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Message from the President

As this is the last edition of *Atticus* in 2011, it is appropriate to review and assess some of the events of the year. In many ways this was a good year for NYSACDL. Some of the high points of the year were:

1. Our Amicus Committee produced excellent work which, among other things, contributed to the favorable outcome in *Matter of Brown v. Blumenfeld*.

2. We continued to put on excellent CLE programs throughout the state which were well attended — not that we couldn’t have squeezed a few more customers in!

3. Our Legislative Committee increased our presence and influence in Albany by meeting with legislative leaders, preparing position papers and proposing legislation on expungement and other issues.

4. The creation, editing, and publication of *Atticus* and the numerous articles submitted highlighted the diverse and significant expertise of our membership.

5. We continued to raise the public profile of the Association by taking positions in the media in favor of marriage equality, against the NYPD Stop and Frisk tactics, and federal charges of jury tampering designed to punish jury nullification advocates.

6. We established the New York State Association of Criminal Defense Lawyers Foundation to further the educational mission of the Association.

These accomplishments are something in which to take pride. They flowed from the staggering amount of work, knowledge and dedication of our members and, particularly, of our Board of Directors.

As we go forward, however, we have more to do. When I was sworn in as President, I made it clear that my primary goal was to increase membership. In this area, we have not had much to brag about. We have increased our membership slightly, but not significantly. The committees and activities referred to above cannot be sustained with our current membership levels.

By now all current members should have received their renewal notices. I urge you, if you have not already done so, to renew at the highest possible level. Please spread the word about the benefits that this Association can provide and urge colleagues to join.

It has been a privilege to serve as President of the Association this year. See you all at the NYSACDL Foundation dinner on January 26, 2012!

*Kevin D. O’Connell, NYSACDL President*
Editor’s Page

This issue contains articles written by some of our regular contributors, Don Rehkopf Jr., Ray Kelly, JaneAnne Murray, Andy Kossover and Richard Willstatter as well as some new authors, Yvonne Shivers, Andrew Kennedy, Stuart Rubin and Mitch Dinnerstein whose contributions are greatly appreciated. We continue to solicit member biographies and news of courtroom successes for inclusion in *Atticus*. Please send your news and contributions to the Editors at atticus@nysacdl.org. Please be reminded that this and prior issues of *Atticus* are available for review and downloading via the organization website; www.nysacdl.org.

This issue also heralds the annual dinner which will once again be held at the Prince George Ballroom in Manhattan on Thursday January 26, 2012 during Bar week. The dinner is a great conclusion to the day which begins with the NYSBA Criminal Section’s meeting. The dinner provides an unique opportunity to enjoy the company of members of the defense community and judiciary from all parts of New York State. Our very deserving honorees Chief Judge Jonathan Lippman and David Ruhnke will be present at what promises to be the best attended gala in many years. In addition, our outgoing President Kevin O’Connell will be installing Richard Willstatter as NYSACDL’s 25th President.

Given the popularity of the event everyone is encouraged to get their membership renewals in and to promptly respond to the dinner invitation. Be sure to place your reservation as there is a limited capacity which must be observed.

We look forward to seeing you at the annual dinner on January 26th and we hope you enjoy this issue of *Atticus*.

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Continuing Legal Education

CROSS TO KILL  
Friday, March 16, 2012  
Saint Francis College  
Brooklyn, NY

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

MID-HUDSON TRAINER CLE  
Friday, May 4, 2012  
Grand Hotel  
Poughkeepsie, NY

DEFENDING DRUG CASES  
Friday, May 18, 2012  
Saint Francis College  
Brooklyn, NY
In the News

November 19th, 2011
**NYSACDL Files Amicus challenge to the Second Circuit’s “triviality exception”**
NYSACDL and NACDL filed an amicus brief and will be present for oral argument at the en banc hearing on December 14, 2011 in the U.S. Court of Appeals for the Second Circuit which challenges as flawed the “triviality exception” to the Sixth Amendment’s guarantee of the right to a fair trial. U.S. v. Gupta, 09-4738-cr. The Second Circuit majority in Gupta applied the triviality exception in holding that the erroneous courtroom closure during voir dire was too insignificant to violate the Sixth Amendment’s public trial clause. In Presley v. Georgia, 130 S. Ct. 721 (2010), however, the Supreme Court found a violation and reversed, without reviewing for triviality, based on a similarly erroneous voir dire closure – despite having the exception squarely before it. It is argued now that the Second Circuit should now abandon the triviality exception to the right to a public trial.

October 24th, 2011
**NYSACDL Supports Call to Investigate NYPD Stop & Frisk Policy**
In response to recent news that an NYPD officer has been arrested for violating the civil rights of a black man whom he arrested on false charges, (Officer Accused of Civil Rights Violation, NYT, 10/17/11) NYSACDL joins the call for a federal investigation into the stop and frisk practices of the NYPD which disproportionately target African Americans and Hispanics. NYSACDL President Kevin O’Connell’s Letter to the Editor was printed in today’s New York Times:

We support the call by the Times Editorial Board and several public officials (Manhattan Borough president Scott Stringer, State Senator Eric Adams City Councilmen Juumane Williams and Ydanis Rodriguez) for a federal investigation into the Stop and Frisk policies of the NYPD. The recent allegation that a Staten Island officer fabricated charges against a person of color after the individual protested being stopped for no reason, together with the disturbing statistics that the vast majority of those stopped by the NYPD are black or Hispanic, continue to raise troubling questions about the fairness of these policies. Too many young men of color are being needlessly brought into the criminal justice system, only to come out with a criminal record, thereby limiting their future prospects. It is time for a in depth investigation of this situation which can only be done by the Federal government.

October 7th, 2011
**Appellate Division Backs Judge Blumenfeld**
Refuses to Grant Queens District Attorney’s Article 78

NYSACDL Amicus Brief Submitted in Support of Judge Blumenfeld
The Appellate Division, Second Department, issued a ruling on October 4, 2011 denying the Queens District Attorney’s request for relief under Artilce 78. At issue is whether Judge Blumenfeld should be prohibited from considering ethical implications of the Queens District Attorney’s Office’s practice of interviewing an arrestee after booking but before arraignment.

Under the Program, an arrestee awaiting arraignment on felony charges is brought into the Queens DA’s interview room at Central Booking. The arrestee is given the opportunity to “explain” what he did, to provide an alibi if any, or to give any other relevant information. The arrestee is also given the option to forego the whole process and move on to be arraigned without delay. In the case at issue, People v. Perez, Ind. No. 1202/09, the defendant made a video taped statement. Defense counsel moved to suppress challenging, inter alia, the voluntariness of the video statement. At a suppression hearing, Judge Blumenfeld raised concerns with the ethics of the practice and sought an opinion from an ethics expert, Professor Ellen Yaroshefsky, adjunct professor at Cardozo Law School.
Determining that the question of whether the practice violates the Rules of Professional Conduct is relevant to the voluntariness issue before Judge Blumenfeld, the Appellate Division denied the DAs request for prohibition.

Thus, the matter returns to Judge Blumenfeld to determine whether the Assistant District Attorneys conducting these interviews violate ethical rules and if so, whether that improper conduct undermines the “voluntariness” of any statement obtained from the defendant.


October 6th, 2011

**Michael Dowd Obtains Acquittal in Domestic Abuse Case**

A jury in State Supreme Court in Queens has acquitted Barbara Sheehan of second-degree murder charges. Ms. Sheehan shot and killed her husband of over 20 years, ex-NYPD Sergeant Raymond Sheehan. The defense asserted that Ms. Sheehan was worn down by years of abuse and feared that her husband would surely kill her had she not shot him first. Her children (fathered by the dead husband) supported her chronicles of physical abuse.

Ms. Sheehan was represented by Michael Dowd, NYSACDL Board Member and who has long defended battered women. Mr. Dowd is the founding director of the Pace University Women’s Justice Center and the recipient of awards for his work on behalf of battered women. Ms. Sheehan was sentenced to 5 years in state prison on the weapons possession charge on November 10, 2011 and remains free on bail pending her appeal.

Ms. Sheehan was convicted of a weapons possession charge for the firearm used in the murder, a charge which appears to have been a compromise by the jury which had earlier indicated that it was deadlocked.

We welcome information from all members concerning verdicts and results.

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

There has been a growing effort from various stakeholders, including the New York State Association of Criminal Defense Lawyers, to ensure that New Yorkers retain their faith in the state’s criminal justice system. Part of this effort has focused on advocating for changes to laws in New York that will work to improve the integrity of the judicial system. Four such proposed changes that NYSACDL will be working on in the 2012 legislative session are: discovery reform; parole reform; passage of a sealing statute; and raising the age of criminal responsibility.

**DISCOVERY REFORM:** Over the last several years we have been advocating for discovery reform to bring about needed changes to the current system, which unfairly denies criminal defense attorneys access to material evidence. We will continue to advocate for these changes in the next legislative session.

**PAROLE REFORM:** In 2011, NYSACDL put its support behind a substantial piece of parole reform legislation known as the SAFE Parole Act. The bill was sponsored in the Senate by Senator Tom Duane and in the Assembly by Assemblyman Jeffron Aubry. We will be working with other organizations to make parole reform a reality in 2012. Among the many changes that the SAFE Parole Act would make is the requirement that the parole board explain to the applicant the reasons for denial and “the specific requirements for actions to be taken, programs or accomplishments to be completed, or changes in performance or conduct to be made, or corrective action or actions to be taken, in order to qualify for parole” at the next board appearance.

**SEALING STATUTE:** There are currently several bills under consideration in Albany. The bills provide for differing terms and conditions (level and type of offense, period of post-conviction time in which the defendant has remained crime-free) to obtain sealing of a previous arrest and conviction record. Both Assemblyman Joseph Lentol and Senator John Sampson have introduced sealing bills. Our proposed legislation (A6664/S5843) has been introduced by Assembly Member Daniel O’Donnell and Senator Ruth Hassell-Thompson. You may locate the bills at the respective legislative websites. We remain optimistic that the 2012 legislative session will result in New York finally enacting a sealing statute.

**AGE OF CRIMINAL RESPONSIBILITY:** According to Chief Judge Jonathan Lippman, “[e]very year, about 45,000 to 50,000 youths aged 16 and 17 are arrested in New York and prosecuted as adults in our criminal courts – overwhelmingly for minor crimes.” These prosecutions do nothing more than have lasting negative effects on these youths, especially with regard to their education and future employment prospects. NYSACDL supports raising the age of criminal responsibility to 18 and will be advocating for this change next year.

Of course, there will be many other criminal justice issues which we will be keeping an eye on for our members. We are regularly invited to comment on proposed legislation, including providing formal testimony before the New York State Permanent Sentencing Commission in December on the age of criminal responsibility. We continue to pursue building coalitions with the New York...
State Bar Association, the New York State Association of Counties, and the District Attorneys Association of the State of New York in order to present a powerful voice in Albany on positions on which we can find common ground.

Lastly, we look forward to the next issue of Atticus which will be our annual “Legislative Issue” with articles devoted to these and other important criminal justice initiatives. If you wish to contribute or simply wish to make a suggestion, please contact Andy Kossover at ak@kossoverlaw.com.

Happy and healthy holidays!

Legislative Committee:

Andy Kossover, Chairman (New Paltz)
Andy Correia (Wayne)
Tim Donaher (Rochester)
Greg Lubow (Greene)
Aaron Mysliwiec (New York City)
Manny Ortega (New York City)
Alan Rosenthal (Syracuse)
Lisa Schreibersdorf (Brooklyn)
Andre Vitale (Rochester)

If you have any specific issues you would like to bring to the legislative committee, contact the chair, Andy Kossover. If you have any relationships with your local politicians, or believe your local district attorney would support sealing or discovery reform, it would be helpful for the legislative committee to be aware of that as well. Feel free to contact any of the members above if you are interested in participating in legislative work. It is particularly helpful if you have an expertise that we can draw on in those final moments of the session when bills are being proposed and passed very quickly.

2012 DINNER JOURNAL AND TICKET INFORMATION

NYSACDL invites you to purchase an ad in our 2012 Annual Dinner Journal to honor our Award Recipients. A Journal ad is an excellent way to extend your congratulations and good wishes to our honorees and past and present officers. Details and rates can be found at www.nysacdl.org

Individual tickets are $225; Tables for ten may be purchased for $2,000. A quarter page Journal Ad is complimentary with the purchase of a table. Contact Margaret Alverson, Executive Director, at malverson@nysacdl.org (212.532.4434) for more information.
NYSACDL’s *amicus curiae* brief in support of Judge Joel Blumenfeld in opposing District Attorney Richard Brown’s Article 78 petition was successful. Before we filed our brief, this Association publicly protested Mr. Brown’s unfair attacks on the judge and on the ethics expert who he asked to opine concerning the People’s interrogation policy. For years, the Queens District Attorney has had a policy of delaying newly arrested defendants’ arraignments while they conduct a videotaped interrogation by an Assistant District Attorney in which the prosecutor advises the defendant:

> If you have an alibi, give us as much information as you can, including the names of any people you were with. If your version of the events of that day is different from what we have heard, this is your opportunity to tell us your story. If there is something you would like us to investigate concerning this incident, you must tell us now so we can look into it.¹

Even if you have already spoken to someone else, you do not have to talk to me. This will be the only opportunity you will have to talk to me prior to your arraignment on these charges. This entire interview is being recorded with both video and sound.

In considering a motion to suppress statements in the case of *People v. Perez*, Judge Blumenfeld, pursuant to Canon 3(B)(6)(b) of the Code of Judicial Conduct, and with notice to both parties, sought the expert advice of Professor Ellen Yaroshefsky, Clinical Professor of Law and Director of the Jacob Burns Center for Ethics in the Practice of Law at Cardozo Law School. Prof. Yaroshefsky found that the interview was misleading and ethically inappropriate. District Attorney Brown was apparently incensed and moved to strike the Yaroshefsky report. When his motion was denied, Mr. Brown brought a writ of prohibition in the Appellate Division to seeking to stop the judge from even considering whether the DA’s policy was unethical.

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¹ Subsequently, the People decided to change this sentence in their script to read: “If there is something you would like us to investigate concerning this incident, if you tell us about it, we will look into it.”
A unanimous panel of the Second Department denied the People’s petition. *Brown v. Blumenfeld*, 930 N.Y.S.2d 610 (2d Dept. Oct. 4, 2011) The appellate court found that the trial court was entitled to decide the suppression motion and to render any decision it sees fit on such a motion. The Court recognized that if Judge Blumenfeld were to suppress in reliance on a finding that the DA’s unethical conduct made Perez’s statement “involuntarily made” within the meaning of CPL 60.45, the People could argue –presumably by appealing– that he was wrong. The Appellate Division noted Brown’s legitimate concern “with the reputations of his office and the public servants who are his ADAs” but then noted that they would have to decide whether to appeal an adverse ruling if one is rendered. Significantly, however, the Appellate Division noted that while trial courts cannot impose professional discipline on a lawyer, they are fully authorized to decide whether an attorney has engaged in professional misconduct.

This decision while appropriately careful to decide the case on the narrowest grounds presented, does vindicate the principle of judicial independence. It was clear that the petition was entirely meritless. No District Attorney, and indeed no public official, is above the law. Public officials should not deliberately mislead vulnerable people who are about to be charged. At least now the judges in this state are reassured they are empowered to examine such matters with outfear that they themselves will be hauled into court for daring to consider whether a prosecutor has acted unethically. 2

In *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011), the Second Circuit Court of Appeals applied its “triviality” exception to a violation of a defendant’s Sixth Amendment right to a public trial. The panel found that a deliberate and erroneous exclusion of the public from Gupta’s voir dire was “too trivial to implicate the Sixth Amendment’s public trial guarantee.” There was a spirited dissent from Circuit Judge Barrington D. Parker and then the Court granted en banc review. NYSACDL Co-Chair Marc Fernich has written a brilliant 52-page amicus brief or our Association and the NACDL, explaining why this “triviality exception” cannot stand in view of the Supreme Court’s determination that a violation of the right to a public trial is structural error not subject to harmless error analysis. From our point of view, the Circuit Court’s conjuring up of its triviality exception is the application of harmless error by another name.

On October 20, 2011, the State Court of Appeals heard oral argument in two cases in which defendants were shackled during trial, *People v. Clyde* and *People v. Cruz*. NYSACDL submitted a brief on behalf of Mr. Clyde, written by Amicus Committee Co-Chair Marshall Mintz, in which we argued that, unless a trial court makes sufficient findings to justify visible shackles during a jury trial, the error cannot be harmless. NYSACDL member David Elkovitch admirably argued the case for Raymond Clyde. The Court’s questions appeared aimed at what sort of record could be needed to justify shackling and about whether the evidence against Clyde was really overwhelming. Clyde, while in state prison, was convicted of assaulting a female truck driver and attempting to rape her but the Fourth Department could legally insufficient evidence to support the attempted rape charge. At least some of the Court of Appeals judges expressed concern that the justification for the shackling was based on Mr. Smith’s application for payment of a second lawyer in the case was justified by the difficulty of the matter. Mr. Smith, a member of NYSACDL, was not a member of the local assigned counsel plan yet he was appointed by a trial court to be one of two lawyers to represent a defendant in a difficult and high-profile murder case in Syracuse, New York. Mr. Smith second-chaired a trial in which his co-counsel was appointed and the trial court later found that the appointment of a second lawyer in the case was justified by the difficulty of the matter. Mr. Smith’s application for payment of legal services pursuant to County Law 722-b was then granted by the trial judge. However, Administrative Judge
James Tormey denied compensation entirely because Smith was not a member of the panel. In April, the Fourth Department unanimously granted Smith’s Article 78 petition, finding that the Administrative Judge was not empowered to deny fees to counsel and that his authority [under 22 NYCRR 127.2 (b)] was limited modifying an award of fees in excess of the statutory limits. 83 A.D.3d 1425. Our brief will be written Nathaniel Z. Marmur of Stillman & Friedman in New York City. We will argue that trial lawyers who are appointed to represent criminal defendants and who agree to perform these services have a right to expect they will be compensated at least on a quantum meruit basis. The 18B rate of $75 per hour is a low rate of compensation for any lawyer who is competent to handle a murder case. No lawyer who agrees to accept a difficult assignment like Smith’s should be denied compensation if he performed well – as the trial judge found in this case. Further, while Administrative Judges do have discretion pursuant to the regulations to reduce fee awards greater than the statutory limit ($4,400 for felonies), those regulations do not permit them to deny fees entirely. Any lawyer who takes on a complex homicide defense can expect she will be putting in more than the 58 and two-thirds hours that $4,400 represents.

The Amicus Curiae Committee can be contacted if you have or learn of a matter in which our participation is solicited. However, members are reminded to contact us as early as possible in the course of the case because it takes time to recruit an author, prepare, edit, print, copy and file a brief. You may contact our co-chairs listed to the right.
“Hey Atticus!” yelled Publius from the bar of The Chambers. “Let me buy you a drink and let’s talk in the corner booth.” “Sure thing,” Atticus replied to his comrade-in-arms and barrister buddy. The corner booth gave them the visual advantage of seeing if any prosecutors entered – not that either of them cared, but sometimes confidentiality was necessary.

“What’s up?” asked Atticus as their drinks were served. Publius took a sip from his Merlot before responding. “Your battle-plan for ‘Handling Rat Testimony’ was spot-on – except for one section. You got some bad intel on the ‘Military History Sources.’”

“Huh?” queried Atticus in the same voice that as an Army officer, he barked to his sergeants. “Whadaya mean?” taking a slug from his drink. “Look,” Publius replied, “when we were in the military, intel officers sometimes gave us BS intel; just like some ADA’s give us BS discovery. So, we need to cover each other’s back – that’s what I’m saying.”

“OK, let’s do a damage assessment and press,” Atticus responded.

“Sure,” replied Publius as he flagged the bartender for another round. Atticus pulled out a legal pad out of a battered briefcase. Without saying anything, Publius smiled – both barristers knew that if it’s electronic and digital, “Murphy’s Law” applies. If it can go wrong (or fail), it will at a crucial moment in time. And if its capable of being infiltrated [hacked], some bored 17 year old will figure out how to do it just for sport.

Publius pulled out his own legal pad where the first two pages were filled with what vaguely could be termed “notes,” and pushed it across the table to Atticus. Both took healthy sips from their drinks as Atticus read his friend’s notes:

### MILITARY HISTORY SOURCES

2. A letter to a military branch, without a specific release from the person covered, will be denied per the FPA. A Court Order or judicial subpoena duces tecum will be necessary.
3. A “general” release “for any and all” records will generally be denied by the record’s custodian.
4. The military does not use Presentence Investigation Reports.
5. “Draft Board” correspondence is covered by the FPA. Atticus looked up and said to Publius, “You and I may be the last practicing criminal defense counsel who were subject to the Draft!”
6. Military medical records require a specific and HIPAA compliant release. Mental health records may or may not be part of a former serviceperson’s medical records and will require a Court Order.
7. There is no “probation” in the military, just as there is no “bail” in the military. “What the * * * *” snarled Atticus. “No bail? That’s damn unconstitutional!” “Seems that way” responded Publius, “but the Supremes have never applied the ‘Bail Clause’ of the Eighth Amendment to the military.”
8. VA paperwork will be in DVA files – not military – covered by the FPA.
9. Military felony-level charges [confinement in excess of one year] are submitted to the FBI’s National Crime Information Center, which DA’s can access via NYSIIS terminals. Convictions and sentences are also supposed to be entered into the NCIC system.
10. Military Orders published after a court-martial, will show the Charges, pleas, “findings,” sentence, SORA applicability.

“Damn,” muttered Atticus – “you can’t be looking for this stuff the week before trial, can you.” Publius laughed as he replied, “you’re lucky if you get this stuff 2 to 3 months after you request it, and maybe 1 to 2 months with a court order.”

“Bartender, we need another round,” yelled Atticus. “We’ve got war stories to embellish and we can’t do that dry!”
Our Hon. William Brennan Award for Outstanding Jurist honoree Chief Judge Jonathan Lippman was born in New York City and raised on Manhattan’s Lower East Side. He is a Phi Beta Kappa and cum laude graduate of New York University. He received his J.D. from New York University School of Law in 1968, the same year he was admitted to the New York Bar.

Chief Judge Lippman’s career in the court system spans four decades. In 1977, he became Principal Court Attorney for Supreme Court and rose through the system until 1989 when he was appointed Deputy Chief Administrator for Management of the statewide court system. In 1995, he was appointed as a Judge of the New York Court of Claims by Governor George E. Pataki, who subsequently reappointed him to a full term on that court in 1998. In 2005, he was cross endorsed by the Democratic and Republican Parties in recognition of his unmatched qualifications and elected as a Justice of the Supreme Court for the Ninth Judicial District.

From January 1996 to May 2007, he served as Chief Administrative Judge of the New York State Court system and is the longest serving Chief in state history.

In May 2007, Governor Eliot Spitzer appointed Judge Lippman to serve as the Presiding Justice of the Appellate Division of the Supreme Court, First Department. In that capacity, he dramatically reduced the court’s pending backlogs and served on the Administrative Board of the Courts, the policy and rule making body of the New York State Court System.

In February 2009, Governor David A. Paterson appointed Judge Lippman to serve as the Chief Judge of the State and Chief Judge of the Court of Appeals. In that capacity, he presides over New York’s highest court while heading a statewide court system with a $2.6 billion budget, 3,600 state and locally paid judges, and more than 15,000 non-judicial employees in more than 350 locations around the State.

During his tenure on the Court of Appeals, Chief Judge Lippman has authored a number of major decisions addressing constitutional, statutory and common law issues shaping the law of our state, the contours of state government and the lives
of all New Yorkers. As the State’s Chief Judge he has championed equal access to justice issues and strengthening the state’s indigent criminal defense system, addressing the systemic causes of wrongful convictions, and reforming New York’s juvenile justice system, among many other areas. Chief Judge Lippman has decried the current system in many towns and villages where arrested people are brought arraigned without counsel. He supported a $10 million grant to New York’s Office of Indigent Legal Services to improve the availability of legal defense provided to the poor. He helped create the New York State Justice Task Force on wrongful convictions. “Nothing is more damaging to the pursuit of justice than the conviction of an innocent person,” he said. NYSACDL commends Chief Judge Lippman for his interest in and advocacy for the constitutional rights of New York’s indigent criminal defendants and those who are wrongfully accused.

Judge Lippman’s imprint upon the Court is seen in many of his decisions, including that in Hurrell-Harring v. State of New York, 15 N.Y.3d 8 (2010), a historic ruling reinstating a lawsuit challenging New York’s system for providing criminal defense lawyers to indigent defendants in five New York counties. Reversing a decision by the Appellate Division for the Third Department, which had dismissed the suit, the opinion by Chief Judge Lippman paves the way for the lawsuit to go forward. The Hurrell-Harring suit seeks to remedy New York’s persistent failure to guarantee meaningful and effective legal representation to indigent people accused of crimes, in violation of their rights under the Sixth Amendment to the United States Constitution and the Constitution and laws of New York.

Judge Lippman’s four decades in the courts have been marked by a deep commitment to fostering a justice system that is independent, open, accountable and responsive to the people it serves. He has pursued these goals with a work ethic, energy and passion that can only be described as legendary. He is widely respected in legal and governmental circles for his competence, credibility and encyclopedic knowledge of the courts.

Judge Lippman is active in court improvement efforts at the national level, as a member of the Conference of Chief Judges, and as a former President of the Conference of State Court Administrators (COSCA). He also served as Vice-Chair of the Board of the National Center for State Courts.

Among his many honors, Judge Lippman received the 2008 William H. Rehnquist Award for Judicial Excellence, presented each year by the nation’s Chief Justice to a state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. Judge Lippman was selected for his “unparalleled ability to promote and achieve reform in the state courts.”

It is for these reasons that NYSACDL has selected Chief Judge Jonathan Lippman to receive our 2012 Brennan Award at the New York State Association of Criminal Defense Lawyers Foundation Annual Dinner on January 26, 2012.

“ When I was 15, I decided I wanted to be a lawyer. No one thought this was a good idea. ”

Constance Baker Motley
People, even lawyers, often ask the question, “Who’s the best lawyer you’ve worked with?” I don’t like to answer that question because I don’t know the answer. There are many lawyers who qualify for that distinction, and they possess different skills, personalities, and expertise that make ranking them impossible.

However, there is one query I can answer categorically: to whom do you make your first phone call in a capital case? That’s always David Ruhnke, whether to find out if he’ll agree to be learned counsel. Otherwise, he’ll be approached by another lawyer in the case, and I would lose out on the premier capital litigator in the federal system.

I first met David in 1997, before authorizing capital prosecutions over the objections of local federal prosecutors was even a twinkle in John Ashcroft’s eye, in a Southern District case in which David was learned counsel for a death-eligible defendant. My client was not death-eligible, but it was a valuable learning experience nonetheless, perhaps even more so because I could observe objectively without the pressure of a potential capital authorization looming over my client.

At the time David still had exclusive rights on capital prosecutions in federal court in New York: first Pitera and then Dhinsa. That first case we were in together did not proceed to trial, even though David’s client was authorized. Back in those nascent days of the modern federal death penalty, plea bargains were still possible.

David brought to that case a maturity and composure that instilled confidence and, to my surprise, brought an odd serenity to a case infused with an considerable level of tension. His strategies were direct, coherent, and unflinching. That type of reliability at the helm helped the rest of us know the direction in which the case was heading, so we could plan the best options for our own clients. I recall there were at least 14 homicides in that case (and other cringe-worthy gratuitous violence), nine by David’s client alone, but not a single death verdict. It was an impressive example of lawyering and leadership devoid of ego or animosity.

Two years later David was appointed to represent a death-eligible defendant in the Embassy Bombings case. I was already involved on the team representing a non-death-eligible defendant. That case did proceed to trial, and David and his
colleagues provided a textbook tutorial on trying an extraordinarily challenging capital case: 224 deaths, signed confessions, and an horrific incidence of prison violence in which David’s client was directly implicated. The lessons in jury selection were manifold; the example of adhering to a sound, prudent plan despite the constant temptation to deviate was indelible.

From the first pretrial conference, David told the judge, “death is different,” and by the conclusion of trial the judge not only agreed, but that sensibility was reflected in his rulings and the outcome: again, no death verdicts.

In 2008, I had the opportunity to try a federal capital case with David. He brought to it the same integrity, sense of purpose, and discipline to the ultimate strategic objectives that I had previously seen from my vantage point representing co-defendants in those other cases. It was comforting to know those skills were being applied to my client in that capital case. And despite my conscious attempts to reject superstition, I even promised David I would not write with a black pen (made easier by my preference for blue, anyway), although even if I had I do not think it would have altered the quality of his work or the result we achieved: a unanimous life verdict within four hours of penalty phase deliberations.

While it may not have been the most difficult capital case – the Southern District had declined, only to be overruled by Attorney General Gonzales – the stakes were still intimidating. David’s commitment made it manageable, though, and only during that brief deliberation did I detect any of the anxiety that must be present in some sense all the time for a career capital defense lawyer, but which David so deftly hides for the benefit of his colleagues and his clients. Like a great athlete, David has a positive affect on those around him. David’s excellence in not just his performance, but also in his attitude and relationships with defense lawyers, clients, prosecutors, and judges, propels everyone to do a better job at securing a fair trial. I cannot think of a better impact on the criminal justice system.
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Sienna graciously greeted Atticus in The Chambers. “Your ‘Rat Investigation Source Manual’ has given me a wealth of material to cross-examine the flipper in my upcoming trial. What do I do with all this information? How do I prepare myself for crossing the rat?”

“Skilled cross-examination of a rat takes many hours to prepare. Your overall mind set is to create chapters of cross which are sequenced so as to instill, maintain and maximize total control of the rat from start to finish utilizing the principles of primacy and recency. Query: are you going to attack the rat or are you going to attack the rat’s testimony pointing the finger of accusation at your client? Because too many rats have information that strike alarmingly close to the facts alleged against your client, many lawyers opt to attack the rat personally rather than risking a cross that might reaffirm the rat’s direct examination at trial. The tactic is to strategically attack the rat as a person and then argue that this vermin cannot be believed beyond a reasonable doubt regarding anything they say. If you have made the decision to attack the rat rather than what the rat has to say about your client’s position in the case, begin your questioning with a chapter which clearly communicates your theme(s) regarding how the jury should feel about the rat when your cross ends. You structure your chapters of cross. You structure your sequence of cross. You structure the destruction of the rat as a witness.”

Publius, Atticus’s long-time cohort, looked up from his glass of Merlot and interjected. “Sometimes ya gotta do both – attack the rat’s testimony and attack him. If you can clearly establish that the rat is lying about a material fact, then first expose his lies. Then go after the rat for what he is – a scurrilous, plague-carrying vermin!”

After jotting down a few notes, Sienna asked “What overall themes should I incorporate in structuring my rat cross?”

“The key to impeaching a rat is to develop themes which are sounded again and
again throughout the cross. These themes establish that the rat has a history of conning people and is now conning the jury. The rat is motivated to take action for personal benefit at the expense of others. The rat’s goal in life has always been to take care of ‘me, myself and I’. The rat’s life exhibits a pattern of deceit and lies - all of which make his/her testimony unreliable, incredible and unbelievable. You must demonstrate by precise questioning how the rat benefitted from his/her deal for testimony and that this deal is just another one of the rat’s many manipulations in life.”

Sienna asked “How do I arrange the chapters? How do I sequence my cross-examination?”

“You thorough investigation utilizing the ‘Rat Information Source Manual’ has developed episodes in the rat’s life which highlight your themes: a/k/as, aliases, con jobs in business dealings, deceptive employment applications, false statements to police, perjurious testimony, outright lies to prosecutors and judges, etc. Your initial investigation has disclosed multiple episodes in the rat’s life, each of which you use to destroy, piece by piece, the rat’s credibility. Sequence your cross-examination to establish: (1) all favorable facts; (2) assertions on which the rat will be self-impeached; and (3) critical facts about which another witness or exhibit will contradict what the rat has bad to say about your client’s position in this case.

Sienna mused, “This is labor intensive. We have massive amounts of information. Are there any shortcuts you can suggest for sorting and charting all this information for its most effective use?”

“Let’s defer for a moment talking about the traditional BCL (before computers lawyer) technique involving accounting pads, manila folders and yellow scratch sheets which were utilized to chart each year in the rat’s life history. Nowadays, we all have computer and/or I-Pads which can substantially reduce your time investment in charting and segregating the rat’s prior bad acts. For reasonable cost, you can now purchase Adobe Acrobat, OCR (optical character recognition), Case Map, Time Map, Text Map and Microsoft Power Point software programs which allow you to scan all of the documents obtained during your investigation and from both formal and informal discovery. These software programs make it a simple task to chart each year of the rat’s life and to cross-reference all of the testimonies or statements which commit the rat to positions from which there is no safe haven. You can chart the entire case, all of the facts and create time lines for each witness and event of significance. And these software programs allow you to affix electronic sticky notes to the pertinent areas of cross on each document. In essence, you now apply old BCL techniques utilizing updated software programs which take a fraction of the time.”

“What old BCL techniques did you use when charting the rat’s life and accompanying foibles?”

“The rat’s life history and prior testimonies were charted and cross-referenced using accounting pads (with lined vertical and horizontal columns), manila folders to segregate each event and each year, and yellow scratch sheets upon which were indelibly etched our work product thoughts for future use. Several weeks before trial, each chapter was reviewed and a rough draft for cross compiled. Once each chapter was completed, the chapters were sequenced for optimal communication and persuasion. The work product draft contained all facts to be crossed upon, the anticipated testimony desired, and all source documents for the testimony including date/time/place/person to
whom given/or exhibit contradicting the rat. Effective preparation included having readily available all prior inconsistent statements that you will torture the rat with on cross. Each prior inconsistent statement should be in its own folder. Each constitutes a separate chapter of cross. As to each inconsistent statement have a highlighted copy for your use and a clean copy in case needed. Within each manila folder you have readily available the testimony or prior inconsistent statement(s) so that you can readily source the documents needed for cross. As to each exhibit which contradicts the rat, draft a potential cross anticipating best/worst answers, and have readily available the sources (i.e., witnesses or exhibits) which testify contrary to the rat. Finally, craft your initial chapter and final cross chapter. Set up your files with one chapter per file, each file to be labeled by chapter name. In each file you should have the written cross, the source documents, and copy of each exhibit to be introduced or questioned upon.

Chuckling, Publius noted, “I used to use Atticus’s file folder method – that is, until as I was arguing an objection, an unhappy client pushed my banker’s box full of my files off the table and files went flying everywhere. So, I now use 3-ring notebooks and alphabetical tabs with one notebook just for the rat. But use whatever method you’re comfortable with as long as you can find your chapters quickly and easily. To help, here’s a form that I developed to optimize each chapter as Atticus suggested.”

“What are your brainstorming thoughts?” Sienna asked Atticus.

“In planning your cross of the rat, try to craft a story which conjures up visual images which become unforgettable when properly presented. Employ emotion. If one of your themes is that this rat is dancing to the master’s tune and that the 5 K1 letter is the only escape from the box s/he’s in, cerebrate precisely how you anticipate telling the rat’s story so the jury can actually feel the rat’s hopeless desperation.”

Sienna asked, “What do you suggest as a workable approach?”

“Work bassackwards - - do your summation first and then plug in to your planned cross-examinations what you want to say about your theory of the case and your themes of the rat as a witness. Cross-examination does not take place in a vacuum. The snitch is a real person in a real world. Who is this rat? What biases does the rat have (especially since bias is never collateral and may always be proven). What motivates the rat? What role does the rat represent in the morality play that is our trial? How do you feel about the rat? How do you really feel about the rat deep down inside? This is important because if there is congruence between message and messenger during cross-examination, you will subtly communicate to the jury how you, and thus how they, should feel about the rat. Cerebrate about how you wish to delve into the rat’s point of view during cross-examination. Just like when filming, the director is always concerned about ‘POV’, i.e., from whose point of view do you want the jurors to view the rat? It is not just that the rat is pointing the finger of accusation at our client in exchange for a ‘deal’, but also, under the circumstances surrounding the decision to become a rat, anyone would be willing to lie in order to get someone else, anyone else, to do their time for them. Here is where the art comes in - - we don’t always have to beat a rat to get the jury to see the mendacity. You have the option of determining POV either from the jurors’ standpoint or from the rat’s own eyes. By telling the story of the hopelessness of the rat’s situation, the more readily apparent the bias and the motivation to lie. If the jury sees and feels the rat’s hopelessness, you have created an image of despair in the collective minds’ eye of the jury so that you do not have to use the word ‘liar’. The jurors think ‘liar’ and use the word ‘liar’ during deliberations in dismissing the rat as a witness.”

Sienna plied Atticus with, “Can you suggest some chapters of cross and the sequence in which the chapters should be arranged?”

“Not now. I need some more sarsaparilla to oil my mind.”

Waiving his hand to the bartender for another round of drinks, Publius said, “Don’t forget, the average juror has little or no knowledge about rats, snitches or ‘liars for hire.’ So somewhere, early on in your cross, educate the jury at the rat’s expense – especially if there are jurors who are regularly involved with religious activities.”

“Huh?” queried Sienna. “I’m not sure I follow you.”

Publius, pondering his wine, retorted, “Simple – you do it once and you can’t forget. Here’s what you do.”

“Q: Mr. Rat, you know who Judas Iscariot was, don’t you?” “If he says ‘yes,’ you’ve got him hooked. If he says ‘no,’ then go on.”

“Q: You know, the guy who ratted out Jesus for 30 pieces of silver?” “If he agrees, the hook is set. Or answers: “A: No, never heard of the dude.”

“Q: Judas or Jesus?”

“A: Oh, I know Jesus!”

“Q: How were you paid for your testimony – in money or a reduced sentence?”

“A: I got no deals!”

“The guys a freakin’ liar!” Sienna yelled.

“Exactly,” Atticus replied. “That’s the reaction you want the jurors to have when you refer to him as the ‘Rat Judas’ in your closing argument.”

A
When the charge is murder, and the defense is self-defense, some form of evidence of the deceased’s prior violence may be admitted into evidence to determine who was the initial aggressor ...

Unless you are in New York (or Maine).

INTRODUCTION

New York Criminal Defense Lawyers may be surprised to learn that in self-defense cases where the identity of the initial aggressor is a contested fact, all federal courts and every state court that has considered the issue (except New York and Maine) permit some proof of the violent propensities of the deceased to prove which party started the violence. The rule holds true in these enlightened jurisdictions regardless of whether at the time of the incident the defendant had knowledge of the victim’s violent past. It is time for New York to join the well reasoned majority.

CHARACTER EVIDENCE OF THE DECEASED IN SELF-DEFENSE CASES

Evidence of a victim’s violent character may be admitted to support a defendant’s claim of self-defense under two theories. First, it may be admitted to prove that at the time of the assault the defendant was reasonably apprehensive for his safety and used a degree of force that was reasonable, given the victim’s violent history. The evidence is relevant to the defendant’s state of mind; therefore, the defendant’s prior knowledge is required for admissibility. The second theory for admission is that the victim’s history of violence, whether known or unknown to the defendant, tends to prove that the victim, rather than the defendant, was the initial aggressor. New York permits admission under the first theory; however, we are virtually alone in the nation in precluding admission under the second theory. Significantly, fact finder determination of who was the initial aggressor in a self-defense case is the threshold issue. With a very limited exception, self-defense cannot be asserted if the defendant was the initial aggressor.

HISTORY OF THE NEW YORK RULE.

Evidence of the reputation of the deceased for violence, is “not received to show that the deceased was the aggressor…it is competent only in cases where

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1 Disclaimer: This article is not intended to cover every aspect of the issue presented. The legal theories presented may apply in assault and other cases.
2 New York Penal Law §35.15 provides:
   A person may...use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself...from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person unless...
   (b) the actor was the initial aggressor.
the killing took place under circumstances that afforded the slayer reasonable grounds to believe himself in peril and that solely for the purpose of illustrating to the jury the motive which actuated him....It can have no bearing on what the defendant apprehended, unless he knew it.”

The Court of Appeals later modified Rodawald and permitted specific acts of violence committed by the deceased (in addition to reputation evidence), provided once again, that the prior acts were known to the defendant and only to explain the reasonableness of the defendant’s apprehension and actions.

The most recent occasion on which the Court of Appeals addressed the admission of prior violence committed by the deceased on the issue of initial aggressor was in 1981. The Court took notice of “less restrictive holdings in other jurisdictions…” but nonetheless followed the rule recognized in Rodawald and prohibited the violent history of the deceased to be admitted despite the identity of the “initial aggressor” being a contested fact at trial.

New York courts have historically admitted prior threats made by the deceased against the defendant as proof of which party was the initial aggressor regardless of whether the defendant knew about the threats. In permitting this evidence, the Court of Appeals reasoned that such threats create the probability that the victim acted upon them and was therefore the initial aggressor.

THE NEW YORK RULE DOES NOT VIOLATE THE U.S. CONSTITUTION BUT HAS BEEN SHARPLY CRITICIZED.

In Williams v. Lord, the United States Court of Appeals for the Second Circuit reviewed the Eastern District’s dismissal of Veronda Williams’ Petition for a Writ of Habeas Corpus. The conviction, for Murder 2 in Queens County, was ultimately left undisturbed but not without severe criticism in Judge Cardamone’s concurring opinion.

Williams, a prostitute, had dispatched one John Neil Bennett in Queens County, New York with a stab wound to the chest. She confessed to the stabbing. According to her confession Williams, a prostitute, was paid by Bennett to have oral sex. The pair was in Bennett’s automobile when Bennett smoked some crack and then “started going crazy, grabbing her by the neck, calling her a “bitch” and saying, “you ain’t going nowhere.”” He punched her in the face, then grabbed a knife from under the seat and cut her arm. When he tried to cut her face, she grabbed the knife by the blade, wrestled it from him, and stabbed him in the chest. During trial, a prosecutorial memorandum revealing that Bennett was the subject of a prior rape investigation was inadvertently disclosed to the defense. Defense counsel argued that the prior rape victim should be allowed to testify that Bennett had a “modus operandi of committing these types of assaultive acts in conjunction with sexual assaults” after ingesting drugs. The trial court denied the application. Williams was convicted, exhausted her state remedies, then claimed on the writ, as she had at trial, that she was denied her constitutional due process right to assert a defense.

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3 People v. Rodawald 177 NY 408, 423 (1904)
4 People v. Miller 39 N.Y.2d 543, 549 (1976)
6 Petty at 285
7 996 F.2d 1481 (2nd Cir. 1993)
The U.S. District Court and, in turn, the U.S. Court of Appeals for the Second Circuit, ruled against Williams, finding that the state court may properly place restrictions on defendant’s introduction of evidence without violating the constitutional right to present a defense so long as the restrictions are neither arbitrary nor disproportionate to the purposes they were designed to serve (confusion of issues, collateral evidence). Accordingly, the circuit found that the state court had adopted a constitutionally permissible evidentiary rule limiting the admission of relevant proof, but the decision did not end there. Circuit Judge Cardamone, in a concurring opinion, sharply criticized the New York rule.

“The New York rule, which completely ignores the relevance of prior acts of violence in the present circumstances is now the much criticized minority rule.” Judge Cardamone advised that “New York may want to reconsider its restrictive rule that not only, like fans thrown at the face of the winds, bucks the more enlightened modern trend, but also fails to recognize that the truth of whether a defendant is guilty or innocent is more likely to emerge by hearing the testimony of those possessing relevant facts, leaving the weight of such evidence to be determined, under proper instructions, by a jury... The state’s legitimate policy of excluding proof that it deems a wrong reason for acquittal should not be a blanket rule for exclusion for evidence that may be found reliable in an individual case... New York has not looked at how its rule applies to an objective occurrence but only narrowly as a matter of defendant’s subjective knowledge”.

In Matter of Robert S., Judge Fuchsberg, in a spirited dissent, proposed that New York abandon the “outmoded parts of Rodawald” and adopt a more modern view, recognizing that effective fact finding requires “utilizing all rational means for the ascertainment of the truth.” He noted that the New York rule bases its exclusions on a fear that the evidence of propensity will be misapplied by a jury to license criminal conduct against an unworthy victim. Judge Fuchsberg expressed his confidence that properly instructed juries would make the proper distinctions. With respect to propensity evidence, the judge opined that in criminal cases there is to be greater latitude in admitting exculpatory evidence than in determining whether prejudicial potentialities in proof offered to show guilt should result in its exclusion.

THE ENLIGHTENED RULE

“Under Rules 404 and 405 of the Federal Rules of Evidence, all Federal courts now permit the introduction of evidence of the victim’s violent character to support a defendant’s self-defense claim that the victim was the first aggressor. Similarly, appellate courts in virtually every state jurisdiction that has considered the issue have decided that some form of such evidence (specific acts,
of the deceased; it may throw much light on the probabilities of the deceased’s action.” 1 J.Wigmore, Evidence Sect. 63, at 467 (3rd Ed. 1940).

JURISDICTIONS THAT PERMIT THIS EVIDENCE HAVE PROCEDURAL SAFEGUARDS AND PERMIT SOUND JUDICIAL DISCRETION.

In Georgia, specific violent acts perpetrated by the deceased are allowed only upon proper notice to the prosecution. 12 In the District of Columbia, specific acts evidence is allowed only in homicide cases. In Connecticut and Utah, specific act evidence is admissible in the form of recent convictions for violent crimes. 13 In most states, if this type of evidence is offered, it “opens the door” to prior violence used by the defendant.

In all jurisdictions that permit this evidence, trial courts engage in balancing so that trials don’t focus on collateral issues, and mini trials as to prior incidents don’t confuse the jury within the context of the trial at hand.

TRIAL COUNSEL SHOULD PROFFER THIS EVIDENCE AND PRESERVE THE ISSUE FOR APPELLATE REVIEW.

The current New York rule is antiquated and precludes relevant evidence. It is particularly ironic because it applies in fact patterns where an utter stranger with a long history of violence attacks a truly innocent person who has no history of violence. This common-law rule prevents fact finders from considering an important source of evidence on the threshold issue in most justification defenses, namely who exactly was the initial aggressor.

“Stare Decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however…..questionable”, People v. Bing 76 N.Y.2d 331,338 (1990) quoting Justice Frankfurter (citation omitted) in overruling People v. Bartolomeo 53 N.Y.2d 225 (1981). While New York trial courts are constrained to follow Matter of Robert S., the New York Court of Appeals will be hard pressed to maintain New York’s minority position the next time it is called upon to address the issue. Raise this issue if warranted in your next justification case, and you just might make New York law.

Who Needs a Sealing Statute?

Martin Luther King, Jr. was arrested in February 1956 during the Montgomery bus boycotts. The mugshot has appeared on various sites on the internet. He was 27, when arrested. The photo was uncovered in July 2004 by a deputy cleaning out a Montgomery County Sheriff’s Department storage room. It is uncertain who or when “DEAD” and “4-4-68” were written on the picture.

For an update on NYSACDL’s efforts with regard to a sealing statute, see the Legislative Report on page 6.


11 People v. Lynch, 104 Ill.2d 194, 200 (1984); State v. Griffin, 99 Ariz. 43, 46-47 (1965) (“It is the rule that where it is questionable as to which was the aggressor... the general reputation of the deceased as a dangerous, turbulent, and violent man may always be shown”). “Evidence probative of the victim’s reputation for violence is highly relevant and admissible to show that the victim was the aggressor in a case in which self defense is raised,” State v. Soto, 477 A.2d 945, 949 (R.I. 1984), Lolly v. State, 259 GA, 605, 609-610 (1989), (Welner J., concurring), quoting Henderson v. State, 234 GA 827, 830 (1975) (“It is more probable that a person will act in accordance with his character than he will act contrary to it”). “When the issue of self defense is made in a trial for homicide, and thus a controversy arises whether the deceased was the aggressor, once persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased’s action.” 1 J.Wigmore, Evidence Sect. 63, at 467 (3rd Ed. 1940)

12 Chandler v. State, 405 S.E. 2d, 669 (GA. 1991)

In the pressure cooker, think-on-your-feet world of a state court trial, an attorney might be forgiven for not having at the forefront of his thoughts an as yet theoretical federal habeas petition that might be brought on behalf of his client years down the line. Most attorneys recognize, of course, even as they focus on winning the trial, the importance of making an adequate record of issues for a state court appeal should there be a conviction. Often, however, framing issues to meet the requirements for a potential federal court post-conviction remedy - in other words preserving federal constitutional issues - is overlooked.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996, the Supreme Court, a circuit judge or, more typically, a federal district court, may entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” In nearly all circumstances, a petition for a writ of habeas corpus may not be granted unless the petitioner “preserved” the issue by adequately presenting it to the trial court and then “exhausted” the issue by presenting it for review to the highest state court with jurisdiction over the defendant’s appeal. These requirements are based on the principle of comity, which “dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.”

Preservation has both procedural and substantive components. Procedurally, adequate preservation requires “contemporaneous objection” to a trial court’s ruling. Substantively, the objection must be sufficient to make the nature of one’s claim (in this case one’s federal constitutional claim) known to the court.

Exhaustion also has both procedural and substantive aspects. Procedural exhaustion requires that a petitioner raise all federal constitutional claims in state court prior to raising them in the habeas corpus petition. Substantive exhaustion

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2 28 U.S.C. § 2254(b)(1)(A); see Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct. 509 (1971); Doye v. Attorney General of New York, 696 F.2d 186, 190 (2d Cir.1982)(en banc). Statutory exceptions to this requirement are when there is an “absence of a state corrective process” or “circumstances exist that render such process ineffective to protect the rights of the” petitioner. 2254 § (b) (1) (B) (i)(ii). See Aparicio v. Artuz, 269 F.3d 78, 91 (2d Cir. 2001); Ex Parte Hawk, 321 U.S. 114, 118, 64 S.Ct. 448 (1944); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 1935 (1935).
requires that a petitioner “fairly present” any constitutional claims to the highest state court in the same factual and legal context in which it appears in the habeas petition.4

**PROCEDURAL PRESERVATION AND EXHAUSTION**

Although exhaustion and preservation are distinguishable, they are very closely related in the federal habeas context. As set forth in Criminal Procedure Law § 470.05(2), known as the “contemporaneous objection rule,” an issue is preserved or (as the CPL puts it) “is presented,” at a trial or proceeding, when at the time of such ruling or instruction “a protest thereto [is] registered, by the party claiming error.”9 An issue is “exhausted” where it has been adjudicated on the merits in the highest state court accepting jurisdiction prior to the issue being raised in a federal habeas petition.9 Thus, preservation is closely tied to exhaustion since a claim cannot be exhausted if it is not decided on its merits in the highest appellate court.

While as a rule, an intermediate appellate court will not decide an unpreserved issue on its merits, that court has the discretion to do so by exercising its “interest of justice” jurisdiction.9 Such jurisdiction is rarely exercised and making a contemporaneous objection on federal constitutional grounds is therefore still critical. However, for the appellate lawyer faced with a meritorious federal constitutional issue that was not raised at trial, interest of justice jurisdiction may still be available.

**7 See C.P.L. § 470.35(2)(a)(b).**

**8 An exception to the preservation rule lies for claims of ineffective assistance of counsel.** Such claims may be raised for the first time on appeal. See People v. Angelakos, 70 N.Y.2d 670 (1987); People v. Brown, 45 N.Y.2d 852 (1978). Further, many ineffective assistance of counsel claims must be raised for the first time in post-judgment motions to vacate (via C.P.L. § 440.10) rather than on direct appeal, because they involve matters dehors the record. Brown, 45 N.Y.2d at 853-54. Appeal from a denial of a motion to vacate is by permission to appeal from the intermediate appellate court (the appellate division). C.P.L. § 450.15(1). Exhaustion of an issue raised in a motion under 440.10 is generally satisfied by the denial of permission to appeal from the intermediate appellate court. See Yates v. Hudishan, 2011 WL 1743672 (April 20, 2011). See C.P.L. § 470.15 (3)(c), (6)(a); See e.g. People v. Nesbitt, 77 A.D.3d 854 (2d Dept. 2010) (exercising interest of justice jurisdiction to consider unpreserved issues and vacate first and second-degree robbery counts).
its merits, it will then be exhausted for purposes of federal habeas review.11

Relatedly, a federal court will not review a federal constitutional claim raised in a habeas petition if the state court decided the issue on any “independent” and “adequate” state law ground.12 Generally, a finding by a state appellate court that an issue was unreviewed for review (in accordance with the contemporaneous objection rule set forth in C.P.L. § 470.05) is an independent and adequate bar to federal review of the issue.13 However, in rare circumstances, an application of the contemporaneous objection rule can successfully be challenged as inadequate to bar federal review. An “adequate” state procedural bar is defined as one that is “firmly established and regularly followed state practice.”14 “State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.”15

Thus, for example, the Second Circuit in Cotto held that the New York Court of Appeals’ finding that the defendant’s failure to object after the court’s preclusion of a witness’ cross-examination (although he had objected to preclusion of the testimony before the court’s ruling) rendered the issue unreviewed under the state’s contemporaneous objection rule, did not preclude federal habeas review. Rather, because the contemporaneous objection rule, as applied in that case, was not “firmly established and regularly followed,” it was not an “adequate” bar to federal habeas review.16

Likewise, a state procedural bar that is not “independent” of federal law does not preclude federal habeas review of it.17 Where the state court’s application of a procedural bar is interwoven with federal constitutional law, its ruling does not rest on an “independent” state ground and “habeas review is not foreclosed.”18

Additionally, in “exceptional cases,” an “exorbitant misapplication” of a generally sound state rule, “renders the state ground inadequate to stop consideration of a federal question.”19

**SUBSTANTIVE PRESERVATION AND EXHAUSTION**

To satisfy the substantive exhaustion requirement, a defendant must have “fairly present[ed]” his or her federal constitutional claims to the state court in the same factual and legal context in which it appears in the habeas petition.20 A federal constitutional claim is “fairly presented” to the state tribunal provided there is (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so adequate that it is fairly present[ed] to the state court, (d) assert[ion] of the claim not preserved for review (in accordance with the contemporaneous objection rule), (e) objection of the party under consideration of a federal question.”19

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11 Harris v. Reed, 489 U.S. 255, 262, 109 S.Ct. 1038 (1989)(“a federal claimant’s procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default”); James, supra, 2007 WL 3232513 at *8 fn 4 (although claim not preserved for appellate review, since Appellate Division denied claim on its merits, there was no procedural bar to habeas review).

12 Lee v. Kemna, 534 U.S. 362, 375, 122 S.Ct. 850 (1991)(“a federal claimant’s procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default”); Cone v. Bell, ___ U.S. ___, 129 S.Ct. 1769, 1782 (2009); Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038 (1989); Messiah v. Duncan, 435 F.3d 186, 195 (2d Cir. 2006)(“It must be clear from the face of the opinion that the court intended to rely on the state procedural rule in disposing of the federal claim.”). Additionally, if the state court’s decision is silent on whether federal constitutional claims that have been raised by the appellant are procedurally barred, they may be addressed by the federal habeas court. See Kotter v. Woods, 620 F.3d 366 (2d Cir. 2009)(where Confrontation Clause claim was raised on appeal and appellate court did not, although it could have, expressly hold that the issue was procedurally barred but simply stated “his remaining contentions are without merit,” habeas court considered the merits of the claim).


16 Id. at 244-45. This is to be distinguished from a state procedural rule being “discretionary.” A rule, although discretionary, “can serve as an adequate ground to bar federal habeas review” provided it is “firmly established” and “regularly followed.” Beard v. Kindler, 130 S.Ct. 612, 618 (2009).

17 Lee, supra; Coleman, supra.

18 Green v. Travis, 414 F.3d 388 (2d Cir. 2005)(where Appellate Division’s application of 470.05 (2) (contemporaneous objection rule) merged with adequacy of a prima facie case under Batson which is a matter of interpretation of federal constitutional jurisprudence on jury selection,” court did not rely on “independent” state procedural law; Brown v. Miller, 451 F.2d 54 (2d Cir. 2006)(court’s ruling that claim challenging sentence as persistent violent felony offender was procedurally barred was interwoven with federal law under Apprendi and therefore not an independent state law ground).


20 See Daye, supra, 696 F.2d at 194.
constitutional litigation.21 Similarly, to meet the requirements of what might be called the substantive aspect of preservation, the objection must be sufficient to make the party’s position known to the court.22

Adequately framing an objection, whenever appropriate, as both a state law issue and federal constitutional issue is essential. A perfect example is when, at trial, a defendant objects to the admissibility of evidence on hearsay or other state common law evidentiary grounds and, on appeal, argues that the evidence was inadmissible as well on federal constitutional grounds. This was precisely the situation addressed by the New York Court of Appeals in People v. Kello,23 in which the defendant argued that the evidence was insufficient to make the party’s position known to the court.24

How specific must an objection be to alert the court to the constitutional nature of the claim? For purposes of substantive exhaustion, a “petitioner may alert the state court to the constitutional nature of a claim without referring chapter and verse to the U.S. Constitution.”25 In Jackson v. Edwards, 404 F.3d 612 (2d Cir. 2005), the Second Circuit refined this maxim and the “fairly presented standard.” There, the defendant argued in his habeas petition that it violated his Fourteenth Amendment right to a fundamentally fair trial.26

31 See also James, supra, 2007 WL 3232513 at *8 (finding federal constitutional claim “fairly presented” where substance of state court repugnancy claim and federal Fourteenth Amendment claim were identical); McKinney v. Artuz, 326 F.2d 87 (2d Cir. 2003)(Batson claim exhausted although in state court defendant relied on due process clause while in federal court he relied on the equal protection clause).
32 Strogov v. Attorney General of the State of New York, 191 F.3d 188 (2d Cir. 1999) (dismissing habeas petition on exhaustion grounds where state and federal claims were distinct, not the substantial equivalent.”).

22 C.P.L. § 470.05 (2).
25 Id. at 744.
26 Id.
27 28 U.S.C. § 2254(b)(1). If the appellate division had adjudicated the federal claim on the merits, raising the issue in the N.Y. Court of Appeals, even if rejected there on preservation grounds, would have been sufficient to exhaust it. Harris, supra, 489 U.S. at 262; James, supra, 2007 WL 3232513 at *8 fn 4.
28 Taylor v. Curry, 708 F.2d 886, 890-91 (2d Cir. 1983).
29 Daye, supra, 696 F.2d at 194.
MIXED HABEAS PETITION

The district court, presented with a timely habeas petition containing both exhausted and unexhausted federal claims, known as a “mixed” habeas petition, may issue a stay holding the petition in abeyance pending exhaustion of the petitioner’s state court claims. Three conditions must be met: 1) there must be “good cause for the petitioner’s failure to exhaust his claims in state court;” 2) the petitioner’s claims must not be “plainly meritless;” 3) petitioner must not have engaged in “intentionally dilatory litigation tactics. If an unexhausted claim is raised after a habeas petition has been filed, a fourth condition is that the claim must relate back to the claims originally pled in the petition.

EXCEPTIONS TO EXHAUSTION REQUIREMENT

Under the AEDPA, the district court may, in rare cases, excuse a failure to exhaust if the petitioner can show “cause and prejudice” or a “fundamental miscarriage of justice.” “The existence of cause for a procedural default must ordinarily turn on whether [petitioner] can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” Among such objective impediments would be “a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that „some interference by officials‘ made compliance impracticable.”

“In an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” But note, claims of actual innocence have not been held to state a ground for habeas relief standing alone; there must be “an independent constitutional violation occurring in the underlying state criminal proceeding.” An actual innocence claim acts as a “gateway” for the court to consider a petitioner’s otherwise procedurally barred constitutional claims.

CONCLUSION

Federal habeas review can be an important and successful “second bite of the apple.” There can be no second bite, however, unless counsel (trial and appellate) take the long view; making timely objections on federal constitutional grounds at trial (and other proceedings), and fully exhausting those claims in the appellate courts. Both trial and appellate counsel should, moreover, be mindful that there may be federal gold even in state evidentiary and common law claims, and federalize such claims whenever possible.

33 Rhodes v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528 (2005). Such stays should be limited in duration, therefore the district court must “place reasonable time limits on a petitioner’s trip to state court and back:” the state court claim should be filed “normally 30 days” after the stay is entered. Id. at 278.

34 28 U.S.C.§ 2254(b)(1); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); Harris v. Reed, 489 U.S. 255, 258,271, 109 S.Ct. 1038 (1989); See Dorsey v. Irvin, 56 F.3d 425 (2d Cir. 1995)(whether or not petitioner has shown cause and prejudice for his procedural default of prosecutorial misconduct claim may depend in part on the viability of an effective assistance or Brady claim); St. Helen v. Senkowski, 374 F.3d 181 (2d Cir. 2004)(District court wrongly reached the merits because petitioner had not presented the federal constitutional issue to the state court and failed to show cause and prejudice for having not done so).


36 Id. (internal citations omitted).

37 Id. at 496


In 1964, I was a One-L law student at Brooklyn Law School (although none of us knew, or used, the term then.) That year “Freedom Summer” attracted many young people to the South, including Michael Schwerner, Andrew Goodman, and James Chaney. Their murder, later determined to be with the connivance of Neshoba County Sheriff Rainey and Deputy Price, actually had the opposite of its intended effect; rather than intimidation, many idealistic young people signed up in various capacities for the summer of 1965.

I had heard about ‘LSCRRC” (the Law Students Civil Rights Research Council), which matched law students to work with attorneys from “LCDC” (the “Lawyers Constitutional Defense Committee”), lawyers supporting the southern civil rights movement. I was interviewed by Henry Schwarzschild, LCDC’s Executive Director, a noted “progressive” and LSCRRC’s D’Army Bailey (later a Judge in Memphis, Tennessee, since retired) and was accepted and assigned to go to Selma, for the summer of 1965. Selma was just a quaint name to me, then – this was just before Dr. King’s attempts to lead a march from Selma to Montgomery and the much chronicled police brutality (“Bloody Sunday”) at the Edmund Pettus Bridge.

But before we left there was an orientation session, addressed by Prof. Anthony Amsterdam, attorney Charles Morgan, Jr., and former U.S. Marshal James McShane. I recall the Professor’s speech as inspirational, although not the content. Charles Morgan, Jr. once a prominent lawyer in Birmingham, had an epiphany following the bombing of the Thirteenth Street Baptist Church, killing four young girls, the oldest 14. Morgan had a lunch date the day after, at the most exclusive club in Birmingham and stood up in outrage, demanding how the leading lights of that city could go about their business when such evil occurred in their midst. With that he became an outcast in his community and in his practice and now spent his time in civil rights litigation. His puckish humor led him to devise imaginative captions, such as a voter registration case entitled “Black v. White” (he’d found a plaintiff with the last name Black and a voter registrar named White.)

McShane, an imposing 6’2”, had been chief of the U.S. Marshals Service and told how he and John Doar, then the DOJ’s Assistant Attorney General for the Civil Rights Division, had, in 1962, escorted the diminutive James Meredith to enroll, as the first African-American (we didn’t have that phrase then, either) at the University of Mississippi, following extensive litigation. Mississippi Governor Ross Barnett had appointed himself registrar of the University and met Doar, McShane and Meredith at the school’s front door. When the party reached him, McShane told us, Barnett looked innocently at the three of them, and inquired “which one of you men is Mr. Meredith?” Barnett told Meredith he could not enter; McShane presented the Supreme Court’s decree and gestured at the large party of assembled marshals behind him. Barnett, who had secretly been negotiating a resolution with President John Kennedy and Attorney General Robert Kennedy, then said “I have done all I can” and stepped aside.

I was pumped and ready to go. I drove down with another civil rights volunteer and was dropped off in Montgomery, at the home of Clifford and Virginia Durr. Mr. Durr, a lawyer, was from a distinguished Alabama family and had defended activists accused of disloyalty during the McCarthy era and represented Rosa Parks in the “back of the bus” case. He had been a Truman appointee to the E.C.C. but was forced to resign because he opposed a proposed loyalty oath as a condition of Federal communications licensing.
I soon met the head of the Alabama operation, Bruce Rogow. Bruce was from Gainesville, Florida and handled accusations of being a “Northern agitator” by answering that he’d actually had to travel north to get to Alabama. Bruce later represented the State of Florida in the contested “hanging chad” litigation in the 2000 Presidential election.

After the team had assembled in Montgomery, we traveled down U.S.80 to Selma. There we had lodgings in a black neighborhood and an office in “downtown Selma”, near the Courthouse and police headquarters. Bruce made contacts with local ministers and civil rights activists and we were in business. As a know-nothing first year law student I was assigned to legal research and “escort duty.” The latter involved “carrying” clients, to use the locals’ phrase, to State agencies, to enroll as voters or dispute a tax bill. A white person’s presence, it was thought, ameliorated local recalcitrance. Most of the time I’d encounter steely iciness; I recall once being asked my name by a petty official, and when I said “Adelman” was answered with “I thought so!” Hmm – now what could that signify?

Personal safety was a constant concern – Rev. James Reeb had been killed on a Selma street-corner, just months before, in March of 1965. The interior light in our one rented car was removed, so occupants would not be silhouetted at night, when the car door opened. If traveling outside Selma, we were given locations of “safe houses” along the way, to flee to if pursued, and – at least once every hour – to stop at and call in (of course, this was before cell-phones.)

Once I was traveling to a small town – Boykin – and stopped at a “SNCC” house (Student Non-Violent Coordinating Committee) for a call-in. This was when SNCC’s position was understood to be that while white people might be useful in the civil rights movement, the struggle was to be won by black people. I was greeted with icy distance but when I explained who I was, they allowed me to use their phone. As I was leaving I recognized a young woman, my age, as a classmate from my Bronx high school and called her name – “goodbye Jeanette.” The atmosphere dramatically changed and we reminisced for a few minutes (she later married Bob Moses, a giant in the movement in Mississippi.)

Despite concerns for safety if identified as a “northern agitator” the fact was that most of the time Alabamans were “right friendly.” Transactions at stores were imbued with gentle kindness, ending with “you hurry back soon.”

I perpetrated a Bronx-tinged version of a Southern accent in most such encounters. But our residence and most after-hours social contacts were in the black community. I recall one evening in a local bar and social club – Amelie’s I think it was called – and after several drinks, some conversations and a dance with a reluctant young woman, being astonished at seeing my own arm – pale white skin! – as I reached for a glass in front of me.

On one occasion I was sent back to Montgomery, to do research in the Supreme Court law library. I entered the building on a Friday afternoon – in the days before all-present “Court security” - and wandered around the empty halls in search of the library. I came down the hall of Supreme Court Justices’ Chambers and was astonished by the names stenciled on the doors – the likes of „E.W. “Skip’ Johnson,” “B.C. „Tiny’ Thomas” and similar sobriquets. I saw a light on behind one door and knocked timorously. The resident Justice was in and I disclosed the nature of my intrusion – “where is the library?” The learned jurist then revealed a lovely facet of Southern hospitality – which can be summarized as “now don’t reply to a question too quickly, it will make the inquirer feel plain dumb.” So, as he rubbed his chin in deep reflection, sought to confirm the nature of the inquiry: “The library, huh? The one with the books??” Immediately, I assured him that his keen mind had correctly discerned the essence of my quest, and was soon on my way to the Court’s library, the one “with the books.”

My research was a serious mission and I turned to it. We intended to bring a post-conviction motion for a client with a rich history of mental illness, who had been certified mentally fit to stand trial and was convicted of murder. The examination was conducted by a general practitioner with no mental health training, following a ten-minute interview. I had hoped to find Federal habeas cases decriying Alabama’s backwards notions about mental health issues, but was astonished to discover that the State, apparently with some justification, prided itself on its actual excellence in the field. We turned the argument around to contend that the case presented the rare exception to the otherwise illustrious history of Alabama’s treatment of mental disabilities and got to a hearing. We lost.

On another occasion, a Friday, I was sent from Selma to Demopolis. A civil rights worker had been arrested and was held on $250 bail. The community raised the funds, but no local resident wanted to deal with the Sheriff to post it. I met the folks and was given a sack containing mostly one and five dollar bills, as well as a pile of change. In verifying the total I was struck by how old some of the coins were – buffalo-head nickels, standing liberty quarters. It was obvious people had emptied piggy banks to bail the young man out.

When I met with the Sheriff we stood outside, him with his right boot heel
resting on the bumper of his police car. He warned me “I sure hope you got the money, the boys will be out drinking tonight, I’ll probably have to put some in the jail, and I just don’t know what they’ll do to your friend.” Summoning courage I didn’t know I had, I replied “well, that’s your job, to make sure nothing happens to him while he’s in your custody.” After a half-hour of the Sheriff counting and recounting the coins, I had the first pleasure of a client released from jail into my arms.

The summer of ’65 ended and I returned to law school. But I felt the attraction of my small participation in the great social revolution and signed up again for the summer of ’66, to return to Selma. Now Donald Jelinek headed the office, and much of our legal work was brought before USDJ Frank M. Johnson, Jr., an Eisenhower appointee in the Middle District of Alabama. Judge Johnson was a great force in civil rights litigation and we won several significant cases before him.

Things were different in State Court. Jelinek was famous for a habeas corpus application in the Alabama Supreme Court, for a black man held with no bail - on a misdemeanor! A Justice observed that the writ was defective because it did not conform to Court rules as to the size of the paper! Jelinek shot back “this is the Great Writ, you’d have to accept it if it was written on a napkin!” The Chief Justice suppressed a grin and remarkably asked “are you trying to make civil rights points? We turn you down and you get some publicity – or do you really want to get your man out?” When Jelinek affirmed his goal was his client’s freedom, he was momentarily excused and then informed that the trial Judge would hear a renewed bail application the next day. (Jelinek’s account of this case and his incredible career in the South can be found at http://www.crmvet.org/nars/jelinek.htm.)

Another case I worked on involved a sharecropper who was being cheated on his seed expenses, which were supposed to be reimbursed to him, as part of his share. It turned on the law of hereditaments and the knowledge I acquired on the subject has been stored in my brain during the intervening 40 some-odd years, just waiting for a client who needs it.

The highlight of the summer of 1966 involved the aforementioned James Meredith. He had graduated from “Ole Miss and was now a student at Columbia Law School. In June, 1966 he renewed his civil rights advocacy in the South, vowing to walk from Memphis to Jackson, Mississippi, the State capital, on a “March Against Fear,” to encourage black voter enrollment. However he was shot soon after he started out and there was a swelling of outrage to continue the cause. So continuing the “Meredith March” became a catalyst –we were not going to be intimidated. The whole office traveled to Mississippi to join in. We “Alabamans” saw Mississippi as “the belly of the beast” – we thought Alabama slightly “civilized” compared to Mississippi. The faces of the locals, lining the road as we marched, the cat-calls and hostile or obscene gestures towards our line showed real hatred. Jim Leatherer, of Saginaw, Michigan marched on crutches; his right leg had been amputated. As he heroically proceeded, the locals kept cadence by shouting “left, left, left” at him, mocking his disability.

When the march line assembled the day we arrived, excitement buzzed - Dr. King was in the front, to lead us. I ran up, there he was! I pointed my camera and some of his protectors moved to push me aside. All I could think of was to yell out inanely “Dr. King, my name is Martin too, can I take your picture?” He pointed at me and said “let him take his picture.” That photo has the same meaning to me as the poster of Uncle Sam in the identical finger-pointing pose - a call to nobility and sacrifice.

When we arrived in Jackson we marched around the Statehouse. It was surrounded by hundreds of Mississippi State Police, standing shoulder to shoulder in riot gear, wearing gas masks and with long guns perched on their hips. While we had no plan to attack the Statehouse, I experienced the unique taste of fear which being confronted by armed men can evoke, particularly with a hostile crowd shouting behind.

To have grown to age in the 1960’s was a fantastic experience and a terrific opportunity – the explosion of the youth culture, Woodstock, anti-war protests in the streets, at colleges and universities, the Yippies at the 1968 Chicago Democratic convention – all deeply involving young people in protest and restructuring the fabric of American society.

Seeing the perversion of the tools of the State used to oppress a large segment of the population in some way channeled me to become a criminal defense lawyer. It’s more than 40 years, but Sydney Carton’s last words seem apt, it was a “far, far better thing” I had done, in going south.
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You represent a defendant facing a possession charge. You are going to trial. The prosecution has a positive DNA result and plans on presenting an expert to testify. How do you tackle this witness?

A prosecutor claiming to have a positive DNA test on an object your client is accused of possessing, such as a weapon or drug container, can be an intimidating situation. Do not give up hope. There are avenues available to combat this type of evidence. Some of these approaches do not require hiring a DNA expert.

**THEORY OF DEFENSE**

Your first issue with how to tackle DNA evidence is to assess your theory of defense. Do you acknowledge that your client was present at the place of the incident? Or is your theory of defense based on your client being located in a distant land at the time of the alleged incident? If your client was not present at the time of the alleged incident, is there another explanation as to why he may have been in the area of the object at any time prior to the DNA test?

If your theory of defense places your client at or near the object, or within some proximity of the object at any time, you will be able to make an argument of secondary or tertiary DNA transfer. You do not need to concede it is your client’s DNA, but even if it matches your client’s DNA alleles then you still have a valid line of questioning by which to attack the allegation of actual possession.

If your theory of defense places your client elsewhere at the time of incident you are more limited in your options. You can attack the credibility of the results, the bias of the expert, the admissibility of the results. However the theory of secondary transfer of DNA alleles may not be available or may require more development.

**ADMISSIBILITY**

The Confrontation Clause does not permit a prosecutor to introduce a forensic lab report containing a testimonial certification through the in-court testimony of an analyst who did not sign the document or did not personally observe the test. *Bullcoming v. New Mexico*, 564 U.S. _ (2011).

If the government’s expert did not sign or observe the DNA test, the expert cannot be used as the foundation for introducing this forensic lab
from two or more individuals is a mixture. By their very nature mixtures are difficult to interpret. It is often difficult to determine if the sample came from two, three or even more individuals.4

**CREDIBILITY OF TEST RESULTS**

If your theory of defense relies on the inaccuracy of the test result, hiring a DNA expert might be necessary. However, there are several angles whereby credibility of a DNA report may be attacked without the use of an expert.

**DNA “COULD” BELONG TO DEFENDANT**

The forensic report will not say that the DNA does belong to the defendant. The report will state that the DNA “could” belong to the defendant.

Unlike the other forensic expert witnesses that the prosecution will present, a DNA expert will not testify that they can conclude to a scientific certainty that the DNA belongs to the defendant. Further, they will not testify that they can conclude to a scientific certainty that the defendant ever touched the object due to secondary DNA transfers.

Ultimately, this evidence that the DNA could belong to the defendant, but also could belong to someone else, is inconclusive. Inconclusive can be said to be the scientific word for doubt.

The prosecution will likely have presented several other forensic witnesses who have reached a conclusion to a scientific certainty with regard to a result. The jury will be familiar with the term “scientific certainty.”

**PROBABILITY RATIO – SAMPLE SIZE**

While it does not appear to be the practice in New York for DNA experts to provide a probability ratio as to the likelihood of the DNA sample belonging to the defendant, you should be prepared if one is provided. This ratio can be used to your advantage to show the expert as disingenuous and manipulative.

A probability ratio would state that there is a 1 in X chance that the DNA belongs to the defendant. Attack this ratio based on the sample used.

What does the expert mean by 1 in X probability of DNA belonging to the defendant? What sample of persons did the expert use to determine this ratio? Is this 1 in X probability out of all people in the world? Is this 1 in X probability of people in the United States? Is this 1 in X probability of people in New York City? Is this 1 in X probability of people living in the particular neighborhood where the weapons or drugs were found?

The ratio of African American and Caucasian persons living in the United States is a greater ratio than a sample size using the global population. The sample size of African Americans living in New York would be greater than the sample size of African Americans living in other parts of the country.

An expert using a world population as a sample size, or even a national population as a sample size, to claim that a black male’s DNA has a 1 in X probability of belonging to the defendant will come off as disingenuous and misleading.

**DNA TESTING AS A SUBJECTIVE SCIENCE**

Interpreting DNA results is a subjective science that requires human interpretation of DNA peaks. Each laboratory is responsible for determining their own peak thresholds.3 Like any subjective
science, these interpretations are subject to human error.

The prosecution’s expert may make your job easier by disputing the subjectivity of the results. They may try to claim that DNA interpretation is an objective science. Clearly the laboratory analysts who administer the tests and interpret the results are required to undergo training as to how to perform this work. A claim by the expert witness that the results are purely objective will make the witness appear to be less credible.

DNA MIXTURES
By their very nature, DNA mixtures are difficult to interpret. Even determining the number of persons whose alleles may be contained in the mixture can be difficult to determine.6

Whose DNA did the laboratory analyst include in their test? Did they obtain a sample from every officer on the scene? Did they obtain a sample from every person who handled the object after its seizure? It is unlikely that the laboratory obtained DNA samples from more than a couple of persons associated with the case.

SECONDARY TRANSFERS
It is not required that a person actually touch an object for their DNA alleles to appear on such object. Even a prosecution’s DNA expert will admit this fact.

The prosecution’s DNA expert may downplay the frequency of nonprimary transfers. The expert may state that secondary and tertiary transfers are unlikely. The expert may even cite a research report by their firm downplaying the probability of secondary transfers. However, at the end of the day, the expert should admit that secondary transfers are possible.


TRANSFER OF DNA ALLELES
Primary transfer of DNA is the transfer of DNA alleles from the donor individual to an item. A secondary transfer of DNA occurs when the DNA sample is transferred from the donor through an intermediary onto an object. The intermediary could be a person through a handshake or other contact, or an object such as a towel or article of clothing. A tertiary transfer of DNA involves two intermediaries. While tertiary transfers are less likely than primary or secondary transfers, they can happen. In fact, some studies have found transfers involving a fourth transfer with three intermediaries.

Secondary transfers are real. They can happen on the crime scene if an officer has contact with a defendant and then handles evidence. The transfers can happen in the laboratories from one piece of evidence to another.

Person A and Person B shake hands. Person B then touches an item. That item could very well have Person A’s DNA alleles present. If Person A is a good shedder and Person B is a poor shedder, there might be a presence of Person A’s alleles as the dominant donor.

A person is not necessarily a good shedder or a poor shedder. One person can at times be a good shedder, and at other times be a poor shedder. Factors that can increase a defendant’s shedder status include whether that person has showered recently or has been out all day. Factors that would increase a person’s perspiration would increase their shedder status. The presence of the defendant’s blood would increase his status as a good shedder.

Time can also play a role in the transfer of DNA. A person only needs to hold an object for a short period of time for their DNA to shed. Secondary transfers of DNA do not have to be immediate.

PROSECUTION’S EXPERT REPORT ON SECONDARY TRANSFERS
The prosecution’s DNA expert may try to discuss research done by their firm that downplays the frequency of DNA allele transfer. It will conclude that the transfers are possible, but not likely.

The witness likely had no input in this report. They have no first hand knowledge as to the accuracy of this report.

The firm creating this report has done so in anticipation of litigation. The firm did not create this report for fun or for them to put away in a file. The firm regularly provides DNA results and expert testimony for the government. The firms create these reports to bolster the testimony of their for-hire expert witnesses.

This is an extremely biased report that should be attacked as such in voir-dire questioning. The admission of such report or the testimony regarding any of these results should be objected to. While you may have your objection overruled, you will effectively point out to the jury that this expert has no first hand knowledge of the scientific value of this report that was prepared with a biased objective.

POSITIVE SECONDARY TRANSFER RESULTS
While the prosecution’s DNA expert will be well versed in their firm’s expert report on the likelihood of DNA transfer, there is a good chance they have never heard of any of the reports and test that show secondary transfers happening with any regularity. As an expert they should be aware of reports stating the increased probability of secondary transfers. The expert should read scholarly articles and stay up to date on this issue. Don’t be surprised if they claim an intentional ignorance to the existence of many of these reports showing frequent secondary transfers. You should ask if he/she is aware of these reports, and if he/she is aware
of the results. The expert’s lack of awareness on all of these reports will appear to be an intentional ignorance and he will further lose credibility with the jury.

The Forensic Science Service in London tested secondary DNA transfers occurring with handshakes. Person A, a good shedder, shook hands with Person B, a poor shedder. Person B then gripped a plastic tube for 10 seconds. In five separate occurrences, all of Person A’s profile was on the object with none of Person B’s alleles appearing. 7

The handshake experiment was repeated, but with the introduction of a 30 minute delay between time of handshake and the time when Person B touched the object. This result showed Person B depositing some alleles, but secondary transfer of Person A’s alleles still occurred. 8

A study conducted by the forensic science department at Staffordshire University arrived at similar results. Three tests of handshakes were performed and each handshake resulted in secondary DNA transfers. One of the three tests showed the person who never touched the object as the dominant DNA profile on the object. 9

The Forensic Science Service in London, UK. 10 11 12

RELIABILITY OF DNA V. RELIABILITY OF FINGERPRINTS
A fingerprint requires that an individual actually touch an object. DNA on an object does not require that an individual ever touch the object. In a question of whether an individual ever touched an object, fingerprints are more reliable than the presence of DNA alleles.

While this may seem obvious to most people, including the jurors, the DNA expert might not be willing to admit that fingerprints are more reliable than DNA alleles when it comes to showing whether a defendant ever touched an object.

LACK OF DNA ON PARTS OF THE OBJECT
The lab report shows DNA alleles on the handle of a gun. How about the hammer of the gun? How about the trigger? How about the barrel or the area of the bullet chamber? Is there any DNA on the bullets? The expert may use the excuse that bullets, once fired, take on too much heat and destroys any recognizable DNA. How about the bullets that have not been fired?

Preumably if the defendant possessed an object, and that object has multiple parts that would be handled such as the chamber of a gun and even the bullets, there should be DNA on those objects. A person does not need to hold an object for several minutes in order to transfer DNA. A period of several seconds is long enough. Lack of DNA on portions of the object that would have been handled by the defendant could be used to bolster an argument of secondary transfers.

A stance may be taken that the surface of the object is the reason why DNA appears in some spots and not others. Some surfaces are more likely to collect a person’s DNA than other surfaces. However, the hammer of a gun may be the same surface as the handle of the gun.

BIAS
Who is paying you to be here today?

Isn’t it true that you spend the vast majority of your time either testifying or preparing to testify in trials, and very little time actually performing DNA tests?

Why did your company test the frequency of secondary DNA transfers? Isn’t it true that they created this report in anticipation of litigation? Isn’t it true that this report created by your firm, which is paid by the county, and created in anticipation of litigation, still finds that secondary DNA transfers do occur?

Treat the witness like a bought and paid for expert in a civil case. Expose their continued business relationship with the prosecution. Alert the jurors of the expert’s motive to provide positive results to continue their relationship and their inherent bias. A
The United States has the highest prison population in the world. In 2007, the population was nearly 2.3 million people, nearly one quarter of the world prison population. Russia and China combine for the next quarter. Western European countries have prison populations which are roughly 10% of the rate in the United States. China, the country often believed to have the harshest criminal justice system, has a prison population rate one fifth that of the United States.1

One of the reasons for this high prison population is that Congress has passed numerous criminal statutes requiring judges to impose mandatory sentences. These statutes strip judges of any discretion in imposing sentences that meet the crime. The best known are mandatory minimum drug sentences; in cases where defendants do not cooperate with the government, courts must impose mandatory ten year sentences for being part of relatively small scale drug conspiracies, regardless of the individual’s role in the offense.2

This article will deal with a different type of case, child pornography, that requires Federal Courts to often impose mandatory five year prison sentences.4 Oddly, the statute mandates a five year sentence for “receipt” of child pornography, while permitting a defendant charged only with “possession” to receive a non-jail sentence.5 It is hard to understand the actual differences in the criminal conduct between “receipt” and “possession”.

A recent case of mine is illustrative of the difficulties inherent in these cases. The defendant Pietro Polizzi was charged with “Receipt and “Possession” of Child Pornography pursuant to Title 18 USC §§ 2252(a)(2) and (4). Mr. Polizzi’s case was wheeled out to Judge Jack B. Weinstein of the Eastern District of New York, a compassionate and brilliant jurist, who did everything in his power to try to do justice in this case. Even so, he failed. The history of this case provides insight into the harm caused by mandatory minimum sentences. They create a judiciary powerless to do justice and obliged to act as a rubber stamp for a Congress that has passed laws designed to usurp judicial discretion in favor of unnecessarily harsh mandatory sentences.

Mr. Polizzi was 53 when he was arrested in January of 2006. He had immigrated to the United States from Sicily in his early teens. He spoke no English at the time.

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1 International Centre for Prison Studies, King’s College London, World’s Prison Population List (eighth edition)
2 Title 21 USC §§ 841(b)(1)(A)(i) and 846
4 Title 18 USC §§ 2252(a)(2) and 2252(b)(1)
5 Title 18 USC §§ 2252(a)(4) and 2252(b)(2)
What is popular is not always right, and what is right is not always popular.

Howard Cosell
jurors indicated that they would have found the defendant not guilty by reason of insanity if they had known this. United States v. Polizzi, 549 F. Supp. 2d 308 at 339-341.

At sentencing, Judge Weinstein set aside the twelve “receipt” counts of the verdict in a 178 page decision, sentencing the defendant to one year and one day on the eleven possession counts. United States v. Polizzi, 549 F. Supp. 2d 308 (E.D.N.Y. 2008). The receipt counts required a mandatory minimum sentence of five years.8 Two items of interest to the question of mandatory minimum sentences were addressed. First, the Court found that a five year sentence under the circumstances of this case and this defendant was “cruel,” at 359 but not “unusual.” Judge Weinstein observed that cruel sentences are now par for the course, and therefore defendants do not have Eighth Amendment recourse to a “cruel and unusual punishment” argument. at 360. Judge Weinstein cited Justice Breyer’s dissent in Hamelin v. Michigan, 501 U.S. 957 (1991) which noted that “severe mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.” Judge Weinstein ordered a new trial, stating that he erred when he refused to charge the jury with respect to the mandatory minimum sentence. at 444. The Judge discussed, in some detail, the jury’s historical right to nullify and therefore their need to understand fully the effects and implications of its decision. at 404-444.

Both sides appealed.

The Second Circuit reversed. United States v. Polouizzi, 564 F.3d 142 (2nd Cir., 2009). The Circuit found that the defendant had no Sixth Amendment right to an instruction on the mandatory minimum sentence, at 160, although it noted that a District Court, in its discretion, may, in certain circumstances, inform the jury of the consequences of its verdict., at 162. The Court then failed to provide any guidance to the lower court as to when judges can exercise such discretion.9

The Second Circuit also indicated that in the child pornography sphere where a defendant is charged with possession for a single collection of child pornography containing multiple images, the defendant can only be charged with a single count of possession. at 157. The Circuit Court determined that in Polizzi’s case, the number of charges should have been five -- four receipt counts and one possession count -- and not the 23 in the original indictment. The case

8 The Court sentenced the defendant to eleven counts of possession of child pornography to one year and a day to run concurrent with one another. Those counts, by statute, did not require the Court to impose a mandatory five year sentence.

9 Certainly, the practitioner can use the Second Circuit decision to attempt to obtain a jury charge in an appropriate case.
was remanded to the District Court to address this concern. The Circuit declined to address the question regarding a proper insanity charge to the jury at 153.

On remand, Judge Weinstein, in a 74 page opinion, granted the defendant a new trial on the ground that the Second Circuit required that the District Court determine what impact the overbroad indictment -- the improper inclusion of multiple receipt and possession counts -- had on the ultimate fairness of the trial. USA v. Polouizzi, 687 F. Supp. 2d 133 (E.D.N.Y., 2010) Judge Weinstein indicated that the impact of an overbroad indictment may improperly prejudice a jury by suggesting that the defendant committed not one, but several crimes, and he found that the quantitative difference between 23 and five counts had tainted the original trial.

The government appealed, and the Second Circuit again reversed in a terse, one page unpublished opinion. USA v. Polouizzi, 393 Fed. Appx. 784 (2nd Cir. 2010). The Circuit indicated that Judge Weinstein had no basis for granting a new trial under its previous decision and remanded for reinstatement of the jury’s verdict. at 785. The Circuit then wrote, in an obvious slap at Judge Weinstein, that “in the event of a subsequent appeal, the matter will be assigned to this panel.” at 785.

On further remand, Judge Weinstein sentenced the defendant to the statutory mandatory minimum of five years on the receipt counts. In his opinion, after summarizing the defendant’s exemplary personal background, Judge Weinstein described the “federal criminal sentencing regime” as “by far the harshest in the 5 Western world.” USA v. Polouizzi, -------- F. Supp. 2d --------, 2011 WL 118217 (E.D.N.Y) Judge Weinstein cited newspaper and sociology articles to illustrate this point. A recent article he cited from the Washington Post describes the harsh sentences in this country as parallel to the lynching of Blacks during a different era.10

Mr. Polizzi is now serving a five year sentence. It is frankly impossible to envision how imprisoning Mr. Polizzi serves any legitimate public purpose. Requiring federal district court judges to impose lengthy sentences without discretion does not serve a society that claims that justice is one of its highest principles. It is simply embarrassing that this country, and all its purposes to stand for, has the world’s largest prison population. The Polizzi case provides an example of a justice system that makes no sense. It is long past time for our system of justice to begin restoring the judiciary to their rightful place, with the discretion to sentence. A

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Second Thoughts
A Review of Recent Notable Cases from the Second Circuit

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The phenomenon of over-criminalization – in its broadest sense, the overuse of the criminal justice system to right all wrongs in society – is born in the legislature, but nourished in the executive and judicial branches. Since prosecutors have little incentive to let a wrongdoer walk on the grounds that indicting him would stretch the criminal law too far, the burden falls on judges to reign in a criminal process that has led to a massive expansion of the criminal code, a proliferation of mandatory minimums, and America’s Nobel prize for incarceration.

This column addresses three recent Second Circuit decisions where that gauntlet has been taken up with welcome and far-reaching results. Perhaps it is no accident that the three were written by judges with extensive district court experience, who have seen the effects of over-criminalization first-hand. United States v. Banki\(^1\) applies the rule of lenity to narrow the reach of a regulatory crime, reminding practitioners that victories can be scored with a dictionary and a grammar book. United States v. Lee\(^2\) holds that the government abused its authority when it withheld a third “acceptance of responsibility” point – effectively advocating an additional two-year penalty – because the defendant had challenged errors in his presentence report. Finally, United States v. Rivera\(^3\) applies the rule of lenity to an ambiguous sentencing guideline, while blasting the racist effect of the congressionally-mandated crack-cocaine disparity.

MORE BANKI FOR YOUR BUCK

Banki is a perfect example of the over-criminalization problem: an irrelevant minnow targeted in a battle against an undeniable foe. At issue were Treasury regulations issued under President Clinton’s 1995 order imposing an economic embargo of Iran, a “blunt instrument” designed to isolate Iran and strike a blow against its most threatening policies, including the development of weapons of mass destruction and state-sponsored terrorist activity.\(^4\) The Iranian Transaction Regulations (“ITR”) were “deliberately over-inclusive,” prohibiting “not only bombs but also beer,” not only advice and services to the Iranian government and but also advice and services to Iranian businesses.\(^5\) And in Banki, the government took the position that they prohibited intra-family remittances for personal purposes.

The charges against Banki, a naturalized U.S. citizen who had emigrated from his native Iran in 1994, arose out of his receipt of funds from Iranian-based family members using an informal system called a “hawala.” The hawala system is widely used in Middle Eastern and South Asian countries to make international fund transfers without money actually crossing borders. In Banki’s case, his family used a Tehran-based hawalader who matched amounts Banki’s family wanted to send to Banki in the U.S. with an amount a U.S.-based client (or client of a fellow broker) wanted to send to the Middle East. Once the money had been wired or otherwise lodged in Banki’s account, Banki would email his family to confirm receipt, and the hawalader would pay an equivalent amount to the U.S.-based contact’s intended recipient. The hawalader’s profits consisted of the difference in the “buy” and “sell” exchange rates on any completed transaction. Over a period of three years, Banki’s family used this system to send him $3.4M, which he

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1 2011 WL 5027426 (2d Cir. October 24, 2011).
2 653 F.3d 170 (2d Cir. 2011).
3 2011 WL 5022734 (2d Cir. October 21, 2011).
4 2011 WL 5027426 at *6-7.
5 Id. at *7.
used for personal purposes, including buying an apartment in New York City. There was no evidence, or indeed suggestion, in the case that Banki had any connection to the Iranian government or terrorist activity. A jury convicted Banki of all counts.

On appeal, Banki argued, among other issues, that he was entitled to a judgment of acquittal on the ITR convictions. The ITR authorizes a U.S. depository institution to process transfers “not prohibited by this part” such as “a non-commercial remittance” like “a family remittance not related to a family-owned enterprise.”6 The defense argued that the plain language of this provision meant that all non-commercial remittances to or from Iran, including family remittances, are exempt from the ITR.7 The government argued, on the other hand, that the provision permitted non-commercial remittances between the United States and Iran only if such remittances were processed through a U.S. depository institution. Conducting a painstaking analysis of different interpretations of the provision, the Court, in an opinion authored by Judge Chin, found “at a minimum” that the regulation is ambiguous, and thus applied the rule of lenity to interpret the provision in the defendant’s favor.8 Reversing Banki’s convictions relating to violations of the ITR, the Court noted that the rule “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain.”9

Not many readers will encounter the unusual charge and factual scenario at issue in Banki, but this notable victory on rule of lenity grounds is a reminder that the best criminal defense can be the most basic – starting with a textual analysis of the statute at issue. Moreover, the rule of lenity is just one of many doctrines that can be enlisted in a statutory-based challenge. Others include, for example, the void-for-vagueness doctrine, which was used to narrow the reach of honest services fraud in Skilling v. United States,10 or a commerce clause challenge, as seen in United States v. Lopez.11

LEE’S REFUSAL TO SURRENDER

Over-criminalization is not just a textual or operational issue; it can also be a psychological one – for example, in attitudes towards defendants and their exercise of due process rights. This latter aspect of our overly-criminalized criminal justice culture is exemplified in United States v. Lee.

Lee pled guilty to cocaine importation without the benefit of a plea agreement. He objected to findings in his PSR, including that he had threatened to kill drug couriers. A Fatico hearing was held, and the district court rejected his challenge. At sentencing, the government recommended a two-level “acceptance of responsibility” adjustment but refused to move for a third point on the grounds that its preparation for the Fatico hearing had been “akin to preparing for trial.”12 The district court denied Lee’s request for a third point, and sentenced Lee to 235 months – the bottom of the advisory range. Had he been granted the third point, the bottom of his range would have been 210 months, more than 2 years less.

Writing for the Court again, Judge Chin condemned the government’s failure to move for the third point as “improper,” “unjustified,” “unlawful and grounds for reproach,” and – for good measure – an “abuse of its authority.”13 First of all, the plain language of the relevant guideline provision and commentary authorized the third point where the defendant had spared the government from preparing for trial. “A Fatico hearing is not a trial, and Lee’s post-plea objections to the PSR did not require the government to prepare ‘for trial.’”14 There was therefore no justification for the government’s refusal to make a motion granting the third point.15 More importantly, “a defendant – even one who pleads guilty – has a due process right to reasonably contest errors in the PSR that affect his sentence” and “should not be punished for doing so” in good faith.16 In words that apply beyond the issue presented in Lee, Judge Chin makes the obvious but often forgotten point that it is “[t]he court, not the government, [that] imposes sentence, and the court is

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6 31 C.F.R. § 560.516.
7 The ITR prohibits the exportation of “services” to Iran, which the Court held included the execution of money transfers to Iran on behalf of others, even if not performed for a fee.
8 2011 WL 5027426 at *8.
9 Id. at 8 (quoting United States v. Santos, 553 U.S. 507, 514 (2008)). It also granted Banki a new trial on his convictions for conspiring to operate and aiding and abetting the operation of a money-transmitting business, because the trial judge had improperly instructed the jury on the meaning of the phrase “money-transmitting business.” Id. at *12-13.
10 130 S.Ct. 2896 (2010).
11 514 U.S. 549 (1995) (Gun-Free School Zones Act, making it federal offense for any individual knowingly to possess firearm at place that individual knows or has reasonable cause to believe is school zone, exceeded Congress’ commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce).
12 A defendant qualifies for a third acceptance point under certain circumstances, including where he has “timely notify[ed] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” U.S.S.C.C. § 3E1.1(b). This third point is granted “upon motion of the government.” §3E1.1(b).
13 653 F.3d at 174.
14 Id.
15 Id.
16 Id.
entitled to a full and accurate record—
as are the parties—before sentence is imposed."17

**CRACKING THE CODE**

Yes, it’s judges, not prosecutors or lawmakers, who impose sentences, and, while in some cases, their hands are tied by mandatory minimums, the change from a mandatory to an advisory sentencing guideline regime frees them to address seriously their role in the sky-rocketing federal prison population, and its attendant devastating social and economic consequences.

E.D.N.Y. Judge John Gleeson has written some of the most cogent critiques of harsh sentencing laws and guidelines—pointing out, for example, in United States v. Ovid that the fraud guideline “does not account for many of the myriad factors that are properly considered in fashioning just sentences"18 and, in United States v. Vasquez, describing mandatory minimum sentences for low-level participants in drug conspiracies as “miscarriages of justice [.]. in small doses.” 19 In Rivera, sitting by designation and writing the majority opinion, he pulls no punches on the crack-cocaine disparity, denouncing it in some of the most explicit language yet in a Second Circuit decision.

Convicted after trial of crack distribution, Rivera had been classified at his original sentencing as a career offender, but granted a modest three-level downward departure based on a neuropathological assessment that he suffered from “a profound cognitive disability.”20 His sentence was 292 months. The issue on appeal was what was his “applicable guideline range”?21 for purposes of determining his eligibility for a sentencing reduction under the retroactive crack amendment? If it was the career offender guideline, he was out of luck; if the post-departure range, he would be in the running for an additional 30 months off. Applying the rule of leniency, the Court opted for the latter construction. This dry textual analysis need not be done “wearing blinders.”22 Retroactive amendments, by their nature, are designed to rectify past inequalities, and “the now-infamous 100-to-1 ratio was the source of shameful inequalities,” characterized by the Department of Justice itself as “unjustified, fundamentally unfair and racially discriminatory.”23

Judge Gleeson’s damning words about the crack-cocaine disparity and other guideline iniquities bring to mind Justice Anthony Kennedy’s testimony at a congressional hearing in 2004, when he described as “courageous” and “independent” those federal judges who depart downward from “unjust guidelines.”24 Since then, the Supreme Court issued Booker, opening up a whole new vista of sentencing opportunity—limited not by courage but imagination. But as I have noted in the past, while judges are flexing their departure power post-Booker, they continue to incarcerate at the same levels as before.25 The legal restraints have been removed, but the statistics confirm that norms play as powerful a role in maintaining the status quo. In other words, there is tinkering on the edges but the machinery is firmly in place.

What can practitioners do? As Banki, Lee and Rivera demonstrate, creative advocates can mine their cases for statutory and guideline ambiguities, anomalies and outright injustices, as well as explore their client’s history and participation in the offense for compelling mitigation. Such mitigation may have more traction if accompanied by in-depth mitigation and/or expert reports.26 As research on the civil rights movement can tell us, it is advocates who effect long-term change—individual wins aggregating to a point where the center cannot hold, and the current incarceration rates and severity are viewed as they should be: unacceptable in a civilized society. A

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17 Id. (my emphasis). These words would apply, for example, to discovery/Brady requests relating to sentencing; demands for documents provided to and/or underlying the Probation Department’s factual and legal conclusions in the PSR; and applications to adjourn the sentencing, to appoint an expert to conduct an analysis relevant to sentencing, or produce a cooperating defendant for cross-examination.

18 2010 WL 3940724 at *1 (E.D.N.Y. October 1, 2010).


20 2011 WL 5022734 at *1.

21 “[Eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) [of § 1B1.10] that lowers the applicable guideline range.” Id. at 3 (quoting § 1B1.10 cmt. n.1(A)).

22 Id. at 7.

23 Id. Judge Gleeson notes – the irony is palpable – that the Sentencing Commission has already plugged the ambiguity identified in Rivera so others in his position will not get the benefit of the retroactive adjustment. But Judge Gleeson makes clear that the Commission’s fix is a substantive one and therefore cannot fairly be applied retroactively to Rivera on remand. Id. at *13.


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“Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.”

Justice Louis D. Brandeis, Olmstead vs. United States 277 U.S. 438 at 474 (1928), From his dissenting opinion in the first wiretapping case to reach the Supreme Court.
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Website: 

Bar Admission State: Year Admitted: 

*Please circle membership type.*

<table>
<thead>
<tr>
<th>Membership Type</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lifetime Member</td>
<td>$2500</td>
</tr>
<tr>
<td>President’s Club</td>
<td>$500</td>
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<tr>
<td>Sustaining Member</td>
<td>$300</td>
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<tr>
<td>Regular Member</td>
<td>$200</td>
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<tr>
<td></td>
<td><em>Income over $50,000</em></td>
</tr>
<tr>
<td></td>
<td><em>In practice over 5 years</em></td>
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<tr>
<td>Regular Member</td>
<td>$125</td>
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<tr>
<td></td>
<td><em>Income under $50,000</em></td>
</tr>
<tr>
<td></td>
<td><em>In practice less than 5 years</em></td>
</tr>
<tr>
<td></td>
<td><em>Full-time public defender</em></td>
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<tr>
<td>Associate Member</td>
<td>$175</td>
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<tr>
<td></td>
<td><em>Non-lawyer</em></td>
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<tr>
<td>Law Student</td>
<td>$50</td>
</tr>
<tr>
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<td><em>School: Graduation date:</em></td>
</tr>
</tbody>
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Membership dues can be paid by check or charged to American Express, MasterCard, or Visa.

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

NYSACDL Office
2 Wall Street
New York, New York 10005
Phone: 212-532-4434
Fax: 888-239-4665

Please charge my credit card.

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

Our Mission

- To promote study and research in the field of criminal defense law and the related arts.
- To disseminate and advance by lectures, seminars, and publications the knowledge of the law relating to criminal defense practice.
- To promote the proper administration of criminal justice.
- To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases.
- To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby
- To protect individual rights and improve the criminal law, its practices and procedures.
Since 2000, Legal Audio has been providing Audio & Video Forensic services for the U.S. Attorneys, FBI, Law Enforcement Agencies, Private Law Firms, Private Investigators, Insurance Companies, Legal Aid Society and others. Our experience ranges from Federal cases to Local and Civil cases. We’ve seen and heard it all - everything including wiretaps and interviews to security video and 911 calls.

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Sincerely,

Frank Piazza

Frank Piazza, President