

...the essential presupposition of this basic constitutional right [to counsel] is that the judge conducting the trial will be able to understand what the defendant’s lawyer is talking about for if the judge himself is ignorant of the law, then he, too, will be incapable of determining whether the charge is “good or bad”. He, too, will be unfamiliar with the rules of evidence.” And a lawyer for the defendant will be able to do little or nothing to prevent an unjust conviction. In the trial before such a judge, the constitutional right to the assistance of counsel thus becomes a hollow mockery – “a teasing illusion like a munificent bequest in a pauper’s will”.4

In New York, the right to trial before a lawyer-judge is theoretically ensured a criminal defendant by Criminal Procedure Law §170.25 (1).5 However, CPL §170.25(1) requires that the defendant show “good cause in the interest of justice” to have the case presented to a grand jury for indictment and thereafter prosecution

---

*4 427 US 328, 342-343 quoting Edwards v. California, 314 US 160, 186*

*5 CPL §170.25(1) Divestiture of jurisdiction by indictment; removal of case to superior court at defendant’s assistance: (1) at any time before entry of a plea of guilty to or commencement of a trial of a local criminal court accusatory instrument containing a charge of misdemeanor, a superior court having jurisdiction to prosecute such misdemeanor charge by indictment may, upon motion of the defendant made upon notice to the District Attorney, showing good cause to believe that the interest of justice so require, order that such charge be prosecuted by indictment and that the District Attorney present it to the grand jury for such purpose.”*
in a superior court presided over by a lawyer-judge. In practice, this was an almost insurmountable burden for criminal defendants. After its enactment in 1970, the requirement that the defendant establish “good cause” before his case could be transferred to an attorney-judge was litigated in cases throughout New York, culminating in the 1983 Court of Appeals decision in People v. Charles F.\(^6\)

In Charles F. a sharply divided Court held that “a defendant has no absolute Due Process right under New York or federal law to trial before a law trained Judge”.\(^7\) Instead, the majority concluded that the discretionary procedure provided for in CPL § 170.25(1) to divest justice court lay judges of jurisdiction was sufficient to protect a defendant’s right to a fair trial.

In her noteworthy dissent, then Judge Kaye, joined by Chief Judge Cooke and Judge Wachtler, wrote “…defendants facing imprisonment, with a complex array of constitutional and statutory rights, must have the option to be tried before a law trained Judge”.\(^8\) Judge Kaye observed:

> [t]he right to effective assistance of counsel and the right to trial by jury, both so jealously guarded, lose force without a law trained Judge to ensure that motions are disposed of in accordance with the law that evidentiary objections are properly ruled on, and that the jury is correctly instructed. Lay Judges are an important segment of the judicial system of the State. But “a lay person, regardless of his educational qualifications or experience, is not a constitutionally acceptable substitute for a member of the Bar.” Because of the technical knowledge required to insure that defendants facing imprisonment are afforded a full measure of the rights provided to them, use of non-law-trained Judges is a procedure that “involves such a probability that prejudice will result that it is deemed inherently lacking in due process.” (Emphasis added.)\(^9\)

United States Supreme and New York Court of Appeals jurists are not alone in their criticism of the use of lay judges in criminal cases. Over the years, various organizations have reviewed the justice court system and its use of lay judges in criminal matters, and found that system wanting. In the 1950’s, the Tweed Commission\(^10\) conducted a study of New York courts, and its Loeb Subcommittee\(^11\) expressed concern for the Due Process rights of defendants being tried before lay Judges. “[T]he jurisdiction of the Justice of the Peace is such that there are many cases which he may be called upon to adjudicate in which a knowledge of law and legal training are indispensable to the proper disposition of the case”.\(^12\) The Loeb Subcommittee recommended extensive restructuring of the justice courts with all judges required to be lawyers. In the face of opposition from town and village judges and their supporters, this recommendation was not included in the Tweed

---

6 60 NY2d 474; see also Sec. also, People v. Dean, 96 Misc2d 781 (1978); Matter of the Legal Aid Society of Sullivan County, Inc. v. Scheinman, 53 NY2d 12 at 22: “Here, however, only if CPL 170.25 is read as preemptory – a motion must be granted upon the request of the defendant – does the choice as to whether a lay or lawyer Justice shall preside remain with the defendant.”, dissent of J. Fuchsberg
7 Id. at 477.
8 Id. at 478
9 Id. at 481.
10 The Temporary State Commission on the Courts (1953); (see also Dunne Commission Report - footnote 13 below at page 26)
11 Subcommittee on Modernization and Simplification of the Court Structure, a proposed simplified statewide court system (1955)
12 Id. at 59-60 (see also Dunne Commission Report, footnote 31 at page 27)
Commission’s final report.\textsuperscript{13}

In the 1970’s, another Legislative review known as the Dominick Commission\textsuperscript{14} again expressed concern “with the present quality of justice at the town and village level”.\textsuperscript{15} It, too, recommended that justice courts be eliminated or that they be stripped of misdemeanor jurisdiction. This effort was again rebuffed by the magistrates and their supporters.

In 2007, the Association of the Bar of the City of New York issued a report that recommended that all defendants have the option of transferring their cases from a lay judge to an attorney judge, that the CPL be amended to provide that all pretrial hearings and jury trials be transferred to attorney judges, and that misdemeanor cases could be transferred at the request of either the People or the defense.\textsuperscript{16}

In 2008 the New York State Bar Association issued its report relating to the justice courts, which, in adherence to its long-standing position, recommended that all justices be attorneys.\textsuperscript{17}

In September 2008 the Dunne Commission issued its final report. Charged with reviewing the entire justice court system, the Dunne Commission’s Report, entitled “Justice Most Local” provided an excellent overview of the history of the justice courts and earlier reform efforts. Noting that earlier efforts to reform the justice courts had failed because of opposition from “stakeholders” (town and village judges and their supporters) the Dunne Commission proposed what it termed a “pragmatic” approach to the reform of the justice court system.\textsuperscript{18}

Recognizing that reforming the entire justice court system is a daunting task, the Dunne Commission recommended that defendants have their cases heard by a lawyer-judge, thus ensuring a defendant’s fundamental Due Process right to meaningful representation by an attorney is protected. The Commission found that “many of our Commission members share this concern [the qualifications of lay judges] and believe that – in a perfect world – all judges would be attorneys…”\textsuperscript{19} Their concern over the apparent lack of Due Process compliance where criminal cases are presided over by lay judges led the Dunne Commission to “…conclude that immediate action should be taken to insure the substantive and Due Process rights of those who appear in our justice courts.”\textsuperscript{20}

The Dunne Commission, “rather than advancing an unrealistic call for the abolition of non attorney judges,”\textsuperscript{21} instead recommended an “opt out” procedure to safeguard a defendant’s Due Process right to counsel.\textsuperscript{22} Defendants would have the right to have their case transferred to a court presided over by a lawyer-judge after arraignment and before motion practice or trial. The Commission believed “that such an ‘opt out’ right should address any substantive and Due Process concerns, without entirely dismantling a system that has been in place for hundreds of years”.\textsuperscript{23}

The Commission’s ‘opt-out’ proposal, however, was not supported by all members. Mark G. Farrell, Esq., the president of the State Magistrate’s Association and one of four magistrates added to the Commission to study the justice courts,\textsuperscript{24} stated upon the release of the report that his association was opposed to giving defendants the right to opt-out of having their case “heard by a lay judge”.\textsuperscript{25} At the other end of the spectrum, Eve Burton, Esq. filed a ‘concurrence in part’ in which she suggested that the Commission’s report did not go far enough on two issues - that the constitutional mandate comes before ‘pragmatism’ - the need for district court’s and the need to recognize the defendant’s right to have a lawyer judge preside over their case. She suggested an ‘opt-in’ rather than an ‘opt-out’ approach, whereby the defendant’s right is to have the case heard by a lawyer judge, but they could ‘opt-in’ to have a lay judge preside.\textsuperscript{26}

NYSACDL recommends amendments to the Criminal Procedure Law, the Uniform Justice Court Act and other statutes as necessary, to provide a clear statement that a person charged with a crime has an absolute right to have their case presided over by a lawyer judge. NYSACDL has proposed legislation that would protect a defendant’s due process rights, as well as the right to assistance of counsel, without significantly burdening the current justice court system.

Under the proposed legislation,\textsuperscript{27}

\begin{itemize}
  \item[14] Temporary State Commission on the State Court System; …and Justice for All (1973)
  \item[15] Dunne Commission Report page 28 footnote 37
  \item[17] Dunne Commission, page 47
  \item[18] Id. page 10
  \item[20] Id.
  \item[21] Id.
  \item[22] Id. at 13 and 17.
  \item[23] Id. at 17
  \item[24] Justice David O. Fuller, Esq. the then President of the SMA had previously testified in opposition to significant changes in the Justice Court System at the New York State Assembly Hearing conducted by the joint committees of the Judiciary and Codes Committee in December 2006; he also testified similarly at the Senate Committee on the Judiciary Hearing in January 2007.
  \item[27] The proposed legislation is attached as an appendix to this article.
\end{itemize}
after arraignment upon a felony or misdemeanor accusatory instrument, a lay judge would be required to transfer the case, through the superior court, to a court presided over by a lawyer judge. If he or she so chooses, a defendant could affirmatively waive his or her right to appear before a lawyer-judge, and permit the case to continue before the non lawyer Judge.

The NYSACDL proposal provides for the superior court judge in the county to administer and make the transfers to local criminal courts presided over by lawyer judges or to superior courts judges as it deemed appropriate. The jurisdiction of the superior court would be expanded so that it could sit, in the proper case, as a local criminal court without the need for grand jury action or indictment.

This proposal does not require that all local court judges be lawyers, so the current system does not need to be completely restructured. While some defendants will not waive their right to have their case heard by lawyer judge, many, faced with less complicated cases that do not require pre trial discovery, demands for bills of particulars, suppression or other hearings or trial, will, upon consultation with their own counsel, elect to have their cases adjudicated before the lay Judge.

In case upon case, in various reports from multiple state commissions, and anecdotally from NYSACDL members, criminal defense attorneys and prosecutors alike, NYSACDL recognizes that many, if not most town and village court lay judges have provided exceptional service to their communities. They are dedicated public servants elected to provide a valuable community service – the fair administration of justice. They are intelligent, articulate, diligent, considerate and compassionate. They take their position in the community seriously and strive to provide impartial justice. As well intentioned and well meaning as they are, however, constitutional Due Process mandates that where a person’s liberty is at stake, a person trained in and experienced in the law is required to preside over such cases. Whatever their educational background, the lay judge did not spend years studying the law, did not spend a significant amount of time studying for the bar exam, was not admitted to practice, and did not expand his or her knowledge of the law as a practicing attorney. While a law degree is certainly not a guarantee of fairness, impartiality or even common sense, the constitutional administration of a criminal justice system, and the complicated issues it engenders, demands that judges in criminal cases must be lawyers.

The immediate adoption of legislation clearly stating that defendants accused of a crime in the local criminal court have an absolute right to have their case presided over by a lawyer judge is necessary to assure compliance with Due Process and equal protection under the law. Adoption of such legislation would not require significant changes to the overall structure of the current justice court system. Paraphrasing what Justice Stewart said in his dissent in North v. Russell – it is now 795 years since King John promised to have judges knowledgeable in the law preside over cases. The time for New York to make that a reality is long overdue.

To view NYSACDL’s proposed legislation see page 38.
The 2009 amendment commonly known as the Rockefeller Drug Law Reform Act brought sweeping changes to the draconian and wholly ineffective laws which punished non-violent felons to mandatory incarceration; and, for the first time, seriously considered treatment as an alternative to prison. What became apparent to the Legislature is what we, as defense attorneys, knew for years: that laws meant to punish those who trafficked in narcotics had a disproportional effect on those who used drugs and committed crimes to support their addiction.

In addition to the ameliorating sentences for first and second time felony drug offenders, the law also gave judges greater discretion in placing those facing addiction problems in treatment programs, eliminating the explicit veto power of the prosecution. For the first time, judges were empowered to order a client directly into Shock Incarceration or to the Willard Drug Treatment Campus when convicted of an enumerated Penal Law Offense.

A main pillar of the reform efforts included the enactment of Judicial Diversion (CPL Article 216) which empowered judges to place eligible offenders into treatment programs and, if successful, can lead to a drastic reduction or, in some cases, dismissal of the charges entirely; not to mention a Conditional Sealing of one’s record. It is apparent when looking at the eligibility criteria for Judicial Diversion that the Legislature intended to include those non-violent offenders suffering from addiction and excluding those who have been convicted of “violent” crimes.

An explicit exclusion for consideration of Judicial Diversion includes those who, within the prior ten (10) years, have been convicted of a violent felony (Penal Law 70.02), an offense where merit time is not available, or a Class A Drug Offense. However, such an “excluded person” could become eligible upon consent of the prosecution. At first glance, these exclusions seem somewhat understandable as the reforms were intended to delineate between those who engage in the “supply” side of the drug trade and those who, sadly, occupy the “demand” side of the equation.

While the bills were being debated there was the usual hue and cry from prosecutors about how taking away their veto power over such programs was fundamentally unfair; and, for many, they have not gotten over their misperceived feelings of “defeat”. In my experience and from what I have heard from others, prosecutors routinely refuse to consent to allow an eligible person from even being considered for Judicial Diversion if he or she is subject to one of more of the above exclusions.

As Defense attorneys we see first hand the scourge of addiction and how far our clients will debase themselves to achieve the next fix. In addition to selling their bodies and committing small-time larcenies, many will feel compelled to burglarize a residence and steal whatever they can get their hands on to trade for drugs. A stunning number of these cases involve burglarizing the home of a family member who, at their wits’ end, feel there is no other recourse than to report the matter to the police. What they don’t know, is that it will often lead to a conviction for a violent felony – Burglary in the Second Degree (or the attempt thereof).

Admittedly, the invasion of one’s home is a cause of great concern and the feeling of intrusion is mentally scarring to those victimized. Those who commit such crimes should be punished justly; but is it really fair to categorize such an act as “violent” when a resident is not home, the perpetrator is not armed, and thus, no chance of a physical confrontation?
Removing the Violent Felony Exclusion for Judicial Diversion when there is No Violence

How many of our drug addicted clients fall into this category of offenders? And, how many of them end up with a “violent felony” conviction as a result?

Another issue arises in more urban areas where many buildings are “mixed-use”, most often containing a ground-floor commercial establishment with residential apartments above. Is it likewise fair to convict someone for a “violent felony” burglary which occurred exclusively in the commercial space? Further, is it reasonable to convict someone of a VFO “residential” burglary when there might arguably be no access from the commercial to the residential part of the building or even no attempt by the perpetrator to enter the residential area?

The law does allow for a Violent Felony Override (VFO) (NYCRR §1900.4(c)) in such instances where someone is convicted of a crime listed in the Regulations and which does not contain as an element: (1) “either being armed with, the use of, the threatened use of, or the possession with the intent to use unlawfully against another of, a deadly weapon or a dangerous instrument;” or (2) “the infliction of serious physical injury” 7 NYCRR §1900.4(c)(1)(ii). (Otherwise known as Executive Order Number 9). What the VFO allows for is merely that the client be considered for temporary release programs such as CASAT and work release. Whether DOCS seriously considers such a person for these programs is a topic for another discussion.

Clearly, the intent of the legislation is to weed out those who have committed objectively violent acts as a means to an end and wholesale suppliers of narcotics rather than the addict committing small property crimes to feed his or her addiction. By excluding all of those convicted of offenses labeled as “violent felonies” coupled with prosecutors’ unreasonable use of their “trump card” to deny the opportunity for a hearing, the aim and intent of the Legislature has been thwarted.

In order to correct this obvious oversight and to further level the playing field, it is proposed that, in the spirit of the Violent Felony Override, that subdivision-two of the Burglary Second statute (Penal Law §140.25) be amended to a non-violent felony in those instances where the perpetrator in a residential dwelling is not armed with a weapon of any kind and the occupant(s) are not at home at the time. An alternative could be to add a defense that the perpetrator was only in the commercial area of the mixed use building and no attempt was made to enter the residential area or there was no access possible to the residential area. This defense would not apply to the lesser charge of Burglary in the Third Degree.

Such an amendment would, in no way, be perceived as being “soft on crime” or would otherwise not punish clearly illegal behavior at the felony level. Such an amendment does not automatically place a client into a program as opposed to prison. All it does is something we as attorneys have been seeking for years – a level playing field by allowing the opportunity for a judge to make an independent determination in the letter and spirit of why Judicial Diversion was created: whether the client’s history of alcohol or substance abuse and non-violent background was a contributing factor to his or her criminal behavior which could best be deterred by treatment as opposed to incarceration. Victory, for us, is not defined by wins and losses in the courtroom but whether or not that client ends up at our doorstep again, and what we can do to prevent that.
NYSACDL SUPPORTS CALL FOR

PAROLE REFORM
NYSACDL has joined a growing list of legal, advocacy and community organizations that have called for the reform of New York parole law. This diverse coalition supports the Safe And Fair Evaluation of Parole Act, also known as the SAFE Parole Act. The SAFE Parole Act would amend New York’s existing parole statute, Executive Law § 259-i.

Under current law a parole applicant appears before the Parole Board and may be denied discretionary parole release based upon reasons she can no longer control, as the Parole Board looks back at the seriousness of the offense. The denial decision provides no indication of what she is expected to do to prove readiness for release at the next Parole Board hearing in two years. Under the SAFE Parole Act the release decision is based upon the parole applicant’s preparedness for reentry and reintegration and a reasonable basis to conclude that if released, he or she will live and remain at liberty without violating the law. There are eight factors that the Parole Board must consider in order to make its determination. If parole is denied, the Parole Board is required to explain the reasons in detail and the specific requirements for actions to be taken, programs to be completed, and changes in conduct in order to qualify for parole release at the next parole appearance.

WHY PAROLE REFORM NOW?
It might be asked why parole reform should be supported at a time when the newly appointed New York State Permanent Sentencing Commission seems poised to recommend adoption of a mostly determinate sentencing scheme for non-violent felonies, adding it to the determinate scheme already adopted for violent and drug felonies. The answer is simple. No matter how quickly the Sentencing Commission and the Legislature act, there will still be thousands of people in prison serving indeterminate sentences for decades to come who will face parole board appearances. For example, there is certainly no consideration being given to ending indeterminate life sentences for A-1 violent felonies, A-1 drug conspiracies and major traffickers or persistent felony offenders.

In fiscal year 2009-2010 the Parole Board conducted over 19,000 hearings for people who were serving indeterminate sentences.\(^1\) It will take years for that number to diminish substantially. As of January 1, 2009 there were over 9,100 men and women in New York prisons serving life sentences for A-1 violent felonies.\(^2\) With an initial parole release rate of just 8% for A-1 violent felons, and a subsequent parole release rate of 13%, the number of people requiring parole consideration will measure in the thousands for the foreseeable future.\(^3\) The remarkably low release rate for this population reflects the Parole Board’s aversion to parole release for applicants convicted of A-1 violent felonies. The Parole Board has chosen to focus on the “serious nature of the criminal offense” rather than looking at factors grounded in prison based performance, to determine if there is a reasonable basis to conclude that the individual will live a law abiding life if released. It is noteworthy that the recidivism rate for this group is significantly lower than any other group of paroleeseees. According to the Division of Parole, of the 784 people serving life sentences for A-1 violent felonies who were released on parole during 2006, 2007, 2008 and 2009 the recidivism rate, measured by return to DOCS for a new felony conviction, was 1/4 of one percent.\(^4\)

---

\(^1\) Division of Parole Briefing Book, Legislative Hearings, February 8, 2010.
\(^3\) Office of Policy Analysis, 2008.
\(^4\) Division of Parole Briefing Book, Legislative Hearings, February 8, 2010.
It is both unfair and bad corrections policy to require such a significant number of people to continue to be subject to a parole release system so fundamentally flawed.

**JUDICIAL CONCERN ABOUT THE PAROLE BOARD**

Most experienced criminal defense attorneys are familiar with the problem faced by many of their clients serving indeterminate sentences. Despite a stellar prison record, parole release is denied because the Parole Board determined that more punishment was necessary based on the “serious nature of the instant offense.” For the past two decades New York courts have repeated their concerns about the malfunctioning of the Parole Board. Judicial alarm has focused on two key issues. First, courts have expressed disturbance that the Parole Board impermissibly engages in resentencing the parole applicant. Second, there has been judicial distress that when the Parole Board unjustifiably relies solely on the “serious nature of the instant offense” it acts in excess of its administrative function.

*The role of the Parole Board is to evaluate the likelihood that the parole applicant, if released, will live a law-abiding life, based on his or her “overall comportment during the period of incarceration” and “not to resentence the inmate by substituting its own opinion of the severity of the crime for that of the sentencing court.”*

The SAFE Parole Act provides the tools necessary for the Parole Board to perform its evaluative function.

**BRINGING PAROLE INTO ALIGNMENT WITH PENAL LAW § 1.05(6)**

In 2006, Penal Law § 1.05(6) was amended to add a fifth goal to New York’s penological model in addition to the four traditional goals of retribution, deterrence, incapacitation and rehabilitation. The fifth goal, reflecting our increasing awareness of the importance of reentry, requires promotion of successful and productive reentry and reintegration into society. Oddly enough, no legislative change was made to the parole process that would require the Parole Board to focus on this factor. The SAFE Parole Act will bring the parole statute, Executive Law 259-i, into alignment with the Penal Law amendment.

In order to modernize and revitalize the functioning of the Parole Board, reform of the applicable procedures is in order. At the core of this reform is redefining the role of the Parole Board as an evaluative one. The critical focus would become whether the parole applicant is ready for reintegration. Under this reform the Parole Board does not play a punitive role, leaving retribution solely within the purview of the courts. The proposed amendments to Executive Law § 259-i provide the criteria and guidance to the Parole Board so that it can carry out its evaluative function with a more clear focus on its goals and objectives.

**A REVIEW OF SOME OF THE CHANGES PROPOSED BY THE SAFE PAROLE ACT**

Seriousness of the crime will no longer be used as a basis to deny parole.

A decision to release a parole applicant to parole shall be based upon good conduct and efficient performance of duties while confined, and preparedness for reentry and reintegration into society, thereby providing a reasonable basis to conclude that, if such person is released, he or she will live and remain at liberty without violating the law.

There are eight factors to be considered by the Parole Board when making the release decision, some of which are new and some of which are carried over from the previous statute:

(i) readiness for reintegration as evidenced by the applicant’s institutional record pertaining to program goals and accomplishments as stated in the facility performance reports, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and other sentenced persons, and other indications of prosocial activity, change and transformation;

---

5 Division of Parole Briefing Book, Legislative Hearings, February 8, 2010.
6 Cappiello v. New York State Board of Parole, 6 Misc.3d 1010(A) (Sup. Cr. N.Y. Co. 2004).
7 Id.
8 Prior to 1980 it was necessary for the Parole Board to have statutory authority to consider the “seriousness of the offense” because the Board was empowered to set the minimum period of imprisonment (MPI) in the event that the sentencing court did not do so. Effective September 1, 1980, the authority of the Parole Board to fix MPI’s was repealed and exclusive power for establishing MPI’s was vested in the sentencing court (see L. 1980, ch. 873 amending Penal Law § 70.00). Since the Parole Board is no longer involved in a sentencing function, statutory authority to consider the “seriousness of the offense” is no longer appropriate.
(ii) performance, if any, as a participant in a temporary release program; (contained in existing statute)

(iii) release plans, including community resources, employment, education and training and support services available to the parole applicant; (contained in existing statute)

(iv) any deportation order...; (contained in existing statute)

(v) any statement, whether supportive or critical, made to the Parole Board by the crime victim or victim’s representative to assist the Parole Board in determining whether at this time there is reasonable cause to believe that the release of the parole applicant would create a present danger to the victim or the victim’s representative, or would assist the Board in determining the extent of the parole applicant’s readiness for reintegration;

(vi) the length of the determinate sentence to which the parole applicant would be subject had he or she received a determinate sentence for a felony drug offense; (contained in existing statute)

(vii) participation and performance, if any, in a reconciliation or restorative justice-type conference with the victim or the victim’s representative;

(viii) in the case of a reappearance, the progress made towards the completion of the specific requirements previously set forth by the Parole Board for the parole applicant.

In the event that parole is not granted, the Parole Board will be required to state in detail and not in conclusory terms the reasons for the denial and the specific requirements for actions to be taken, programs or accomplishments to be completed, changes in performance or conduct to be made, or corrective action or actions be taken, in order to qualify for parole release at the next Parole Board appearance.

The parole applicant must be informed of the reasons for the denial and the specific requirements within two weeks of the board appearance. Within 90 days of the hearing decision, the Department of Correctional Services must provide the parole applicant access to the program(s), activities and/or facilities needed in order to provide the opportunity to fulfill the requirements set forth by the Parole Board.

At the subsequent Parole Board hearing, if the requirements previously set forth by the Parole Board have been successfully completed and the parole applicant’s institutional record has remained satisfactory, release shall be granted.

The parole hearing shall take place with the parole applicant and the Parole Board present in the same room.

The parole hearing shall be recorded audio/visually.

The parole applicant shall be entitled to full disclosure of all documents upon which the Parole Board may rely for its determination, except as provided by Mental Hygiene Law § 33.16 when disclosure can reasonably be expected to cause identifiable danger or harm to the applicant or others, and that the harm would outweigh the right to access to such records.

In order to provide the crime victim or the crime victim’s representative with current information about the parole applicant’s progress while confined, such person may request a copy of the Inmate’s Status Report(s) and parole release plan, in the event that the parole applicant submits one. The Inmate Psychiatric Evaluation will be provided upon request, if one is available and if the parole applicant consents to its release.

**CONCLUSION**

With the advent of a predominantly determinate sentencing model and criticism of the Parole Board on the rise, the future of the Parole Board may be in doubt. Although the Parole Board’s implementation of discretionary parole release is not without its shortcomings, it can still be an effective and necessary complement to our new awareness of the importance of promoting successful and productive reentry and reintegration into society. Ultimately, it is the purpose of the SAFE Parole Act to treat parole applicants with fairness and create a transparent process while maintaining and contributing to a high degree of public safety. The Parole Board should play an evaluative function not a punitive one. The SAFE Parole Act gives the Parole Board a roadmap to evaluate the rehabilitation, transformation, and readiness for reintegration that will lead to successful reentry. This reform provides the Parole Board with the tools necessary to give parole applicants a clear expectation of what is needed in order to prepare for successful reintegration and to live a law-abiding life beyond the prison walls. If enacted, the SAFE Parole Act will help create a safer community.
Second
Thoughts
A Review of Some Recent Notable Second Circuit Decisions

Reciting *Miranda* warnings, as criminal defense lawyers know too well, does not encourage suspects to stay silent. Perhaps most troubling, false confessions play a role in a significant percentage of wrongful conviction cases.¹ Why hasn’t *Miranda* protected a suspect’s right against self-incrimination? Harvard professor Charles Ogletree argues that it’s because *Miranda* essentially puts the fox in charge of the henhouse: “the police themselves have the responsibility to advise a suspect of her rights[,] but they] have little interest in protecting the suspect’s right to a knowing and intelligent waiver.”² Law enforcement officers employ a myriad of psychological techniques to induce a *Miranda* waiver, including the insidious “two-step” interrogation technique – question first, Mirandize later – at issue in the recent Second Circuit decision, *United States v. Capers.*³ The case is notable because the majority required the government to disprove that the two-step process was deliberate under a test that heavily discounted the officer’s subjective expressions of intent, and affirmed suppression because, contrary to the district court (which had suppressed for different reasons), it found the interrogating officer incredible.

**Interrogation Capers**

In *Missouri v. Seibert,*⁴ the Supreme Court addressed the use of a two-step interrogation strategy designed to elicit a post-*Miranda* waiver and confession after the defendant had already given an un-Mirandized confession. In a split decision, the Court found that the procedure violated *Miranda.* The plurality held that the second confession was admissible only if the intermediate *Miranda* warnings were “effective enough to accomplish their object”⁵ (the so-called “effects” test). In a concurring opinion, Justice Kennedy held that the second confession should be inadmissible only if “the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning”⁶ (the so-called “intent” test). In *United States v. Carter,*⁷ the Second Circuit adopted Justice Kennedy’s intent test.

Capers, a mail carrier, was arrested in a mail sorting facility for stealing money orders. Over the space of ninety minutes, he confessed twice in two separate interviews conducted by the same postal inspector in two different locations. Only the second interview was Mirandized. Indicted on one count of theft of mail matter, Capers moved to suppress both sets of inculpatory statements. In a decision that pre-dated *Carter,* the district judge granted the motion using the *Seibert* plurality’s effects test. He noted that if “Justice Kennedy’s *Seibert* concurrence represented the law, suppression would be denied.”⁸ The government appealed.

Even though it was applying Justice Kennedy’s more stringent intent test, the Circuit affirmed the district court’s grant of suppression. In *Seibert,* it had been undisputed that the interrogation process at issue was a deliberate policy, so in *Capers,* the first question to be addressed was “how should a court determine when a two-step interrogation strategy had been

---

¹ See *Miranda’s Failure To Protect The Innocent Exposed in False Confession Study,* Hans Sherrer, 27 *Justice Denied* 17 (2005) (citing studies).
³ 2010 WL 4869768 (2d Cir. December 1, 2010).
⁵ *Id.* at 615.
⁶ *Id.* at 622.
⁷ 489 F.3d 528 (2d Cir. 2007).
⁸ *Capers* at *11.
executed deliberately[?].”9 A “totality of the circumstances” test should be applied, the Court decided, “with a recognition that in most instances, the inquiry will rely heavily, if not entirely, on objective evidence.”10 Moreover, it held that “the burden rests on the prosecution to disprove deliberateness,” because only the government has access to “evidence of deliberateness or lack thereof.”11

In Capers’ situation, this test favored a finding of deliberateness. While the interviewing inspector denied that Capers was the subject of a deliberate two-step interrogation, the Court – remarkably rejecting the district court’s credibility finding – found the inspector’s “proffered reasons for delaying the Miranda warning to lack not only legitimacy, but also credibility.”12 Objective factors also weighed in favor of deliberateness: the overlap between statements, the similar types of interrogation facilities, the continuity in the cast of interrogating officers, the formality of the interviews and their temporal proximity. Because the use of the two-step procedure was deliberate, and no “curative measures intervened to restore the defendant’s opportunity voluntarily to exercise his Miranda rights,”13 the Court affirmed the district court’s grant of suppression.

This is a significant decision that greatly limits the government’s ability to avoid suppression in cases where the police questioned first and warned later. As the late E.D.N.Y. Judge Trager (sitting by designation) pointed out in his dissent, by “making subjective evidence virtually irrelevant in every two-step interrogation case,” the majority’s decision effectively replaces Justice Kennedy’s narrower intent test with the Seibert plurality’s effects test.14 More broadly, the fact that the Court took the rare step of finding the inspector incredible should give district courts a shot of courage to call out those not infrequent instances of “testifying.”

**Genetic Error**

There are limits to how much the district judge’s “unquantifiable”15 insight at sentencing will be given primacy in the advisory guidelines era. For example, as the Second Circuit held recently in *United States v. Cossey*,16 it will get little respect when it is based on untested, speculative scientific theories of human nature. This bizarre case yields an important holding regarding plain error review at sentencing, and a reminder that as the expertise underlying the sentencing guidelines is deconstructed, individualized forensic reports can now play a key role in filling the void.

Mr. Cossey pled guilty to possession of child pornography with what appears to have been an estimated guideline of 46 to 57 months. Dismissing two separate psychological reports that found Cossey at a “low to moderate risk to re-offend,”17 the district court expressed his view that Cossey would reoffend, based on the notion that he was genetically predisposed to view child pornography and therefore incapable of controlling his urges. Telling Cossey that his conduct was likely caused by “a gene you are born with”[and] not a gene you can get rid of,18 and clearly viewing this factor as an aggravator not a mitigator, the judge sentenced him to 78 months in custody and a lifetime of supervised release. Cossey’s lawyer did not object to the court’s use of this novel genetic theory, and thus, the issue was subject to “plain error” review on appeal.

Vacating the sentence and taking the unusual step of wrestling the case away from the judge on remand, the Second Circuit held that it was plain error for “a district court [to] rely on its own scientific theories of human nature to sentence a defendant.”19 In a comment that may impact many appeals raising plain errors at sentencing, the Court remarked:

> It is uncontroversial to conclude that a sentencing decision that relies on factual findings that were unsupported in the record, and thus could not possibly have been established by a preponderance of the evidence, seriously affects the fairness, integrity, and public reputation of judicial proceedings.20

The Court also hearkened back to *United States v. DeSilva*,21 an important decision from last year addressing the use of psychological reports at sentencing. Quoting *DeSilva*, the Court noted in *Cossey* that where a “psychologist’s report cannot be squared with the court’s own judgment of the defendant’s culpability and the danger he poses to society, the court is free, in its discretion, to decline to rely on the psychologist’s findings, so long as the court explains its basis for doing so,”22 In other words, there is

9  Id. at 6.  
10  Id. at 7.  
11  Id. at 8.  
12  Id. at 12. The Court elaborated that only police and public safety issues may justify intentionally delaying a Miranda warning, or inexperience may rescue an unintentional delay. Id. at 9-10.  
13  Id. at 13.  
14  Id. at 14.  
17  See id. at *3 (the district court opined that “[t]he opinions of the psychologists and the psychiatrists as to what harm you may pose to those children in the future is virtually worthless here” because the profession is “all over the board on those issues”).  
18  Id. at *4.  
19  Id.  
20  Id. (emphasis added).  
21  613 F.3d 352 (2d Cir. 2010).  
22  Cossey at *3 (quoting DeSilva, 613 F.3d at 356-57) (emphasis added).
a rebuttable presumption in favor of the findings of psychological reports at sentencing – a presumption that can often act to benefit defendants, who usually submit the reports in the first place. In appropriate cases, psychological reports of the defendant can have a significant mitigating effect at sentencing – humanizing him in a way that the presentence report does not, elucidating his offense behavior in the context of his unique emotional and psychological deficits, and giving the sentencing judge security (and cover) in rejecting the applicable advisory guideline range.

Effectively Reviewing Ineffectiveness

The Second Circuit discourages claims of ineffectiveness of counsel on direct appeal, preferring that they be presented in a collateral proceeding where “a factual record focused on the defendant’s claim can be developed.”

Habeas proceedings under 18 U.S.C. § 2255, however, are commenced after judgment and often adjudicated years after the direct appeal, and perhaps most saliently, do not entail a right to counsel. But what if the defendant raises the issue before judgment? Now, courtesy of United States v. Brown, the Court has held as a matter of first impression that “when a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that point in the proceeding.”

The mechanism (in Brown at least, but perhaps not necessarily exclusively) is Federal Rule of Criminal Procedure 33, which provides that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”

In Brown, the defendant Chad Marks, filed a habeas petition prior to sentencing, claiming his lawyer had failed to communicate a 20-year pre-trial plea offer from the government. Convicted after trial and now facing 40 years, Marks alleged his lawyer had been ineffective in not communicating an offer he claims he would have snapped up in a heartbeat. The district judge denied the petition, viewing it as an improper attempt to raise arguments more appropriately raised in a § 2255 motion after sentencing.

The Second Circuit disagreed. Finding the claim to be facially plausible, the Court held that the district judge should have held an evidentiary hearing on the matter, and further, that if Marks established his allegations, “equities require[d] that the defendant be put in the same place he would have been but for counsel’s ineffective assistance – i.e., he should be given the opportunity to accept the never-communicated plea offer.”

The Court was not moved by the government’s argument that this would open the floodgates to unmeritorious claims, noting that its ruling did not require the district court to entertain every claim of ineffectiveness prior to judgment. But the government correctly saw that Brown has far-reaching implications. In the life of a criminal case, the defendant’s prospects can deteriorate severely – sadly, sometimes because defense counsel failed to live up to basic standards. Brown offers an opportunity to address some of those errors earlier than usual with the benefit of representation.

---

23 United States v. Oladimeji, 463 F.3d 152, 154 (2d Cir. 2006).
24 623 F.3d 104 (2d Cir. 2010).
25 Id. at 113.
26 Id. at 114.
On January 10, 2011, New York State Senator John L. Sampson introduced legislation to prohibit law enforcement agencies and officers from engaging in racial or ethnic profiling. This article briefly summarizes the problem of racial and ethnic profiling, outlines efforts targeting the problem, and discusses Senator Sampson’s proposed legislation.

The Problem of Racial and Ethnic Profiling & Efforts to Combat It

“Racial profiling” is probably one of the reasons that many NYSACDL members chose to dedicate their careers to being criminal defense lawyers. Anyone associated with the criminal “justice” system, in one role or another, has known for a long time that police unfairly target people for investigation because of their race and/or ethnicity. As a result, “racial profiling” is a problem that has badly undermined faith in the criminal justice system’s integrity and fairness.

In recent years, organizations and legislators have continued to identify the problem, to compile statistics on it, and to make efforts to improve the law to prohibit police officers from engaging in it. One example of an organization that has devoted substantial resources to fighting racial and ethnic profiling is the New York Civil Liberties Union (“NYCLU”). Among its accomplishments, the organization has been able to provide data about the scale of the problem in New York City. NYCLU analysis has “revealed that more than 2 million innocent New Yorkers were subjected to police stops and street interrogations from 2004 through 2010, and that black and Latino communities continue to be the overwhelming target of these tactics.”

Similarly, statistical evidence from across the country demonstrates that racial profiling is a real and measurable phenomenon. In reaction to such evidence,

1 Senator Sampson introduced a bill to amend the Executive law by adding a new section 837-s.
3 Id.
4 Id.

Aaron Mysliwiec
Treasurer for the NYSACDL and Attorney at Joshua L. Dratel, P.C., a New York City law firm that specializes in criminal and civil litigation. For more information about the author, visit the firm’s website at www.joshuadratel.com.
several states have enacted laws to address the problem of racial and ethnic profiling. These laws utilize various strategies to attack the problem. Some states have focused on requiring police to record data relating to traffic stops, stop and frisks of people on the street, and other forms of detention. Other states have combined data collection proposals with express prohibitions on law enforcement agencies and officers from engaging in such conduct.

New York has also recently passed legislation to address one of racial profiling’s consequences. Last July, Governor David Paterson signed a bill to stop the NYPD from storing the names of hundreds of thousands of people who were stopped and frisked without facing charges. The NYPD had asserted that the database has been instrumental to solving 170 cases since 2007, including 17 murders. The legislature and Governor Paterson questioned that contention and passed the law despite NYPD Commissioner Raymond W. Kelly’s opposition. After signing the new law, Governor Paterson stated: “The reality is that just the warehousing of the personal data of innocent people makes a mockery of our constitution and it stops right now.”

**Senator Sampson’s Proposed Legislation to Stop Racial and Ethnic Profiling**

Senator Sampson’s proposed law borrows from the laws already enacted in other states and also creates an innovative enforcement mechanism. The Sampson proposal has provisions prohibiting law enforcement agencies and officers from engaging in racial and ethnic profiling, requiring such agencies to collect data, and establishing methods for both the Attorney General’s Office and individual citizens to seek injunctive relief and monetary damages.

The Sampson bill defines “racial or ethnic profiling” as:

The stopping of a motor vehicle, the stopping and questioning of an individual or the stopping and frisking of an individual by a law enforcement officer that is based upon an individual’s actual or apparent racial or ethnic status without reasonable individualized suspicion or cause to lawfully justify such conduct.

In addition to defining this term and other terms such as “law enforcement agency” and “law enforcement officer,” the legislation expressly prohibits every such agency and officer from engaging in racial or ethnic profiling. The bill would also require every law enforcement agency to adopt a written policy that prohibits such profiling and to establish procedures for taking corrective action based on complaints from individuals who say they have been subjected to such profiling.

Data collection is also a critical step to determining the extent of the profiling problem and creating policies that prevent it from occurring. The Sampson proposal recognizes the importance of data collection and would require law enforcement agencies to track several types of information, including:

1. The number of persons stopped for traffic violations and the number of persons patted down, frisked and searched;
2. The characteristics of race, color, ethnicity, gender and age of each such person, provided the identification of such characteristics shall be based on the observation and perception of the officer responsible for reporting the stop and the information shall not be required to be provided by the person stopped;
3. If a vehicle was stopped, the number of individuals in the stopped motor vehicle;
4. Whether immigration status was questioned, immigration documents requested, and if any further inquiry was made to the Immigration and Naturalization Service with respect to any person stopped or in the motor vehicle;

---

**AWARDS & RECOGNITION**

**Thomas F. Liotti**

An attorney in private practice, has just been appointed by Professor Bruce Green, Chair of the American Bar Association’s Criminal Justice Section, to a Special ABA Task Force on The Collateral Consequences of Pleas.

The establishment of the Task Force was brought about following the Supreme Court of the United States decision in Padilla v. Kentucky, 130 S. Ct. 1473 (2010). The trial lawyer in Padilla was found to be ineffective because he failed to inform his client that he would be deported as a collateral consequence of pleading guilty. Mr. Liotti has been successful in vacating pleas based upon a failure of previous counsel to advise defendants of collateral consequences and as a Village Justice, he wrote an opinion that vacated a plea of guilty on that basis.

---

5. The nature of the alleged traffic violation that resulted in the stop or the basis for the conduct that resulted in the individual being stopped and frisked or searched;

6. Whether a search was conducted and, if so, the result of the search;

7. If a search was conducted, whether the search was of a person or the person’s property, and whether the search was conducted pursuant to consent and if not, the basis for conducting the search including any alleged criminal behavior that justified the search;

8. Whether a warning or citation was issued;

9. Whether an arrest was made and for what charge;

10. The approximate duration of the stop; and

11. The time and location of the stop.

Finally, the Sampson legislation includes significant enforcement methods that would give the new law added teeth. Both the Attorney General and an individual who has been the victim of racial profiling could bring an action for injunctive relief and/or damages against a law enforcement agency that is engaged in or has engaged in an act or acts of racial profiling. The court would also be permitted to award costs and reasonable attorneys fees to a plaintiff who prevails in such an action.

NYSACDL supports Senator Sampson’s proposed legislation to prohibit racial and ethnic profiling. Despite existing legal protections and heightened attention to this problem, it persists. Without a major reduction in the problem, our state cannot meet the goal that criminal laws be applied evenly and without regard to race or ethnicity. Passing Senator Sampson’s proposed legislation would be another welcome step towards reaching this goal.

MARK YOUR CALENDAR NOW for NYSACDL’s annual Cross To Kill Seminar in Brooklyn. Featuring prominent litigators in the criminal defense field, the annual Cross To Kill Seminar will focus on trial preparation and trial tactics. The full Program Agenda and Brochure will be posted on our website and sent out in the upcoming weeks.

This transitional program is approved for new lawyers.

To register, fax this form to 888-239-4665 or mail with payment to:

NY State Association of Criminal Defense Lawyers
2 Wall Street, Third Floor
New York, New York 10005

Tel: (212) 532-4434
Fax: (888) 239-4665
www.nysacdl.org

Tuition: NYSACDL Members: $75
Non-members: $95
(Non-members – Join NYSACDL now and register for the seminar at the member rate!)

Friday, April 15, 2011
9am – 4pm
Registration begins at 8:30 am
St. Francis College
Brooklyn, New York

St. Francis College
Brooklyn, New York

NYSACDL is accredited by the New York State Continuing Legal Education Board as an approved provider; NYSACDL provides tuition assistance to attorneys showing hardship.

Promoting Excellence in Criminal Defense | www.nysacdl.org
The most powerful appellate legal argument has little impact in persuading a jury. Legalisms like “reasonable doubt,” “burden of proof,” and “presumption of innocence” are not impactful to the lay person. These concepts are too abstract. Your job in final argument is to focus the jury on your theory of the case. You want your tunnel-visioned view of the facts to dominate their thinking during deliberation. A common error is to get sidetracked trying to rebut each and every argument the prosecution might utilize. Not all points are of equal weight. While it may be necessary to mention some issues, your argument is impactful when the issues are prioritized and the jury knows the three or four crucial factual issues that will determine their verdict.

For example, in summation, an impactful mental image regarding reasonable doubt is that you and your client are standing in the middle of a field and the prosecution is trying to build a fence around you. It would be a waste of your energy to tear out each and every fence post/argument they make. To render the fence ineffective, you marshal your resources and run full tilt at one post the evidence or lack of evidence has defined as key. If you knock this one post down, the whole fence is useless. Pick the post carefully. Isolate this one post as the reasonable doubt in the case.

To have impact you need to:
1. Deliver a jury-centered argument - you are not speaking to lawyers;
2. Invest considerable personal emotion and energy;
3. Show sincere belief in your client’s cause; and,
4. Organize your argument in a way that focuses the jury on the most important facts.

Courtroom Credibility

Lawyers talk about credibility as if it can be lost like some treasured family heirloom. Credibility is thought of as an inherited trait that you either have or you don’t. Rather, credibility needs to be thought of as a verb leading an actor into action. For example, on stage an actor’s goal is believability. Actors create behavior in their role so the audience will believe in the imaginary world in which the character has to function. If the play/movie is to be a success, it is essential that the audience believe the actors. Interchange believability with credibility. In the courtroom, lawyers must subtly persuade jurors to believe them. When you say and do things that the jury believes, you are credible. You earn credibility by what you say and how you say it. Your credibility is linked to many factors, not the least of which is your manner/appearance, and the kind/quality of information you provide. Several millennia ago, an ancient orator and philosopher was asked what it took to be an effective speaker. The response is useful today: “An orator is a good person who speaks well.” Everything you say and do reveals who you are as a person. You start building credibility with the jury the moment you step off the elevator. Your message must be congruent. There must be congruence between message and messenger.

Be mindful of the fact that, as long as you can be seen, you can persuade. You must be aware that the jury sees everything. Your credibility with them builds (or diminishes) as they watch you interact with the judge, with the courtroom staff, with your client, with the other witnesses and with each of them. Do not aim to “be credible.” Rather, perform believable actions that
reveal your credibility. Credibility is key to the art of persuasion. It takes time to establish your credibility, and it cannot be pushed on the listener. There is no credibility pill.

While appearance is a factor, credibility is not about the cut of your suit or having your colors done at the cosmetic stand. Credibility is not an external. It is earned through behavior and presence. Presence is one of those often used terms that few have defined. When you comment on a person’s presence in a situation you are actually reacting to the level of comfort you sense in the situation. When you feel uncomfortable in a situation your lack of presence causes the viewer to be concerned about your ability to execute the task at hand. When people watch you in court you want them to perceive your comfort and ease in the situation; this is your theater and you are at ease in your role as producer and director. The comfort you exude communicates as loudly as what you say.

Throughout the trial, the jury has witnessed you in action. If you are a professional and are truly motivated by the belief that your client’s cause is just, your credibility is established by the time you arise for closing. Your articulated and unarticulated self exudes credibility.

**Becoming Jury Centered**

No one should end up at the point of closing argument without a clear idea of how the case “went in” with the jury. You must have a good understanding of which issues from both sides were easily understood and which issues are troublesome for them. Knowing that jurors will measure your argument through the “scripts” they rely on to tell them how the world works, you must plan your argument to focus on the jury and the scripts which will dominate during deliberations. Adjusting to your audience is fundamental to effective persuasion. “Understand what reaches the mind and moves the heart” is a slogan which has withstood the test of time. Arguments that appeal to attorneys, an audience to which you would not have to adjust, are not persuasive with the jury. Your credibility will soar with the jury if your argument lets the facts tell the story. That is, you must directly address the issues that sit before the jury. In discussing final argument, one of New York’s legendary trial lawyers has poignantly noted, “The juror will have to be accepted by his family and friends when he tells them about the verdict.” Give the jurors the critical facts in a word picture story easily told to family and friends.

Understanding that the juror must return to the community and hold his head up, the lawyer needs to point the juror toward the appropriate verdict, at the same time, resolving questions that might linger in the juror’s mind after finding in his favor. An effective argument is one that strikes a balance between putting the jurors on the spot and giving them a course of action that is easily followed. It is necessary for them to feel the verdict is important and meaningful. It is your job to focus them clearly on the decision to be made and then show them how they arrive at it.

The belief systems (i.e., scripts) jurors bring with them are powerful and vigilant. It is impossible to persuade people by telling them that they must stop believing something they have held on to all their lives. The key to undoing the script is to provide them with information that allows them to go beyond their original thinking. So, instead of asking them to give anything up, you are giving them the tools to use what they already know. The manner in which you organize the facts must honor the jurors’ belief systems. Impactful persuasion is sharing and inclusion, not manipulation or exclusion. As the central persuasion equation, the word pictures you utilize in summation grinds the lens through which the jurors will process the evidence and makes the jurors virtual eyewitnesses to your most critical facts.

*To be continued ...*

> **Laws should be like clothes. They should be made to fit the people they serve.**

Clarence Darrow
§1. Section 10.20 of the criminal procedure law is amended by adding a new subdivision four to read as follows:

(4) Notwithstanding subdivisions one, two and three, a superior court may sit as local criminal court, with all the jurisdiction of such local criminal court as provided for in section 10.30 upon the transfer of an action from such local criminal court to the superior court on the grounds that the Judge presiding in the local criminal court is not an attorney admitted to practice law in the State of New York.

§2. Section 10.30 of the criminal procedure law is amended by adding a new subdivision four to read as follows:

(4) Notwithstanding the provisions of subdivisions two and three, a superior court judge may sit as a local criminal court with full trial jurisdiction of any offense including preliminary jurisdiction when the superior court is sitting pursuant to a transfer of an action from the local criminal court to the superior court because the judge in the local criminal court is not an attorney admitted to practice law in the State of New York.

§3. Subdivision three of section 170.10 of the criminal procedure law is amended by adding a new paragraph (d) to read as follows:

(d) Where the judge presiding over said action is not admitted to practice law in the State of New York, said judge must notify the defendant that the action will be transferred to a court where the judge is admitted to practice law in the State of New York and that said transfer shall not affect any right the defendant has; such court shall also advise the defendant that the defendant has a right to affirmatively waive the right to have the case heard by a judge admitted to practice law in the State of New York.

§4. The criminal procedure law is amended by adding a new section 170.17 to read as Section 170.17. Removal of action from local criminal court; non-lawyer judge presiding.

Notwithstanding the provisions of section 170.15 and 170.25, where an action is pending in a local criminal court the defendant has the right to have said action heard by a judge who is an attorney admitted to practice law in the State of New York. Where the judge presiding over the local criminal court in which such action is pending is not an attorney admitted to practice law in the State of New York, said action shall be transferred to a court presided over by a judge admitted to practice law in the State of New York as follows:

(1) After arraignment and prior to the entry of a plea of guilty to or commencement of a trial of a local criminal court accusatory instrument containing a charge of misdemeanor, the local criminal court shall notify the superior court in said county that such action is pending in a court presided over by a judge who is not an attorney admitted to practice law in the State of New York. The superior court shall direct the transfer of such action to a court presided over by a judge who is an attorney admitted to practice law in the State of New York in accordance with the following:

(a) Where another judge of said local criminal court is admitted to practice law in the State of New York, said action shall be transferred to such judge’s docket; or

(b) Where no other judge in said local criminal court is admitted to practice law in the State of New York, such action shall be transferred to a local criminal court where a judge is admitted to practice law in the State of New York in a town or village adjoining such local criminal court; or

(c) If no judge in an adjoining town or village local criminal court is admitted to practice law in the State of New York, such action shall be transferred to a local criminal court within the county where the judge is admitted to practice law in the State of New York; or

(d) Notwithstanding subparagraphs a, b or c, the superior court in its discretion may transfer the action to a superior court within the county.

Pollack, Pollack, Isaac & DeCicco, LLP

In Padilla v. Kentucky, No. 08-651 (Mar 31, 2010), the U.S. Supreme Court held that criminal defense lawyers must advise their clients about immigration consequences of their criminal charges & pleas. Our experienced Immigration attorneys are available to assist criminal defense counsel in such cases.

CONTACT: 212-233-8100
CEP@PPID.COM • WWW.PPID.COM
(2) Upon such transfer the local criminal court shall deliver forthwith all papers and documents of such action to the court said action has been transferred to.

§ 5. Section 180.10 of the criminal procedure law is amended by adding a new paragraph (d) to subdivision three to read as follows:

Where the judge presiding over said action is not admitted to practice law in the State of New York, the judge must notify the defendant that the action will be transferred to a court where the judge is admitted to practice law in the State of New York; such court shall also advise the defendant that the defendant has the right to affirmatively waive the right to have the case heard by a judge admitted to practice law in the State of New York;

§ 6. The criminal procedure law is amended by adding a new Section 180.11 to read as follows: Removal of action from local criminal court; non-lawyer judge presiding.

Where an action is pending in a local criminal court and in said action the accusatory instrument contains a charge of a felony, after arraignment pursuant to CPL §180.10(d), the superior court shall transfer of such action to a court presided over by a judge who is admitted to practice law in the State of New York as follows:

(a) Where another judge of said local criminal court is admitted to practice law in the State of New York said action shall be transferred to such judge’s docket; or

(b) Where no other judge in said local criminal court is admitted to practice law in the State of New York, such action shall be transferred to a local criminal court where a judge is admitted to practice law in the State of New York in a town or village adjoining such local criminal court; or

(c) If no judge in an adjoining town or village local criminal court is admitted to practice law in the State of New York, such action shall be transferred to a local criminal court within the county where the judge is admitted to practice law in the State of New York; or

(d) Notwithstanding subparagraph’s a,b or c, the superior court may transfer the action to a superior court within the county.

§ 7. The Uniform Justice Court Act is amended by adding the following language to section 2001(1) to read as follows:

[.], except that where the judge presided in said local criminal court is not admitted to practice law in the State of New York, the jurisdiction of said court is limited to arraignment of said defendant when the accusatory instrument charges a misdemeanor or a felony unless the defendant affirmatively waives the right to have the case presided over by a judge admitted to practice law in the State of New York, in which case the jurisdiction of the local criminal court shall be to hear said case in its entirety.

§ 8. This act shall take effect on the 90th day after it shall become law.

“Facts are stubborn things; and whatever may be our wishes, our inclination, or the dictates of our passions, they cannot alter the state of facts and evidence. ”

John Adams, in Defense of the British Soldiers on trial for the Boston Massacre, December 4, 1770
Danny Colon and Jabar Collins received the Lifetime Achievement Award in recognition of his national work counseling immigrants charged in criminal and immigration proceedings.

George Goltzer, 2010 President with Kevin O’Connell, 2011 President.

Joshua Dratel.

Jameel Jaffer and Amrit Singh were honored with a special Pursuit of Equal Justice Award.

Andrew Kossover with Justice Through the Arts Award recipients Sarah and Emily Kunstler.

Joel B. Rudin accepting the Hon. Thurgood S. Marshall Award for Outstanding Criminal Law Practitioner.

Bruce Barket and George Terezakis.

Wayne Bodden and Carolyn Wilson.

Kevin O’Connell, 2011 President with Aaron Mysliwiec.
NYSACDL 2011 Annual Dinner

Despite a snow storm which closed schools and cancelled flights, NYSACDL held its Annual Dinner at the Prince George Ballroom on January 27. The Ballroom was filled with almost 250 guests who were on hand to congratulate George Goltzer on completion of his term in office and to welcome Kevin D. O’Connell as President for 2011. The move to the new venue was met with overwhelming approval of those in attendance. The well deserving honorees each added to the warmth of the evening.

HONOREES

Joel Rudin was honored with the Hon. Thurgood S. Marshall Award for Outstanding Criminal Practitioner for his body of work which includes obtaining a reversals of convictions for several persons who were serving extensive prison sentences including his most recent vindication of Danny Colon’s Manhattan murder conviction in November 2009 by the Court of Appeals, following a 440 motion, due to People’s knowing reliance on false testimony from a “jailhouse snitch” witness minimizing the benefits he had received from the D.A.’s Office and other Brady violations. Colon spent 20 years in jail including 3 years of pretrial detention.

Manuel (Manny) Vargas received NYSACDL Lifetime Achievement Award. He is the Founder, former Director, and now Senior Counsel of the Immigrant Defense Project in New York. He is also the author of several legal resource materials for advocacy on behalf of immigrants accused of crimes, including Representing Immigrant Defendants in New York (4th ed, 2006; 5th ed. coming in 2011), and provides training and immigration law backup assistance on criminal/immigration issues. His commitment to assisting and educating criminal practitioners for over three decades made him a most deserving honoree.

Donald M. Thompson was honored with the Gideon Champion of Justice Award. Although he was snowed in and could not make it to the dinner, Donald Thompson of Rochester was presented with the Gideon Champion of Justice award for his tireless pursuit for exonerations of three wrongfully convicted individuals, including Frank Sterling which was chronicled in the Summer 2010 Atticus which can still be accessed via nysadl.org.

Jameel Jaffer and Amrit Singh were honored with a special Pursuit of Equal Justice Award for their work on human rights abuses and treatment of terrorism suspects. Ms. Singh is the Senior Legal Officer for the National Security and Counterterrorism program at the Open Society Justice Initiative (OSJI) in New York, where she conducts strategic litigation and advocacy across the globe on national security-related human rights abuses. Jameel Jaffer serves as the Deputy Legal Director at the ACLU and Director of the ACLU’s Center for Democracy. They were honored for their work on human rights abuses. Among the cases handled were ACLU v. Dep’t of Defense, a Freedom of Information Act lawsuit which yielded the public disclosure of the “torture memos. The honorees are the co-authors of Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond (Columbia University Press 2007). Jaffer is currently litigating are Aulaqi v. Obama, a challenge to the CIA’s authority to carry out “targeted killings” of American terrorism suspects; Amnesty v. Holder, a challenge to warrantless wiretapping under the FISA Amendments Act; and ACLU v. Department of Defense, litigation under the Freedom of Information Act for records relating to the Bush administration’s torture program.

Sarah and Emily Kunstler were honored for with the inaugural Justice Through the Arts Award. In their documentary film, Disturbing the Universe, they explore the life of their famous father, the late civil rights lawyer. The film is an intimate, honest, and critical portrait of a journey driven by an unrelenting conscience and an uncompromising belief that justice in America was not blind, but delivered with eyes wide shut based on political, racial and economic prejudices. Disturbing the Universe is one of 15 films in the Documentary Feature category which were considered for the 83rd Academy Awards®.

Fraud includes the pretense of knowledge when knowledge there is none.

Benjamin Cardozo

_Ultramones Corp. v. Touche_ 255 NY170, 179 (1931)
NYSACDL standing committees are chaired by members in good standing who are appointed by the President. Committee membership is a rewarding opportunity for members to network with colleagues throughout the state and to explore various issues in depth. Members are invited to join committees to further the important work of our association. If you are interested in joining a standing committee (listed below), please contact the committee chair or the Executive Director’s office: Malverson@nysacdl.org 212-532-4434, for more information.

**Amicus Curiae Committee**  
**Chair:** Richard Willstatter, First Vice President - willstatter@msn.com  
**Members:** Marshall Mintz

**Annual Dinner Committee**  
**Chair:** Kevin O’Connell, President Elect - koconnell@nycds.org  
**Members:** George Goltzer, Andrew Kossover, Aaron Mysliwiec

**Audit Committee**  
**Chair:** Matthew Kluger - klugerlaw@aol.com

**By-Laws Committee**  
**Chair:** Lisa Schreibersdorf - lschreib@bds.org  
**Members:** Mitchell Dinnerstein

**Continuing Legal Education Committee**  
**Chair:** Gregory Clark, Secretary - gclarke@bas-si.org  
**Members:** Wayne Bodden, Gregory Lubow, Glenn Murray, Kevin O’Connell, Donald Rehkopf, Craig Schlanger, Andre Vitale, John S. Wallenstein, Richard Willstatter

**Contracts**  
**Chair:** Andrew Kossover

**Finance and Planning Committee**  
**Chair:** Aaron Mysliwiec, Treasurer - amysliwiec@joshuadratel.com; Kevin O’Connell koconnell@nycds.org  
**Members:** Michael Shapiro, Richard Willstatter

**Indigent Defense Committee**  
**Chair:** Andrew Kossover - ak@kossoverlaw.com

**Lawyers Strike Force Assistance Committee**  
**Chair:** George R. Goltzer, President - george@goltzer.com  
**Members:** Mitchell Dinnerstein

**Legislative Committee**  
**Chair:** Andrew Kossover - ak@kossoverlaw.com  
**Members:** Andrew Correia, Tim Donaher, Greg Lubow, Aaron Mysliwiec, Manny Ortega, Alan Rosenthal, Lisa Schreibersdorf, Andre Vitale

**Membership Committee**  
**Chair:** Donna Newman - donnanewmanlaw@aol.com  
**Members:** Michael Baker, John Wallenstein, Richard Willstatter

**Prosecutorial and Judicial Complaint Committee**  
**Advisor:** Professor Ellen Yaroshefsky  
**Members:** Kevin O’Connell, Donald Rehkopf, James P. Harrington, Michael Shapiro, Benjamin Ostrer, Jane Byrialsen

**Publications Committee**  
**Chair:** Benjamin Ostrer - ostrerben@aol.com  
**Members:** Cheryl Meyers Buth, Matthew Kluger, Glenn Edward Murray, JaneAnne Murray, Andrew Patel, Donna Newman, Craig P. Schlanger

**Public Relations Committee**  
**Chair:** Pamela Hayes - pdhayesesq2aol.com
SEALING STATUTE

Lisa Schreibersdorf
Executive Director of Brooklyn Defender Services and Past-President of NYSACDL.

Who among our members has not had that sinking feeling in their gut that comes from answering the question from a client “when will this come off my record” with the final and wholly unsatisfactory answer — “never”?

As defense attorneys, we are often the person our clients come to when their misdemeanor conviction pops up pursuant to a routine criminal convictions check, preventing him or her from getting a job. Our advice is also regularly sought when a person who already has a job is suddenly in danger of termination due to an old case that is discovered by an employer.

Most of our members say they receive inquiries regarding sealing or expungement on a weekly basis. Many of these requests come from people who have held jobs for years and who, because technology has made their criminal record so easy to obtain, are in a vulnerable position that there is no way out of.

Many of these requests also come from people who made mistakes in their youth and who have led exemplary lives for many years. It is heartbreaking to tell an older person that a conviction from the 1960’s or 1970’s will be on their record for all of eternity, a legacy that is not indicative of the whole of their lives.

It does not have to be like this. There are many other states that have sealing or expungement provisions that, automatically or upon application of the defendant, effectuate an elimination of the record of conviction in much the same way New York State law already seals violations and Adjournments in Contemplation of Dismissal.

Since 2008, the NYSACDL has pursued a proactive agenda to greatly expand the reach of our sealing statute to include misdemeanors and felonies.

A group of members of the legislative committee has put its legal expertise to work in developing the logistics of a sealing statute that would be workable in the courtroom, and which would be fair to applicants. The primary goal is to limit the spread of information that would be used to deprive people of their basic human right to employment, education and housing.

It is important to note that we do not advocate that information be shielded from law enforcement officials or protect someone who gets re-arrested.

Attached to this article is our current draft of a detailed scheme for sealing criminal records. Not only does this make every aspect of the application clear, it sets up guidance for the judiciary regarding the burden of proof and the criteria for sealing.

In addition, our statute addresses the problem of bulk sales of criminal records that land in the hands of resellers who then sell those records to employers. We have inserted a provision that requires any reseller of criminal record information to check the status of a conviction before turning it over to the prospective employer. Those who fail to do so would be guilty of a misdemeanor and could also lose their right to purchase bulk records in the future.

We hope that our statute or a very close version of a sealing statute will be introduced in Albany this year.

If you find yourself speaking with your representative, please point out that every applicant will be required to pay a fee in order to have their record sealed. If only a small portion of those we believe are eligible for sealing make the application, we believe that the State of New York could stand to gain many millions of dollars. In these hard economic times, this is a win/win situation. Not only will the State collect millions from the fees associated with the applications, but the resultant employment of the applicants should increase the State’s tax revenue while reducing the unemployment, Medicaid and welfare roles.

It is hard to quantify the benefits in human terms. But if the desire to see his or her record sealed helps one ex-offender through a difficult time, how can you measure the value to the victim that might have been victimized without this incentive? If a family man gets a job and because of that, he does not turn to drugs or alcohol out of despair, how can that be measured? Is there a price we can put on even one person obtaining a job or a college degree, when we know that this will affect his or her family for generations to come?

Please provide us with stories of people who have contacted you for assistance along these lines. Call Lisa Schreibersdorf at (718) 254-0700, ext. 105. Also feel free to call if you have any comments, suggestions or experience that would be helpful to the NYSACDL in our efforts to see a sealing statute passed this year.
Ray Kelly
*Lifemember*

Ray Kelly, an attorney in private practice in Albany New York, has been defending fellow human beings for almost his entire professional career. As a result of his involvement in over 60 murder trials, Ray keeps current in forensics as a member of the Forensic Science Society and the American Academy of Forensic Sciences. Ray has been awarded the New York State Bar Association’s Denison Ray Indigent Defender of the Year Award for 1998, the Criminal Justice Section of the New York State Bar Association’s Charles F. Crimi Outstanding Practitioner Award for the Year 2000 and the Hon. Thurgood Marshall Distinguished Practitioner Award for the Year 2002 by the New York State Association of Criminal Defense Lawyers. In 2005, Ray was awarded the New York State Bar Association’s Distinguished Service Award in Law-Related Education for his work with high school students and the state-wide high school moot court camp and in 2007 he received the Wilfred R. O’Connor Lifetime Client-Centered Representation Award by the NYS Defenders Association. Ray’s criminal trial notebook entitled Preparation, Persuasion and Self: Defending Fellow Human Beings has been published by the New York State Association of Criminal Defense Lawyers. Ray is the past President of the New York State Association of Criminal Defense Lawyers (NYSACDL) in 2006 and a Life Member of both the National Association of Criminal Defense Lawyers and NYSACDL. Ray can be reached at rakelly@nycap.rr.com.

Hon. Thomas F. Liotti
*Lifemember*

Thomas F. Liotti, Esq. is a Lifemember of NYSACDL. He was Admitted to practice in New York in 1977 and is also admitted to practice in the United States District Courts for the Eastern and Southern District Courts of New York; the Second Circuit Court of Appeals; the Fourth Circuit Court of Appeals; the United States Claims Court; the Supreme Court of the United States and the United States Tax Court. He has served as Village Justice for the Incorporated Village of Westbury since 1991. He is the Co-author of three books. “Convictions, Political Prisoners, Their Stories (1981); “A Practice Guide for Village, Town and District Courts in New York”, 1995-Present) and DNA: Forensic and Legal Applications, (2004) published by John Wiley & Sons, Inc., Hoboken and the author of Judge Mojo: The True Story of One Attorney’s Fight against Judicial Terrorism, (iUniverse, 2007) He is the author of over 150 law review, legal articles, book reviews, 35 reported judicial decisions and a chapter on Trial Preparation in Lawrence Gray’s book on Criminal Law published by NYSBA. He has over two hundred reported decisions. He has authored and co-authored two amicus curiae briefs in the Supreme Court of the United States. State of Alabama v. Shelton, 122 S.Ct. (2002) Supreme Court of the United States, on Writ of Certiorari to the Supreme Court of Alabama. In July, 2007 Mr. Liotti was named as one of the top 100 attorneys in New York State by the American Trial Lawyers Association. Mr. Liotti served on the CJA Panels for the S.D.N.Y. (1980-1987) and the E.D.N.Y. (1978-1993) and the Second Circuit Panel from 1981 to present. He has served as Past President of the Columbian Lawyers’ Association of Nassau County and was the recipient of their Writing Award and Distinguished Service Award. He is a Past President of the Criminal Courts Bar Association of Nassau County; Past President and Life Member of the NYSACDL. He maintains offices at 600 Old Country Road, Garden City, N.Y. Thomas can be reached at rosemary@tliotti.com.
Kevin D. O’Connell

Kevin D. O’Connell is a graduate of the Boston University School of Law. He has been practicing criminal law since 1972. Throughout that period he has been a full time public defender. While at the Legal Aid Society he worked as a staff attorney, a member of the Senior Trial Attorney Bureau, and as a Supervising Attorney. As a Senior Trial Attorney, he was part of a select unit designated to handle the most serious felony cases in the office. As a Supervising Attorney he participated in the training of staff attorneys at all levels and the administration of teams of attorneys and support staff within the office. In addition, he has participated in trial advocacy training at both Cardozo and Hofstra Law schools and through the National Institute of Trial Advocacy. He is one of the founding members of New York County Defender Services. His responsibilities there include directing the continuing legal education program, obtaining certification as a CLE provider and arranging programs on a variety of topics. While carrying out these responsibilities, Mr. O’Connell has continued to try cases in both Criminal and Supreme Courts. Mr. O’Connell resides in the great borough of Brooklyn.

Mr. O’Connell is a member of the Association of the Bar of the City of New York, where he has served on numerous committees, the Criminal Justice Section of the New York State Bar Association, the Criminal Justice Section of the New York County Lawyers Association, The New York Criminal Bar Association, and the National Association of Criminal Defense Lawyers. Kevin can be reached at koconnell@nycds.org

James A. Baker

James A. Baker has been practicing criminal defense law in Ithaca for more than thirty years, first in a small, general practice firm, and later as a solo practitioner. Since 2001, Mr. Baker has been able to devote his practice exclusively to his first love in the law, criminal defense. His caseload includes both retained clients and court assignments.

Mr. Baker has tried several murder cases, including a successful defense of a “shaken baby” prosecution and a successful “battered spouse” defense. He has been directly involved in two Capital Murder defenses, once as lead counsel in a case arising out of the homicide of a police officer, and once as local counsel for the Rochester Capital Defender’s Office in a case arising out of the kidnap and murder of two high school girls. He has tried numerous assault, drug, and sexual offense felonies. Driving While Intoxicated defense is a large component of Mr. Baker’s present practice, and he has been an invited speaker at continuing legal education seminars on the subject.

Mr. Baker graduated from SUNY Buffalo in 1976, with a degree in Spanish Literature. He graduated from Cornell Law School in 1980. His firm is located at 148 The Commons, Ithaca, New York, 14850. He can be contacted at www.jamesbakerlaw.com or at jamesbakerlaw@hotmail.com

Member Biographies can be submitted to Atticus@nysacdl.org. Photos of Lifemembers are greatly appreciated. A complete NYSACDL Member Directory can be found on the website. Check it out online at www.nysacdl.org/member-directory
NYSACDL Membership

The Largest Criminal Defense Bar Association in New York State

PRESIDENT
Kevin D. O’Connell

PRESIDENT-ELECT
Richard Willstatter

FIRST VICE-PRESIDENT
Benjamin Ostrer

VICE PRESIDENTS
Matthew Kluger,
Donna R. Newman,
Michael Shapiro, Andre Vitale

SECRETARY
John S. Wallenstein

TREASURER
Aaron Mysliwiec

EXECUTIVE DIRECTOR
Margaret E. Alverson

LIFE MEMBERS
Myron Beldock
Anthony J. Colleluori
Terrence M. Connors
Anthony Cueto
Gerard M. Damiani
Telesforo Del Valle, Jr.
Joshua L. Dratel
Herald Price Fahringer
Russell M. Gioiella
Lawrence S. Goldman
E. Stewart Jones
Kathryn M. Kase
Ray Kelly
Terence L. Kindlon
Gerald B. Lefcourt

LIFE MEMBERS cont.
David L. Lewis
Thomas F. Liotti
Brian Joseph Neary
Thomas J. O’Hern
Stephen J. Pittari
Frank Policelli
Murray Richman
Todd J.W. Wisner

LIFE MEMBERS cont.

SUSTAINING MEMBERS
Jonathan Bach
Sidney Baumgarten
Barry Berke
Lloyd Epstein
David I. Goldstein
Allan Haber
Daniel J. Henry, Jr.
Michael Mohun
Gregory J. Naclerio
Gary P. Naftalis
Kevin D. O’Connell
Craig P. Schlanger
Robert Hill Schwartz
Gerald L. Shargel
Harvey Weinberg
Cappy Weiner

Membership Benefits

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

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

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

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

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

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

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

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

Please print or type.

Name: ________________________________

Firm Name: ________________________________

Address: __________________________________

City/State/Zip: _____________________________ County: _____________________________

Phone: _____________________________ Fax: _____________________________

Email: __________________________________

Website: __________________________________

Bar Admission State: ________________ Year Admitted: ________________

---

Please circle membership type.

Lifetime Member $2500
President’s Club $500
Sustaining Member $300
Regular Member $200
  Income over $50,000
  In practice over 5 years
Regular Member $125
  Income under $50,000
  In practice less than 5 years
  Full-time public defender
Associate Member $175
  Non-lawyer
Law Student $50
  School: _____________________________
  Graduation date: _____________________________

---

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

Please make your check payable to NYSACDL and send it to:
NYSACDL Office
2 Wall Street
New York, New York 10005
Phone: 212-532-4434
Fax: 888-239-4665

Please charge my credit card.
Credit card #: _____________________________
Exp. date: _____________________________
Signature of applicant: _____________________________
Date: _____________________________
Check out the new website: www.nysacdl.org
LEGISLATIVE MEMO ON PROPOSED SEALING LEGISLATION

April 23, 2010

NYSACDL is a statewide criminal defense bar association dedicated to promoting the integrity and expertise of the criminal defense practice and to assuring the equal protection of the rights and liberties of all individuals. Our members consist of both private practitioners and public defenders from all parts of New York State. We are the NYS affiliate of the National Association of Criminal Defense Lawyers, a renowned organization of 32,000 members throughout the United States.

SEALING: STRONGLY SUPPORT SEALING, INTERESTED IN WORKING TO IMPROVE THE CURRENT BILL

The NYSACDL supports comprehensive sealing for all misdemeanor convictions and most felonies, with waiting periods that are commensurate with the underlying crime and the person’s record. A proposed bill of that nature is attached.

We understand a sealing bill is being proposed that would allow for certain misdemeanor charges to be sealed after a five year waiting period.
If the waiting period in this bill were to be shortened, we would support the bill as a much needed relief from limited employment opportunities for those who have earned it and a first step towards our ultimate goal of a true second chance for everyone.

We are deeply concerned that the current bill is setting the stage for a grossly inadequate sealing scheme for more serious cases by setting an inordinately long waiting period for the most minor crimes.

- TOO MANY NON-SERIOUS MISDEMEANORS ARE EXCLUDED

The current bill excludes too many people who have relatively minor convictions. A great number of the excluded cases are innocuous crimes. For example, 265.01, Possession of a Weapon, is one of the excluded crimes. Misdemeanor Possession of a Weapon is unlike felony weapon possession in that the “weapons” are often normal household items. We have had clients charged with this crime for picking up a shoe or for threatening a family member with the proverbial wooden spoon.

Even when this charge involves a knife, it is quite often possession of a knife that our client needs to carry for his employment. Hundreds of these weapons are recovered during routine searches in New York City and have not been used against another person or during any crime.

One recent client was wearing the knife openly as he uses it hundreds of times a day in his job as a sound engineer. This is precisely the type of person who should be eligible for sealing.

There are dozens of similarly non-violent misdemeanor convictions that are excluded from sealing in this bill. There appears no basis for the distinctions inherent in the proposed bill and defeats the purpose of sealing, which is to avail people, who may have made one mistake, a second chance at employment and educational opportunities.

The legislation currently proposed requires that a person apply for sealing and that a Judge review the application. The reason for such a review is that the Judge can see if the crime was really one that was violent or threatening or if it was a technical or relatively minor infraction. With this type of solution, there is no reason to exclude any misdemeanor charges from eligibility.

We recommend that ALL misdemeanor cases be eligible for sealing.

- WAITING PERIOD IS TOO LONG

Considering the extremely minor nature of the crimes that are subject to sealing in this bill, the waiting period of five years is much too long.

People who have had incidences in which they may have shoplifted food or clothing or have gotten on a train without paying the fare should not have to struggle for five years with limited employment opportunities for such victimless crimes.
In addition, by starting with five years for these minor crimes, there is no hope for a reasonable set of waiting periods for more serious misdemeanors or low-level non-violent felonies and drug felonies. It is also completely inconsistent with the current sealing provision passed last year which provides for sealing of a felony drug case immediately after someone completes treatment, usually one or two years after arrest. In those cases, prior misdemeanors are also sealed, without exclusion, leaving a person who has a drug felony in a better position than someone who had only one victimless misdemeanor.

We strongly believe that people convicted of non-serious misdemeanor offenses should be eligible for sealing as soon as their criminal justice obligations are completed, such as at the expiration of the Conditional Discharge (one year), their period of probations (3 years for some, 1 year for others), or even at the completion of community service, payment of a fine or restitution, or completion of an appropriate program. Essentially, in our experience, if the DA’s office and the Court agree that the underlying nature of the crime was sufficiently minor to warrant nothing more than a fine or other such punishment, then there is no reason the record could not be sealed upon completion of that sentence, allowing the person to move on with his or her life. It is important to note that if a person were to be re-arrested, that case would be re-instated as if it were never sealed. There is a measure of confidence such a measure provides which, in our opinion, justifies a much shorter waiting period.

- **OTHER SUBSTANTIVE ISSUES**

1. Applications should be able to be referred to a judicial hearing officer for decision.

2. The Judge ought to be required to put findings of fact and reasons for the decision granting or denying an application in writing, unless the application is granted on consent of the prosecutor or if the prosecutor chooses not to oppose it.

3. Victim notification should be up to the discretion of the prosecutor rather than mandatory. Prosecutors are in a better position to determine if the complaining witness should be advised of the proceeding due to their knowledge of the case and the desires of their witness. In addition, prosecutors should not be required to notify businesses entities.

4. There ought to be a presumption that a sealing application be granted, particularly for this level of minor crime after such a long waiting period. We believe many judges will not seal a record without this presumption.

5. There needs to be an appeal process.

6. There should be a method by which someone can get another person’s record unsealed. It is noteworthy that despite current sealing orders being issued and filed (pursuant to CPL 160.50 and 160.55), it is not uncommon for agencies to fail to seal the subject arrest records. This is particularly common in the case of the F.B.I.
7. The bill should address what someone is permitted to say about the case after the record has been sealed.

8. There needs to be a clear indication of when a person can make a renewed application in the event one is denied by the court.

9. Limiting the sealing criteria as currently set forth in the proposed bill greatly reduces the number of potential petitions for sealing and, in turn, the revenue originally expected to be generated by the filing fees.

Attached is a draft of a proposed bill that incorporates language on these issues as well as some other issues we would like to see addressed.

Please feel free to contact us at any time—
Lisa SchreiberSdorf, Lschreib@bds.org (917) 593-0078
Andy Kossover, Ak@kossoverlaw.com;akos@co.ulster.ny.us (845) 797-9567

Thank you for your attention to this matter.
Section 1. the criminal procedure law is amended by adding a new section 160.65 to read as follows:

§ 160.65 Sealing upon termination of a criminal or non-criminal action by a conviction for a criminal or non-criminal offense.

1. A person is eligible to apply to seal a record of conviction, subject to the provisions contained in this section, by application on a form specifically designated, sworn to under penalty of perjury and accompanied by a fee of ninety-five dollars.

2. CONDITIONS PRECEDENT:
   An applicant must be duly terminated and discharged from every aspect of the sentence, including incarceration, probation, parole, conditional release, post-release supervision, conditional discharge, sex offender registration and/or any order of protection on this or any other matter against the applicant must have expired. The following waiting periods apply to applications under this section, however, for good cause shown, the court may shorten a waiting period. Attendance at a diversion program which delayed the imposition of the sentence may constitute good cause, in the court’s discretion.

(i) For a person who has been convicted of one non-criminal offense, the waiting period shall be six months from the date of conviction of such offense.

(ii) For a person who has been convicted of more than one non-criminal offense arising from separate incidenences, the waiting period shall be one year from the date of conviction of the last such offense.

(iii) For a person who has been convicted of a misdemeanor, the waiting period shall be one year from the date of conviction of such misdemeanor.

(iv) For a person who has been convicted of more than one misdemeanor arising from separate incidenences, the waiting period shall be three years from the date of conviction of last such misdemeanor.

(v) For a person who has been convicted of one non-violent felony, the waiting period shall be five years from the date of conviction of such non-violent felony.

(vi) For a person who has been convicted of more than one non-violent felony arising from separate incidenences, the waiting period shall be ten years from date of conviction of the last such non-violent felony.

(vii) For a person who has been convicted of a violent felony, the waiting period shall be 10 years from the date of the conviction of such violent felony.

(viii) For a person convicted of more than one violent felony arising from separate incidenences, the waiting period shall be 20 years from the date of conviction of the last such violent felony.
3. An application for sealing shall be made to the judge who originally sentenced the applicant. In the event such judge is unavailable, the application shall be made to a sitting judge in the court in which the conviction was ordered, as designated by the supervising or administrative judge of that court. The judge may refer an application under this section to a magistrate, who shall have the authority to grant such an application in the case of a misdemeanor conviction or a conviction to a non-criminal offense. In the event the magistrate recommends denial of an application relating to a misdemeanor or non-criminal offense, such recommendation shall be made to a judge as designated in this section, who shall, upon reviewing the record and hearing the applicant, rule on the application. In the case of a felony matter, the magistrate must make a recommendation to the judge regarding such application, stating in writing the reasons for the recommendation. The judge shall review the record and such recommendation and afford the applicant an opportunity to be heard prior to ruling on the application.

4. An application pursuant to this section shall be sworn to under penalty of perjury and shall include:
   (a) a list of each of the petitioner’s convictions in New York State, any convictions in any other state or in Federal court, the sentence for each such conviction and the date of the sentence. Non-criminal convictions outside New York State need not be included.
   (b) A statement as to the termination of each aspect of the sentence for each of the above-listed convictions, include the dates of termination from probation, parole or other supervisory sentences, a statement as to the existence of order(s) of protection and the end date of such, and a statement as to the completion of any conditional sentences or any other conditions of sentence imposed by the court or by law, although this shall not be construed to require a person to have restored driving or other privileges that have been lost, suspended or revoked due to the conviction.
   (c) A description of the nature and circumstances of each crime listed in (a) above.
   (d) A description of the nature of the petitioner’s personal circumstances since the conviction, which shall establish that the petitioner is entitled to the relief in this section.

5. The application for sealing shall be served upon the agency that originally prosecuted the case on 21 days notice. The prosecuting agency may file an answer to the application seven days prior to the return date of the motion. The court may grant an application on submissions if the prosecuting agency does not file an opposition. If there is objection, the court must review the issues of fact and law and determine the merits of the application.

6. In the case of non-criminal convictions, misdemeanor convictions and non-violent felony convictions, the court shall grant the application unless sealing the records will harm public safety or would not serve the interests of justice. In the case of a violent felony conviction or a conviction for a sex offense, the court shall not grant the application unless the applicant has established that he has been entirely rehabilitated, that the
crime was an aberration in the applicants life, that it is not likely to recur and that it is not against public policy and the interests of justice to grant such application.

7. If the court deems it necessary, the court may order a report as to the applicant’s background and circumstances from an independent consultant, expert or agency deemed qualified by the court to prepare such a report.

8. Upon the request of either party or sua sponte, the court shall conduct a hearing as to any issue of fact or law or in the court’s discretion, may hear testimony or accept written submissions relating the merits of the application or any matter deemed appropriate by the court in furtherance of determining the motion. In any such hearing, the court shall not be bound by the rules of evidence and may admit hearsay testimony which the court believes will shed light on the applicant’s character and eligibility to receive relief under this Article. However, a decision to grant or deny an application may not be based solely on hearsay or otherwise traditionally inadmissible evidence.

9. A decision granting or denying an application under this section shall be in writing and shall state the reasons for the court’s ruling, unless the court grants the application without objection or written response by the prosecutor, in which case the court may issue an order without a written decision.

10. The court’s sealing order shall be effective on the 30th day after issuance of the order, except that a court may shorten that period upon good cause shown.

11. Upon the effective date of a sealing order by the court, all state, county and local government and law enforcement agencies and their agents and contractors must seal any record relating to the sealed conviction, including any and all records relating to the arrest and/or detention of the applicant. Each agency shall designate a method of safekeeping documents and computer records in a manner which will not indicate that there ever was a record as to the arrest, detention or conviction of the individual. Records shall be unsealed only pursuant to court order, other than as follows:

(a) The Department of Criminal Justice Services shall maintain a sealed record in its database in a manner that will not be accessible to anyone other than law enforcement agents or prosecution agencies in the course of a criminal investigation or prosecution, or upon a court order or court-ordered subpoena ordering release of the information. In the event the applicant is arrested subsequent to the sealing of the records, the unsealed record shall be included in the DCJS “nysid” sheet that is printed out based on the applicant’s fingerprints. A court, upon determining it is in the interests of justice to unseal such a record, shall order its unsealing, which shall allow the prosecutor and the court to unseal the records of their agency pertaining to that arrest. Any such unsealed files shall be made available to the defendant and his attorney.

(b) The Department of Correctional Services and all local jail or prison agencies shall maintain sealed records in a manner that precludes the public from obtaining information relating to the arrest, detention or conviction of the individual whose record has been sealed, including but not limited to removal from all publicly available databases on the internet and otherwise. However, such agencies shall maintain a record of individuals who have been in custody which shall be kept by a
custodian of those records within the agency. In the event the inmate shall be re-admitted to the facility, the custodian is authorized to re-open such files, to be used solely for the agency’s official purposes.

12. Nothing in this Article shall change the sentencing provisions in the Penal Law. A sealed record, unsealed at the time of a re-arrest, shall continue to qualify as a conviction for sentencing purposes and may be used to establish an element of a crime as provided in the Penal Law.

13. It shall be a class A misdemeanor to publish information, other than as delineated in 9 (a) and (b) of section 160.65 of the Criminal Procedure Law, regarding the arrest, detention or conviction of an individual whose record has been sealed. A person aggrieved by a violation of this section shall have the right to institute a civil proceeding, regardless of whether a criminal action was commenced. A plaintiff is entitled to $500 for each occurrence along with the actual damages caused by the disclosure of such sealed record. Law enforcement, prosecution officials an employees of the Office of Court Administration shall have a defense to a criminal or civil action under this section if they believed, in good faith, that they were permitted or required by law to disclose a sealed conviction. There shall be no prosecutorial or law enforcement immunity under this section for any government official who knowingly and intentionally publishes a sealed record which such official knows to have been sealed under this article. If a conviction is unsealed pursuant to a new arrest, the provisions of this subdivision do not apply.

14. An application to unseal a record which has been sealed pursuant to this section may be granted by the court if it is determined that, in the interests of justice, the information regarding the underlying conviction should be disclosed. There shall be a presumption in favor of unsealing a record if the person who is subject to the sealed record is a witness in a criminal case. An application under this subdivision may be made either to the court that originally sentenced the defendant in the sealed case or may be made to the court which has jurisdiction over any case in New York in which the sealed record may be relevant, including the case where the defendant on the sealed case is a witness in a civil, criminal or other court proceeding.

15. A sealed conviction shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling unless so ordered by the court. Except where specifically required or permitted by statute or upon specified authorization of a superior court, no such person shall be required to divulge information pertaining to the sealed record. Such person shall be permitted to respond in the negative to the question “have you ever been convicted of a crime or violation?” or to any question with the same substantive content.

16. Non-governmental employers are hereinafter not permitted to ask prospective applicants if they have been arrested or if they have been convicted of a crime or
violation. Private citizens and employers are authorized to search official government records for criminal convictions in a manner consistent with the law. In the event an employer searches the criminal record of an individual, such individual must be put on notice, orally or in writing, that such search will occur.

17. Any business, agency or individual who purchases individual criminal records or databases of criminal records shall not disclose any information as to a record which has been sealed subsequent to the time the data was obtained. Any agency providing data to the public or to private businesses must heretofore develop a system whereby any record which is to be re-disclosed can be easily and quickly checked by the person, business or entity which had obtained the record before it was sealed to determine if the record has been subsequently sealed. No governmental agency shall sell any records without developing such a system. Any record sold or provided to an individual, business or entity must contain the following warning:

YOU ARE NOT PERMITTED TO DISCLOSE THIS INFORMATION TO ANYONE WITHOUT FIRST CHECKING TO SEE IF THIS RECORD WAS SEALED AFTER YOU RECEIVED IT. IT IS UNLAWFUL TO DISCLOSE SEALED RECORDS. TO DETERMINE IF THIS RECORD HAS BEEN SEALED, CONTACT (INCLUDE AGENCY CONTACT INFORMATION HERE).

18. Appeal- Either party may appeal as of right from the Court’s order. The appealing party must serve notice of appeal upon the court and the opposing party within 30 days of the issuance of the court order. If the order is appealed by the prosecutor, such notice of appeal shall be deemed a stay of the order to seal the records. The prosecutor must perfect the appeal within 60 days, or the sealing order shall immediately take effect unless the court grants an extension of the time to perfect the appeal upon good cause shown by the prosecutor. The appeal shall be taken to the same court to which the appeal of the original conviction could have been brought. The standard of review at the intermediary appellate court shall be abuse of discretion. The decision of an intermediary appellate court shall be appealable to the Court of Appeals upon leave of the Court.

19. The right to make an application under this Article may not be waived at the time a guilty plea is entered on any case in New York State.