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I am deeply honored to assume the helm of this Association for 2012, filling Kevin O’Connell’s large and resonating footsteps. His year culminated in our 2012 Annual Dinner, which filled the elegant Prince George Ballroom, and also filled the hearts of the attendees with the power and promise of our profession – especially when we join forces. I look forward to harnessing that power, as my predecessors did, to improve the capability and standing of our profession, and the rights of our much-maligned and mistreated clientele.

For the first time, our dinner was sponsored by our new 501(c)(3) charitable arm, the NYSACDL Foundation, Inc. Proceeds from the sold-out event will support the creation of a trial lawyers’ college.

Introducing New York Chief Judge Jonathan Lippman, the recipient of our William Brennan Award for Outstanding Jurist, the Honorable Barry Kamins, Administrative Judge of the Criminal Court of the City of New York, reminded us of Judge Lippman’s inspiring leadership on the Court, not just in his policy positions but also in his courageous opinions. One in particular stands out: People v. Weaver, which held that the police must obtain a judicially-issued warrant before they may attach a GPS device to a suspect’s automobile, presaging the United States Supreme Court’s unanimous January 23, 2012 decision in United States v. Jones. (In fact, NYSACDL joined a broad coalition of amici in both cases.) In her concurrence in Jones, Justice Sonia Sotomayor quoted Judge Lippman’s observation that “[d]isclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.” Weaver was without doubt one of the most important decisions on privacy and Fourth Amendment rights in the digital age.

Chief Judge Lippman’s acceptance speech was notable not just for its passionate content, but his passionate delivery. Urging us to seek justice in our work, he outlined the criminal justice issues he believes are the most pressing. He deplored the criminogenic effect of the criminal prosecution of children. He proposes that nonviolent offenses should be managed like Family Court offenses. He is working to see to it that every New Yorker who is arrested is provided a lawyer at his or her arraignment (arraigning defendants without counsel is common in the city, town and village courts outside the City). The Chief Judge also believes that the right to counsel in criminal defendants, enshrined in our law almost fifty years ago in Gideon v. Wainwright, should be extended to poor civil litigants who are, for example, threatened with homelessness or deportation. And, through the New York State Justice Task Force which he commissioned, he aims to
ensure more reliable eyewitness identification procedures (including videotaping),
greater access to DNA for convicted defendants, and the prevention of wrongful
convictions. The standing ovation Chief Judge Lippman received was spontaneous
and heartfelt.

Our Thurgood S. Marshall Award for Outstanding Criminal Practitioner was
given to David Ruhnke, a member of the Federal Death Penalty Resource Counsel
Project. Introduced by his law partner and wife, Jean D. Barrett – also a Resource
Counsel and an equally impressive death penalty lawyer – she pointed out that
David has tried sixteen death penalty cases, avoiding a death verdict in fourteen,
and winning reversal on appeal in the remaining two. Mr. Ruhnke is a modest
man who has much to be immodest about. His commitment to oppose the death
penalty was clear to all. He said the death penalty “is dying,” and predicted its
death in America “in [his] lifetime.” Like Chief Judge Lippman, Mr. Ruhnke
received a resounding standing ovation.

The roadmap to justice, outlined by our honorees, is our guide in 2012. Building
on Kevin’s and our board’s hard work and successes in 2011, we will fight for
the enactment of meaningful discovery reform, including early and immediate
disclosure of information favorable to the defense; the videotaping of post-arrest
interrogations; and the enactment of a law permitting at least some criminal
convictions to be sealed. We will actively oppose the expansion of the DNA
database to misdemeanants. We are planning a series of exciting and informative
Continuing Legal Education programs. We will be a voice for the defense bar
in the press as well as before the courts and the Legislature. And we will work
closely with the National Association of Criminal Defense Lawyers to advance
our goals in the federal courts and across the country.

Richard D. Willstatter, NYSACDL President

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**Continuing Legal Education**

**CROSS TO KILL**
Friday, March 30, 2012
Saint Francis College
Brooklyn, NY

**ANNUAL SYRACUSE**
**SPRING TRAINER**
Saturday, April 28, 2012
Syracuse University School of Law,
MacNaughton Hall
Syracuse, NY

**MENTAL HEALTH AND CRIMINAL LAW SEMINAR**
Friday, May 4, 2012
Poughkeepsie Grand Hotel
Poughkeepsie, NY

**DEFENDING DRUG CASES**
Friday, May 18, 2012
Saint Francis College
Brooklyn, NY

**THE BUSINESS OF CRIMINAL LAW**
Friday, June 14, 2012
New York Law School
Manhattan, NY

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

We are pleased to present our second annual Legislative Issue of ATTICUS. The articles of our contributors cover a broad range of issues which confront the criminal justice community and which we hope will be the subject of legislative attention in the future. This issue also recaps the exciting annual dinner held at the Prince George Ballroom on January 26th at which Chief Judge Jonathan Lippman and David Ruhnke Esq. were suitably honored and Richard Willstatter was installed as NYSACDL’s 25th President. This issue has benefitted from the broad variety of submissions we are receiving for ATTICUS and the growing list of advertisers. The continued support of our members is the most important factor in continuing our effort to produce a publication worthy of New York State’s largest Criminal Practice Bar Association. We have expanded our reports of the news worthy activities of our members and encourage the submission of reports of case results both at trial and on appeal. Submissions of articles, member biographies and digital photos should be directed to atticus@nysacdl.org or to the humble editorial staff.

In our effort to focus on subjects of interest we are seeking articles dealing with evidentiary issues and forensic science for the Spring and Summer issues.

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

John Wallenstein       Ben Ostrer
jswallenstein@aol.com  ostrerben@aol.com

Events

NYSACDL 2012 Board Meetings

May 4-5, 2012
Minnewaska, Ulster County

June 23, 2012
Binghamton

September 22, 2012
Albany

December 1, 2012
New York City

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

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

Contact us for details & rates!
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February 24th, 2012
NYSCDL member Pete Dumas of Malone, in Franklin County, [peterdumas@me.com] won a hard-fought six week murder trial in St. Lawrence County. This was the third time the defendant stood trial upon the charges. The jury is reported to have deliberated for two hours before acquitting a man accused of an alleged grisly 2005 baseball bat homicide. The first trial ended with a conviction which was overturned on appeal. The second concluded with a hung jury. For a more detailed account you can link to the Watertown Daily Times website for well written article by Josh Gore.
www.watertowndailytimes.com/article/20120224/NEWS07/702249806

Editors Note: Three times a charm.

After a Decade, Sag Harbor Attorney Frees Man from Life Sentence
Sag Harbor Express writer Kathryn G. Menu on January 12, 2012 wrote a most interesting article on the release of George McGuire who had been in custody for over 23 years after his arrest and conviction for a 1988 Brooklyn homicide. Mr. McGuire had consistently maintained his innocence of the charges. McGuire stood on the steps of Auburn Correctional Facility in upstate New York with his attorney and NYSACDL member Laura Solinger, who worked on McGuire’s case for a decade in both state and federal courts. Late last year, with appeals pending in both courts, Laura negotiated the reduction of McGuire’s sentence with federal prosecutors resulting in his release on parole. A detailed account of Laura’s efforts and the case history can be found on the Sag Harbor Express website.

Editors Note:
We hope to chronicle the efforts of our members and provide useful and informative links. If you are aware of a case result which would be of interest to our readers we encourage you to submit it or a link to the editors via atticus@nysacdl.org or jswallenstein@aol.com or ostrerben@aol.com

Ben O.

INVALUABLE RESOURCES FOR CRIMINAL DEFENSE ATTORNEYS
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In the News

February 23rd, 2012
NYSACDL Opposes DNA plan

NYSACDL opposes the governor’s proposal to require DNA samples from every person convicted of any crime, even a misdemeanor. Any claimed law enforcement objective in collecting DNA data from those convicted of relatively minor crimes is seen as far too speculative to justify the intrusion into personal privacy that collecting individual DNA information creates. NYSACDL recently spoke out on the issue in a Letter to the Editor of the New York Law Journal. A letter was also published in the Times Herald Record. NYSACDL has formed a subcommittee on proposed DNA database legislation and will continue to monitor the issue. The subcommittee is chaired by Bruce Barket who is joined by members Timothy Hoover, Andrew Kossover, Marshall Mintz, JaneAnne Murray and Karen Newirth.

February 10th, 2012
NYSACDL Urges Members to Call for Restoration of NYSDA’s Funding

NYSACDL is urging members to write to legislative leaders calling for the restoration of funding for NYSDA’s Public Defense Backup Center. NYSDA’s Public Defense Backup Center which performs New York State’s backup function under the Sixth Amendment is jeopardized by Governor Cuomo’s proposed FY 2012 budget which effectively represents a 42% cut from what it costs NYSDA to run the Backup Center in the current fiscal year. This denigration of the indigent defense function would be a serious blow to the right to counsel in New York State. NYSACDL asks you write legislative leaders and the Governor to seek the $2,211,800 NYSDA needs to run the same Backup Center program it delivered last year and to restore its crucially important statewide Basic Trial Skills Program.

The Backup Center provides training, research, and substantial technical assistance for free or at affordable rates to local public defense programs with the result being improved quality of representation for public defense clients. With the continued erosion of services and resources for public defense programs due to local budget cuts, the need for adequate funding of the Backup Center is even more pronounced so that this invaluable and consistent resource can exist.

February 14th, 2012
State of the Judiciary Address

February 14, 2012 – Chief Judge Jonathan Lippman delivered the State of the Judiciary Address today outlining an impressive agenda for the year. The Address covered important initiatives which Judge Lippman is committed to implementing through the judiciary. These include a reassessment of the treatment of juveniles which is in keeping with developing scientific research on the development of the adolescent brain, continued vigilance of law enforcement and prosecutorial practices to prevent wrongful convictions and a concomitant commitment to providing indigent defense, and, of particular need during these harder economic times, expanded civil legal services for those facing civil legal proceedings ranging from foreclosure or eviction to domestic violence, children services, access to health care and education, and consumer debt among other travails. Visit the Court of Appeals website to link to the webcast and a pdf of the Judge’s speech.

February 10th, 2012
NYSACDL Co-Hosts Women’s History Month Event

“Ready, Set Lead! Women’s Future: Where Do We Go From Here?” a Long Island – wide program honoring amazing women leaders from various fields will be held on March 23, 2012 from 6:00 – 9:00 p.m. at the Melville Marriott. This year’s program marking Women’s History Month will be hosted by, among others, four bar associations comprised of over 10,000 members: the Nassau County and Suffolk County Bar, and the Nassau County and Suffolk County Women’s Bar Associations, and the Partnership to Advance Women Leaders (PAWL). This year, NYSACDL is proud to join these Associations in co-hosting the event. Additional information

The women being honored are:

Hon. A. Gail Prudenti, Chief Administrative Judge of NYS for Law

Dr. Virginia Maurer
Breast Surgeon and Founder of The Maurer Foundation for Breast Health for Medicine

Kris Fischer
Editor of the NYLJ for Business

Theresa Reganante
CEO of United Way for Public Service

Sister Elizabeth Hill
President of St. Joseph’s College for Academia.

CNN Reporter Sandra Endo will be moderating the event.

Last year’s joint program “Ready, Set, Lead! Empowering Women in the Political Process,” United States Supreme Court Justice Sandra Day O’Connor addressed the gathering of over 500 Long Islanders by video. In her words, “If our country is going to maintain a leadership edge, we must fully support and promote women”. The astounding success inspired the creation of the organization PAWL. This year’s program promises to be as successful.

January 23rd, 2012
NYSACDL Opposes Bill Authorizing Forfeiture At Sentencing

Calling it a “dangerous and burdensome expansion of the criminal court’s responsibility”, NYSACDL President Kevin O’Connell recently voiced opposition to a bill contained within the 2012 – 13 budget recently submitted to Gov. Cuomo which requires judges to order asset forfeiture at sentencing on every felony and misdemeanor conviction. Noting that criminals should not be allowed to profit from crimes, NYSACDL nonetheless opposes the current bill which lacks the procedural notices and safeguards in place in the current state forfeiture scheme.
Mr. O'Connell cited as example, for instance, a teenager uses drugs in the family home, is the home “involved” in the crime thereby causing the parents to lose the home?

The bill is supported by prosecutors and intended to obviate the need for prosecutors to pursue asset forfeiture in a separate civil proceeding. Funds from forfeited assets go to state and local governments including prosecutors’ offices. The bill as submitted however is broad and greatly expands the courts’ authority to order forfeiture of assets “constituting, or derived from, proceeds the result of” a violation of any offense.

The bill and NYSACDL’s response were detailed in a recent New York Law Review Article: Caher, John, Cuomo Bill Would Move Forfeiture Rulings to Criminal Sentencings, NYLJ, January 20, 2012

December 16th, 2011

**NYSACDL President Testifies on Raising Age of Criminal Responsibility**

December 15, 2011 – NYSACDL President Kevin O’Connell testified before the New York State Permanent Sentencing Commission in support of Chief Judge Jonathan Lippman’s proposal to raise the age of criminal responsibility in New York to 18. The move would alleviate the burden of a criminal conviction and often dire collateral consequences such as getting accepted into college or programs, getting jobs, and of course, immigration consequences to name a few. Growing awareness of the development of the adolescent brain and the differences between adults and adolescents point to the need and justification for different treatment of the younger offenders. It is urged that the age of criminal responsibility be raised and the eligibility for Youthful Offender Treatment be expanded for misdemeanors and non-violent felonies. NYSACDL President Kevin O’Connell’s Testimony.

December 16th, 2011

**Hurrell-Harring: Important Consequences**

In a recent article, The Right to Counsel at Arraignment in New York, John P. Gross, Indigent Defense Counsel for the National Association of Criminal Defense Lawyers, discusses the importance of the Court of Appeals decision in Hurrell-Harring recognizing that arraignment is a critical stage of the criminal proceeding and the need to provide counsel at that critical juncture. The Court of Appeals decision in Hurrell-Harring v. New York, 15 N.Y.3d 8 (2010) reinstating a challenge on behalf of indigent defendants to the adequacy of New York’s public defense system served as an important recognition of the need to remedy the failure to provide indigent criminal defendants with counsel beginning at arraignment. Yet, defendants throughout the state continue to be arraigned without counsel in the majority of cities and towns outside of New York City. The article is reprinted with permission from the December 12, 2011 edition of the New York Law Journal © 2011 ALM Media Properties, LLC. All rights reserved. www.almreprints.com; also reprinted in The Champion.

December 8th, 2011

**Lawyers Uncover Facebook Posts About West Indian Day Parade**

NYSACDL members Paul Lieberman and Benjamin Moore used 21st century investigative techniques to uncover a string of comments on Facebook by NYPD personnel about Brooklyn’s West Indian Day Parade. The comments - some clearly offensive - provided material for a very effective cross-examination of the officer who arrested their client on the morning of the parade. After the acquittal, the comments, which had been saved by the attorneys before being taken down mysteriously from the website, were forwarded to the NYPD Internal Affairs Bureau for investigation. As noted in the New York Times the disclosure of the comments brought calls for an independent investigation of the incident and condemnation from numerous public officials. Read more in the New York Times

December 7th, 2011

**NYSACDL Attorneys Meet With International Delegation from China**

December 6, 2011 – Members of NYSACDL met today with a delegation of attorneys from China who are visiting the United States under the auspices of the Department of State’s International Visitor Leadership Program. The delegation is here meeting with attorneys, visiting law schools, courts, and bar associations in an effort to better understand the U.S. legal system, judicial processes and constitutional provisions. NYSACDL past president Joshua Dratel, NYSACDL treasurer Aaron Mysliwiec, vice-presidents Michael Shapiro and Donna Newman and Executive Director Margaret Alverson met with JingLi Cai, attorney from Beijing, Cai RangFa, Professor at Law School of Qinghai Nationalities University, ShiDong Dong, Senior Judge, Supreme Court, People’s Republic of China, PiLiang ShanGuan, Associate Professor, Kenneth Wang School of Law, SooChow University, ZhenYu Want, Director, Beiing Impact Law Firm, Meng Yu, Director of Investigation Supervisions, The People’s Procurate of Chaoyang District, Beijing. The exchange included a discussion of the Fourth Amendment protections against unreasonable searches and seizures and the application of the exclusionary rule, the Fifth Amendment’s right against self-incrimination and the right to counsel. Mechanisms for providing counsel, whether retained, pro bono, or court appointed were also discussed.

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We welcome information from all members concerning verdicts and results.

Email submissions to atticus@nysacdl.com or to any of the editors.
I am pleased to present the second annual Legislative edition of Atticus. This issue places an emphasis on the Association’s legislative agenda. With special thanks to our contributors and editors, Tim Donaher, Ben Ostrer, and John Wallenstein, we have provided analysis of several current legislative initiatives including articles by Andre Vitale on the right to counsel at Pre-Sentence Investigation & Report interviews, Alan Rosenthal and Patricia Warth on Parole Reform and other interesting contributions by Greg Lubow and JoAnn Page and Glen Martin of the Fortune Society. We have also included some brief updates on legislative matters addressed in last year’s inaugural Legislative Issue.

The membership of the Legislative Committee, which appears on the adjoining page, continues to grow as have the activities undertaken on behalf of the criminal defense community and NYSACDL. With the help of our lobbyists, Manatt, Phelps & Phillips, LLP, we are regularly asked for comment on proposed legislation by State legislative leadership, gubernatorial staff, and the media. Of course, we also quickly respond and submit unsolicited memos on proposed legislation we perceive as ill-conceived. We see our role as assisting our elected representatives to understand complicated criminal justice issues. We emphasize that any new legislation must achieve fairness as well as constitutional compliance.

NYSACDL has achieved some success by convincing members of the Legislature that the recent DNA database expansion should be accompanied by greater discovery access by defendants, pre and post conviction. We have submitted memorandums and Op-ed letters on a variety of issues including the expansion of the DNA database, adequate funding for the delivery of public defense to the indigent, the Governor’s proposed mandatory forfeiture initiative, and perhaps the most important of issues: discovery reform.

True open discovery procedures will help the innocent and over-charged fairly prepare a defense and it will encourage the guilty to accept proposed plea dispositions without needless and costly delays. Early disclosure will not only prevent wrongful convictions, but wrongful indictments. Any falsely accused individual will tell you that even after exoneration, once an indictment is filed, there will always be those that think the defendant “got away with it” or simply just had “a good lawyer.”

Fair minded prosecutors support open discovery. In those jurisdictions where full voluntary disclosure exists, justice is more regularly achieved. Prosecutors who oppose discovery reform are more focused on winning and convictions than fairness. Time and time again, I hear from members of the public, even those who could be described as “law and order” types, that they want our criminal justice system to be unbiased. The public has a right to expect our legislators to work towards accomplishing such fairness. We have been successful in raising the consciousness of the public and the legislature on the consequences of proposed legislation that hasn’t been fully analyzed. We continue to work with other
Legislative Committee:

Andy Kossover, Chairman (New Paltz)
James Baker (Ithaca)
Michael Baker (Binghamton)
Bruce Barket (Garden City)
Wayne Bodden (Brooklyn)
Andy Correia (Wayne County)
Tim Donaher (Rochester)
Stefani Goldin (Mineola)
Ray Kelly (Albany)
Greg Lubow (Greene County)
Aaron Mysliwiec (New York City)
Kevin O’Connell (New York City)
Alan Rosenthal (Syracuse)
Lisa Schreibersdorf (Brooklyn)
Don Thompson (Rochester)
Andre Vitale (Rochester)
Nikki Zeichner (New York City)

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.

organizations to jointly support legislative priorities such as discovery reform and a sealing statute. Our goal always has been, and remains, the creation of a fairer system of justice.

By your membership in NYSACDL, you become part of this pursuit of justice and well-reasoned legislation. We will continue to call on members to contact their respective representatives to address legislative issues discussed in this edition of Atticus as well as any new bills worthy of comment. By doing so, we not only serve our clients and members, but all the people of the State of New York.
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New York Still in need of Parole Reform

In the Winter 2011 legislative issue of *Atticus*, NYSACDL announced that it was joining a growing coalition of legal, advocacy and community organizations calling for the reform of New York’s parole law and supporting the Safe And Fair Evaluation of Parole Act (SAFE Parole Act). The article on parole reform in that issue detailed the proposed changes to Executive Law § 259-i and explained why a change in parole decision-making procedures was needed. Since last winter the SAFE Parole Act has been introduced in both the New York State Assembly and Senate.¹

As the readers of *Atticus* are aware, one of the first cost saving measures of the Cuomo administration was the merger of the Department of Correctional Services (DOCS) and the Division of Parole into one agency, the Department of Corrections and Community Supervision (DOCCS). This change was enacted as part of the Governor’s March 31, 2011 Executive Budget Bill.

A far less noticed change came in the form of several amendments to Executive Law § 259-c(4), § 259-i(2)(c)(A), and the addition of Correction Law § 71-(a) and § 112(4), which purport to change the procedures for making parole release decisions by the parole board. (Chapter 62 of the Laws of 2011, Part C, Subpart A).

Correction Law § 71-a requires the development of a Transitional Accountability Plan (TAP) to be used for each individual admitted to DOCCS. The TAP is described by the statute as a “comprehensive, dynamic, and individualized case management plan based on the programming and treatment needs of the inmate.” The mandated purpose of the TAP is to “promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release.” The TAP replaces the inmate status report previously used by the parole board when assessing the appropriateness of an inmate’s release to parole supervision and is the document that is to be used “when making your (parole board’s) parole release decisions.”² According to Parole Board Chairwoman Andrea Evans, the TAP is an instrument “which incorporates risk

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¹ The SAFE Parole Act was introduced in May 2011 by Senator Thomas Duane in the Senate (S.5374) with co-sponsors Senators Velmanette Montgomery, Bill Perkins and Gustavo Rivera, and by Assembly Member Jeffrion Aubry in the Assembly (A.7939) with co-sponsors Assembly Members Andrew Hevesi, Eric Stevenson, Herman Farrell, Jr., Richard Gottfried and John McEneny.

² Memo to Parole Board from Chairwoman of the Parole Board Andrea Evans, dated October 5, 2011.
and needs principles” and “will provide a meaningful measurement of an inmate’s rehabilitation.”\textsuperscript{3}

Correction Law § 112(4) requires the Commissioner of DOCCS and the Chair of the Parole Board to develop and implement a risk and needs assessment instrument to facilitate appropriate programming both during incarceration and community supervision and designed to facilitate the successful integration of the formerly incarcerated person into the community.

An even greater shift in procedures is called for by newly amended Executive Law § 259-c(4) which became effective November 1, 2011. The amendment requires the state board of parole to:

establish written procedures for its (parole board’s) use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such person upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

At least one Judge, Hon. Lawrence H. Ecker of Supreme Court, Orange County\textsuperscript{4} and one commentator, Professor Phillip M. Genty of Columbia Law School, have read this amendment to signal a significant shift.\textsuperscript{5} Each views the amendment to Executive Law § 259-c(4) as a modernization of the Parole Board that requires the replacement of static, past-focused conduct with more dynamic present and future-focused risk assessment procedures to guide the Board.

From Professor Genty’s perspective:

Such procedures...will rationalize parole decision-making by placing the focus primarily on who the person appearing before the Parole Board is today and on whether that person can succeed in the community after release, rather than - as under the previous “guidelines” - on who the person was many years earlier when she/he committed the crime. This is a shift of potentially sweeping significance.

In light of such a potentially sweeping shift, it is reasonable to ask whether there is still a need for parole reform. The answer is an emphatic “yes” when one considers the additional amendment to Executive Law § 259-i(2)(c)(A). This statute was amended only to the extent that all of the old factors previously relied upon by the Parole Board were consolidated into one subdivision of the parole statute. Previously, factors \textit{vii} (seriousness of the offense) and \textit{viii} (prior criminal history) were separately set forth in § 259-i(1), which is now repealed. They have been incorporated into subsection (2), and so these static factors remain. These are the same static factors that for years were used by the Parole Board to look backward, not forward, and to deny parole based upon who the individual once was and what they once did.

Therein lies the difficulty of applying the old backward-looking static factors while attempting to follow the new dynamic procedures for parole release.

\textsuperscript{3} Id.
\textsuperscript{5} “Changes to Parole Laws Signal Potentially Sweeping Policy Shift,” NYLJ, September 1, 2011.
decision-making based upon present and future-looking risk and needs principles. There is a contradiction that the Parole Board will find very difficult to conceptually reconcile. As recently as October 5, 2011 Parole Board Chairwoman Andrea Evans, in a memo on the subject of both the TAP and the newly amended Executive Law § 259-c(4), instructed her Parole Board members that “the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed through the aforementioned legislation (Executive Law § 259-c(4) and Correction Law § 71-a),” thus directing them right back to the “seriousness of the offense” and the other seven factors still contained in Executive Law § 259-i(2)(c)(A).

It is critical to understand that the eight factors set out in Executive Law § 259-i need to be amended, because at least one of them, “the seriousness of the offense,” is inconsistent with a parole model that is based upon the use of risk and needs principles. As noted by a national expert and major proponent of the use of risk and needs principles, Edward J. LaTessa, Ph.D., “[r]isk refers to risk of reoffending and not the seriousness of the offense.”

Stated simply, the newly amended Executive Law § 259-c(4) is incompatible with the archaic Executive Law § 259-i. There is a significant contradiction between the old parole decision making factors in Executive Law § 259-i(2)(c)(A) and the newly amended forward-looking risk and needs principle shift contemplated by Executive Law § 259-c(4). Problematic decisions like the one in Matter of Thwaites will continue to trouble the courts and wreak havoc with parole release until Executive Law § 259-i is modernized. That is exactly what the SAFE Parole Act will do as it will eliminate the contradiction between the remnants of an old decision-making system that looks backward at the “seriousness of the crime” and a present and forward-looking procedure that relies on risk and needs principles.

As noted in the Legislative Memo to the SAFE Parole Act (A.7939) the SAFE Parole Act “would enhance the Parole Board’s ability to operate with greater consistency, accountability and transparency in performing this function by providing greater specificity and requirements in the procedures used thus modernizing and revitalizing the board of parole.” If enacted, the SAFE Parole Act would implement the following changes:

A. Remove from parole consideration “the seriousness of the offense,” leaving that consideration exclusively to the sentencing court.

B. Require the Parole Board to consider the parole applicant’s preparedness for reentry and reintegration as evidenced by the applicant’s institutional record pertaining to program goals and accomplishments as stated in the facility performance reports, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and other sentenced persons, and other indicators of pro-social activity, change and transformation.

C. Require that the Parole Board consider the progress made towards achieving the programming and treatment needs developed in the transitional accountability plan.
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FEATUREING:
Cross Examination of the Cooperator, Benjamin Brafman, Esq.
Overview of the Forensic Expert, Benjamin Oster, Esq.
Cross Examination in a Finacial Case, Roland Riopelle, Esq.
Cross Examination in a Drug Case, Russell Schindler, Esq.
Architecture of Constructive (and Destructive) Cross Examination, Bobbi Sternheim, Esq.

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St. Francis College, Brooklyn, NY

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Civil Commitment and Other Consequences of Sex Offender Convictions, Craig Schnapper, Esq.
Defending DWI Ignition Interlock Cases, John Ingrossa, Esq.
View From the Bench: Local Court Practice, Hon.
Thomas Miller, Esq.
Ethical Boundaries and Considerations in Conducting the Defense Investigation, Panel Discussion moderated by Andre Vitalo, Esq.

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Effective Assistance of Counsel: Meeting and Exceeding the Standard, Richard Greenberg, Esq.

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Ethics in Specialty Courts, Lisa Schreiberdorf, Esq.
Voir Dire in a Drug Case, Aaron Mysliweic, Esq.
Defense of the Observation Sale, Karen Smollar, Esq.
Defense of the Boy and Bust Case, Arnold Levine, Esq.
Controlling Search Warrants and Wiretaps, Marc Fennich, Esq.

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D. Require that if parole is not granted the Parole Board will state in detail and not in conclusory terms the factors and reasons for the 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 release.

E. Require that if parole is not granted the DOCCS shall, within ninety days of the hearing decision, provide the parole applicant access to the program or programs, activities and/or facilities needed in order to provide the opportunity to fulfill the requirements set forth by the board.

F. Require that if the requirements previously set forth by the Parole Board at the time of denial have been successfully completed and the parole applicant’s institutional record has been satisfactory during the time between the previous and current parole hearing, release shall be granted.

Without the changes contemplated by the SAFE Parole Act, the Parole Board will flounder, courts will continue to be frustrated, and many men and women will suffer through continued incarceration based upon who they were many years ago rather than the rehabilitated and motivated law-abiding citizens that they have become.
Changing the Age of Majority in New York State

Beyond Judge Lippman’s Call for

Kevin D. O’Connell is the 2011 President of NYSACDL and member of the Association of the Bar of the City of New York, where he has served on numerous committees, the Criminal Justice Section of the New York State Bar Association, the Criminal Justice Section of the New York County Lawyers Association, The New York Criminal Bar Association, and the National Association of Criminal Defense Lawyers. Kevin can be reached at koconnell@nycds.org

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NYSACDL’S RECOMMENDATIONS

In a September 21, 2011 speech to the Citizens Crime Commission, Chief Judge Jonathon Lippman challenged legislators and criminal justice stakeholders to confront a “glaring problem” with our criminal justice system – the age of criminal responsibility in New York. Noting that 18 is the age of criminal responsibility in the vast majority of states and 17 in all other states except North Carolina and New York, Judge Lippman pointed out that “New York may soon have the dubious distinction of standing alone on this issue.”

As advocates, we are painfully aware of the impact a criminal conviction has on the lives and futures of our youngest clients. A criminal conviction can doom a young person to a life of second-class citizenship, creating insurmountable barriers to employment, licensing, education, housing, volunteer work, and other aspects of a full, productive life in the community.

There is no question that, to be effective, Judge Lippman’s call to confront this “glaring problem” in New York will require significant legislative and cultural change. The transfer of arrests involving 16 and 17 year olds to Family Court will require a change in how we think about the behavior of all teenagers, a reallocation of resources from criminal to Family Court, and an initial investment in the community-based resources needed to ensure that these teenagers receive the services needed to successfully re-connect with their schools, families, and communities. But the long term pay-off will be worth the effort if it means that more young people will be able to successfully reintegrate into the community without the life-long burden of a criminal conviction.

To fully realize the benefits of treating 16 and 17 years olds arrested for criminal conduct as minors, it is critical that this State avoid the temptation to “play it safe” by changing the age of majority for only non-violent, minor offenses. A

1 This article is a compilation of the written testimony submitted to the Sentencing Commission’s Subcommittee on Changing the Age of Majority by the Center for Community Alternatives (CCA) and NYSACDL. The primary authors are Patricia Warth and Alan Rosenthal (CCA), and Kevin O’Connell (NYSACDL).

2 North Carolina currently has pending legislation to raise the age of majority.
better understanding of how teenagers fundamentally differ from adults and the policy implications that flow from these differences leads to NYSACDL's recommendations as this State moves to respond to Judge Lippman's call to finally catch-up with the rest of the nation.

**THE BIOLOGY OF ADOLESCENCE: UNDERSTANDING HOW TEENAGERS ARE WIRED DIFFERENTLY THAN ADULTS AND WHY THE ADULT CRIMINAL JUSTICE SYSTEM IS ILL-SUITED TO DEAL WITH TEENAGE CRIME.**

Anyone who has parented, educated, or cared for teenagers knows that even the best-behaved, most goal-oriented teens are prone to shocking lapses of judgment. Nearly all of us know stories of college-bound teenagers who surprisingly end up in the Emergency Room after a night of thoughtless drinking or in jail after taking a car for a “joy-ride” or breaking into a home “on a dare.” The irrational and erratic behavior of teenagers often leaves us scratching our heads asking: What happened? How could such a good kid do something so shockingly stupid?

The answer is beginning to emerge from the rich body of biological and sociological research about adolescent development that has occurred over the last fifteen years. This research is confirming what parents, educators, and caretakers have intuited for years: biologically, teens are poor thinking, impulsive, and risk-prone individuals. There are several biological events that occur during the adolescent years that account for this. The most significant event is the accelerated development of the brain and significant changes “in the frontal lobe of the brain, where impulse control, judgment and long-range planning occur.” Because this part of their brains is still changing, teenagers are not programmed for good executive functioning (that is, the ability to control impulses, think about consequences, and plan for the future). In addition, adolescence is that time of life when, biologically, young people are driven to “leave the nest” and venture out and away from adults. As one researcher described it: “While the structure of the teenage brain may result in startling gaps in reasoning and decision-making, adolescents pursuit of risks, novelty and reward is more intense than it will ever be again. And that drive is geared toward one goal common to all mammals: to leave the nest and explore new territories in search of a mate.”

Add to this mix the fact that during the teenage years, there is a sudden surge of dopamine, a biological chemical that “intensifies pleasure and makes you want to seek out rewards again and again.” A “dopamine system in overdrive” can cause teenagers to “want immediate rewards,” and because the good decision-making part of their brain is not fully developed, they have difficulty controlling this drive. Finally, teenagers experience accelerated hormonal changes, which further enhances “the tendency to take risks, which is very much about impressing peers to winning their approval.”

In *Roper v. Simmons*, the United States Supreme Court acknowledged that teenagers are different from adults in three ways that are relevant to decision-making about teenaged crime. First, teenagers are less mature than adults and have a less developed sense of responsibility, which often results in

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3 The quoted information in this paragraph is from Anita Slomski, “Crazy Kids,” Photomag.com (Fall 2010).
4 *Id.*
“impetuous and ill-considered actions and decisions.” 6 Second, teenagers “are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure.” 7 Third, “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” 8 These differences, reasoned the Court, render it constitutionally impermissible to execute children aged eighteen and younger for a crime, no matter how heinous and violent the crime is. 9

These biological and sociological facts about how teenagers differ from adults give rise to the following significant policy considerations in addressing teenage crime:

- **First**, teenagers are not as morally culpable for their criminal conduct as adults.
- **Second**, the penological goals of retribution, deterrence, and incapacitation apply with far less force to teenagers than to adults. 10 “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for a wrong to the victim, the case for retribution is not as strong with a minor as with an adult.” 11 Deterrence assumes the existence of pre-crime thoughtfulness and consideration - thought processes which are significantly diminished in teenagers. Incapacitation is a less justifiable goal with teenagers because this goal fails to acknowledge the capacity teenagers have for positive change and ignores the fact that imprisonment can be particularly destructive and punitive for younger people. 12
- **Third**, teenagers are susceptible to both negative and positive influences. As adults, we have the moral responsibility to ensure that teenagers – even teenagers who have committed serious crimes – have the opportunity to benefit from a positive, pro-social environment. Prison is not such an environment and can have life-long, negative effects on teenagers. 13
- **Fourth**, and perhaps most importantly, adolescence is transitory. Teenagers mature and outgrow their impulsive and risky behavior, and as a result, the “vast majority of adolescents who engage in criminal or delinquent behaviors desist from crime as they mature.” 14 This is no less true for teenagers who

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6 Id. at 569.
7 Id., citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (“Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage.”).
8 Id. at 570 (citing E. Erikson, Identity: Youth and Crisis (1968)).
9 The Court reiterated these innate differences between juveniles and adults five years later, in Graham v. Florida, 130 S.Ct. 2011 (2010) to hold that life without parole is a constitutionally impermissible sentence for a young person under the age of 18 who commits a non-homicide offense.
10 Roper v. Simmons, 543 U.S. at 571.
11 Id.
13 Id. (noting that the “process of institutionalization is facilitated in cases in which persons enter institutional settings at an early age, before they have formed the ability and expectation to control their own life choices”).
engage in violent behavior; a violent act committed by a 16 or 17 year old simply is not predictive of that child’s behavior as an adult.\(^\text{15}\)

Contrast these policy considerations with the realities of our adult criminal justice system - a system in which the goals of retribution and incapacitation continue to play a prominent role.\(^\text{16}\) Moreover, an adult criminal conviction results in de-facto, if not de-jure, perpetual punishment as the social stigma of a criminal conviction and the legal barriers that are erected last a lifetime.\(^\text{17}\) Prosecution as an adult in criminal court necessarily entails a more punitive approach with life-long consequences.

Considered in combination, the research about adolescent development, the policy

\(^{15}\) Indeed, the Office of Juvenile Justice and Delinquency Prevention’s (OJJDP) review of “Pathways to Desistance Study” reports that most serious juvenile offenders “mature” out of crime. OJJDP notes that longer juvenile incarceration is ineffective in reducing recidivism; rather, the research shows that community-based interventions, such as substance abuse treatment, are effective in reducing recidivism. See Edward P. Mulvey. 2011. Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders. Juvenile Justice Fact Sheet. Washington, D.C.: U.S. Department of Justice, Office of Juvenile Justice Delinquency Prevention, (available at www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf.)

\(^{16}\) Justice Anthony M. Kennedy, 2003 Speech at the American Bar Association Annual Meeting (in calling upon the ABA to address the “inadequacies and injustices” of our criminal justice system, Justice Kennedy stated as follows: “Our resources are misspent, our punishments too severe, our sentences too long.”).

\(^{17}\) Special Committee of the New York State Bar Association, “Re-Entry and Reintegration: The Road to Public Safety,” (available at the “publications” section of the New York State Bar Association at www.nysba.org), at 7 (summarizing the so-called “collateral consequences of a criminal conviction, and noting that these “consequences are far-reaching, often unforeseen, and sometimes counterproductive”).

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The teenage brain is like a car with a good accelerator but a weak brake.

Professor Laurence Steinburg
Temple University
implications, and the realities of our adult criminal justice system confirm that the adult criminal justice system is ill-suited to deal with teenage crime.

**PUTTING THESE IMPLICATIONS TO PRACTICE: RECOMMENDATIONS FOR A RESPONSE TO TEENAGE CRIME THAT WILL ENHANCE PUBLIC SAFETY AND FULLY REALIZE THE POTENTIAL OF OUR YOUNG PEOPLE.**

The foregoing review of the research and the policy implications that flow from it leads to the following recommendations for this State to consider as we embrace and move beyond Judge Lippman’s call for change.

1. **With Few Exceptions, the Age of the Person Rather Than the Nature of Charged Offense Should Control Whether the Person is Prosecuted as a Juvenile in Family Court or an Adult in Criminal Court.**

When a teenager commits a violent crime, the natural inclination is to think of the teen as “acting like an adult,” justifying prosecution in adult court, or to conclude that because the conduct is so serious that prosecution in adult court is “necessary.” Succumbing to such inclinations or drawing such conclusions, however, fails to recognize that the penological goals that favor the adult court’s more punitive approach simply do not apply with the same level of force to teenagers. Furthermore, utilizing the more punitive approach of adult court will necessarily lead to long-term consequences that are not merely counter-productive for the teenager, but for society as a whole.

Responding to teenage crime in a system that focuses on rehabilitation and reintegration holds out the most promise for addressing teenage crime because it recognizes not only teenagers’ lessened culpability, but also their immense capacity for positive change. This is no less true for a teenager who engages in violent behavior. There is no reason to believe – and no research to support the notion – that a teenager who engages in violent conduct is somehow more culpable or less able to change than other teenagers. Indeed, this was the logic employed by the United States Supreme Court in *Roper v. Simmons* -- a case involving a heinous, violent crime -- when it invalidated the use of the death penalty for minors.

The same justifications that drive prosecuting non-violent teenagers as juveniles also drive prosecuting violent teenagers as juveniles. It can be reasonably argued that because of the serious nature of their offenses, it is even more important that in cases involving violent teenage conduct, the justice system adopts an approach that is designed to promote change and life-long law-abiding and positive conduct.

Accordingly, it is recommended that, with few exceptions, the guiding criteria for deciding whether to
prosecute a teenager as a juvenile delinquent in Family Court or as an adult in criminal court be the age of the person and not the nature of the charged crime. We understand that there will be some instances where juveniles will be prosecuted in the adult court system, but such “carve outs” should be extremely limited. Moreover, the 16 and 17 year old teenagers who would be subject to such adult prosecution should be prosecuted like their age-contemporaries, the 13, 14, and 15 year old juvenile offenders, and not like regular adults. Finally, as New York State reforms its juvenile justice system, it would also seem to be an opportune time to review the scope of offenses removed from Family Court to be prosecuted in adult criminal court as juvenile offenses.

2. The Availability of Youthful Offender Adjudication for Those Teenagers Prosecuted as Adults Should Be Expanded.

Currently, youth between the ages of 16 and 19 as well as juvenile offenders prosecuted in the adult criminal justice system may be afforded Youthful Offender treatment. Youthful Offender (YO) adjudication is a mechanism by which to relieve a young person prosecuted in criminal court of the life-long consequences and stigma of a criminal conviction. Even when adjudicated a YO, the young person can still receive a state prison sentence if such a sentence is deemed appropriate and necessary, 18 but the conviction is vacated and the records sealed. With YO adjudication, the young person is punished, but the punishment is not perpetual.

As New York State moves towards raising the age of criminal responsibility, there is also an opportunity to re-examine our application of the State’s YO

adjudication provisions. The same justifications for changing the age of majority are also applicable to expanding existing YO provisions to ameliorate the lifelong consequences of a conviction that attach when a young person is prosecuted in adult court.

Having the 16 and 17 year old population prosecuted in Family Court creates the opportunity to expand mandatory YO adjudication to young people who will continue to be processed in the adult system, both for misdemeanors and first time felony offenses. Indeed, many other states currently offer expungement or sealing opportunities for first-time felony offenses out of recognition of the fact that most people who engage in criminal conduct are one-time offenders. This is particularly true for young people who show great promise for rehabilitation. In public safety terms, it makes sense to ensure that these individuals are able to put their lives back on track and do not needlessly face barriers to employment, housing, higher education, and volunteer opportunities. Mandatory YO adjudication for young first time felony offenders is a mechanism that recognizes the diminished culpability of young people while simultaneously enhancing public safety by making sure such individuals can mature and move forward with their lives as law-abiding, contributing members of the community.

Second, the availability of YO adjudication should be expanded to include those as old as 20 or 21 years. Expanding the availability of YO adjudication in this manner is consistent with the research about human development, which tells us that a person’s brain is not fully developed until a person is in his or her early twenties. This practice would also be consistent with practices in other jurisdictions, which allow for YO adjudication, sealing, or expungement for young adults who engage in criminal conduct.

Expanding YO adjudication as outlined above is not merely a natural compliment to Judge Lippman’s mandate with regard to changing the age of majority – it also makes public safety sense by ensuring that more people do not face life-long barriers to employment, housing, education, and other aspects of full community membership because of a youthful mistake.

CONCLUSION

New York now has the opportunity to change our laws in a way that has a positive, life-long impact on troubled youth or those young people who simply act out impulsively – in accordance with their biological make-up. Young people whose lives are re-directed or changed in beneficial ways will grow to become productive citizens who can enrich the life of their state, community, and family. That is and should be the goal and the result of a system that forsakes the punitive for the supportive and invests in the future of our children.

18 A Youthful Offender is sentenced as though convicted of a class E, non-violent felony offense. See CPL § 720.20; Penal Law § 60.02.


20 Ruben C. Gur, “Brain Maturation and the Execution of Juveniles,” The Penn Gazette (Jan/Feb 2005) (“The evidence is now strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of the consequences, and other characteristics that make people morally culpable.”); Joline Kruger, “Brain Science Offers Insight to Teen Crime,” Albuquerque Tribune, Dec. 8, 2006 (“Cerebral construction is not complete until around ages 20 to 25, most scientists agree. The frontal lobe is one of the last areas of the brain to develop.”)

21 In Alabama, for example, Youthful Offender adjudication, which allows a person to legally deny a conviction, is available to young people aged 20 years or less. See Ala. Code 1975 § 15-19-17. Michigan similarly makes “Youthful Trainee” status available to those aged 20 years or younger; “Youthful trainee” status is not considered a conviction. See M.C.L.A. § 762.11.
JUSTICE COURT UPDATE

DOES DIGITAL RECORDING ASSURE DUE PROCESS?
In the Winter 2011 Legislative Issue of Atticus, NYSACDL urged the New York State Legislature to pass legislation which would require criminal charges in the local criminal courts to be presided over by a town or village judge who was an admitted attorney unless the defendant ‘opted-out’ and consented to having the case heard by a lay judge. The proposed legislation included procedures whereby a superior court judge in the county would make the necessary assignment of criminal cases to attorney-judges in the local criminal courts. This legislation would afford criminal defendants a level of constitutional due process that is now lacking in local criminal court practice, because their cases are being heard by lay-judges not adequately trained in the law. Concern over both substantive and procedural due process in the justice courts has been an issue for the Legislature and the courts (see, Matter of Charles F. dissenting opinion of Judge Kaye) for more than 50 years.

Absent the creation of district courts staffed by attorney-judges, an “opt-out” law, or even an “opt-in” law allowing a defendant to have his case transferred to a court presided over by an attorney-judge, would address the due process deficiencies (and other serious issues) which currently exist in local criminal courts presided over by lay-judges.

To address these issues, in November of 2006, the Office of Court Administration (OCA) developed an “Action Plan for the Justice Courts”, although the justice courts are not “courts of record” and are generally beyond the direct authority of OCA. One significant concern was that proceedings in the town and village courts were not uniformly recorded; while suppression hearings and trials were often recorded verbatim by stenographers, in other matters the judge simply takes notes, requiring reconstruction of the “record” later. This raised “vital concerns about effective review of Justice Court proceedings and thus enforcement of litigant’s substantive rights, especially in criminal proceedings in which fundamental liberty interests are at stake.”

The Action Plan sought to address these issues by providing each justice court with a digital recording computer, microphones and training for the judges and clerks in how to use them. By the end of 2006, all of the nearly 1,300 Town and Village courts in the 57 counties outside New York City were so equipped, at a cost of over $3 million. Thereafter, Chief Administrative Judge Ann T. Pfau, issued an order that required all proceedings in the town and village courts to be recorded.

In September, 2008, “Justice Most Local – The Future of Town and Village Courts in New York”, the Dunne Commission Report, was published, as was an update of OCA’s Action Plan. Both reports noted the continued concern for the rights of criminal litigants in justice courts, and the on-going accomplishments of the Action Plan, including the recording of justice court proceedings. OCA proclaimed that the digital recording of proceedings would not only allow for

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1 Ibid 38-39
2 See Tweed Commission and its Loeb Subcommittee in the 1950’s; Temporary State Commission on the State Court System a/k/a the Dominic Commission 1973; Dunne Commission
3 60 NY2d 474 (1983)
4 New York State Office of Court Administration Action Plan for the Justice Courts, Nov. 2006
5 Id. pg. 7
6 22 NYCRR 30.1
7 New York State Office of Court Administration Two Year Update on the Action Plan for the Justice Courts, Sept. 2008
8 Sept. 17, 2008 press release announcing the publication of the Dunne Commission Report and the Two Year Update

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meaningful appellate review but would “generally insure that litigant’s rights are fully protected in all proceedings and in all courts” 9, as well as “communicat[ing] to every participant in the proceeding the seriousness and importance of what happens in these tribunals” 10.

Has mandated recording of justice court proceedings resulted in the better protection of constitutional rights to criminal defendants? The short answer is that no one really knows. From OCA’s perspective, verbatim digital recording was intended to provide a record to allow effective appellate review. An unstated benefit would derive from town and village judges, knowing that their proceedings were being recorded, adhering more closely to constitutional mandates. This would be especially important at so-called ‘middle of the night’ arraignments, when defendants are routinely unrepresented by counsel. Unfortunately, for a number of reasons, it is difficult to know if these benefits are being realized.

Currently, there is no provision (or funding) for regular, periodic review of the recorded proceedings in the justice courts throughout New York State. In the absence of a systematic review of the proceedings, OCA cannot fairly evaluate the effectiveness of either mandated recording of the proceedings or enhanced training of lay-judges. Do judges advise defendants of their rights under CPL §170.10(2) at arraignment, or do they take shortcuts, ignoring some, or all, of these procedures? No one knows, because no one is listening.

The use of digital recording in the justice courts of New York State is not without significant issues. It is, unquestionably, a highly cost-effective way to record court proceedings. However, experience has shown that there are significant drawbacks to using a digital recorder in lieu of a live stenographer in the courtroom. To begin with, the judge must remember to turn on the machine! Due to the sensitivity of the microphones, the mechanical failure of recording devices, and the tendency of participants (whether they are judges, lawyers, witnesses or others) to not speak clearly or directly into the microphones, (or have extraneous noise overwhelm the recording) oftentimes a transcription of the proceeding looks more like an FBI report redacted for national security purposes. The dreaded term “inaudible” repeated appearing on a page is an indication that the transcriber was unable to accurately discern who was speaking or what was said.

A live stenographer has the ability to see who the speakers are, and identify them in the stenographic record, a task that is much more difficult when transcribing from a recording. A live stenographer has the ability to slow down a fast speaker, or ask a person speaking too softly to speak louder or more clearly. Since the purpose of digital recordings is to provide a record which is satisfactory for appellate review when needed, efforts must be made to assure that digital recordings actually record in a satisfactory manner. Participants should be identified as they speak at proceedings, and be aware of the effect of extraneous noise. Judges must control the proceedings to ensure that only one person is speaking at the same time. Until these issues are remedied, courts should be encouraged to utilize live stenographers when involved in contested proceedings.

One judicial disciplinary case illuminates the Due Process issues noted above. According to the “record”, on March 12, 2009, a town judge with three years experience presided over the arraignment of a 20 year old young man in his court. 11 The judge was familiar with the defendant who had a history of behavioral problems and anger, but no prior criminal history. The defendant had been arrested upon the complaint of his father; he had become angry, threatened his family, and punched a hole in the wall, while “rampaging through the house searching for a gun owned by the family”. His father called the police and the defendant was arrested, and charged with criminal mischief in the 4th degree, a Class A misdemeanor. He was brought before the town judge between 8:30 and 9:30PM at the Town or the purpose of arraignment.

The judge advised the defendant of the charge, and the right to appointed counsel but the defendant indicated that he did not want a lawyer. The judge asked the defendant how he “wished to plead to the charge” and the defendant said that he wanted to plead guilty; the judge then told him that if he pled guilty he would be sentenced to 30 days in jail, which is exactly what happened. The Judge also ordered a mental health evaluation of the defendant.

What cannot be ascertained from the “record” was whether the judge adequately protected the defendant’s due process rights. It appears that the judge complied with the requirements of CPL §170.10(2) 12 – the judge informed the defendant of the charges-

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9 Action Plan for the Justice Courts, Nov. 2006, pg. 27
10 Two Year Update on the Action Plan for the Justice Courts, Sept. 2008, pg. 2
11 Matter of Karl Ridsdale, New York State Commission on Judicial Conduct, July 20, 2011
12 CPL §170.10(2) Upon any arraignment at which the defendant is personally present, the court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him and must furnish him with a copy of the accusatory instrument.
and CPL §170.10(3) by advising the defendant of his right to counsel. However, it is not so certain that he advised the defendant of his right to an adjournment for the purpose of obtaining counsel, or whether the judge took any actions necessary to effectuate the implementation of the defendant’s rights.

At this point the reader may be wondering why the “record” is somewhat sketchy as to what occurred in the courtroom; the reason is that there was no transcript in the case. The judge, who had been on the bench since 2006 and was familiar with the use of the digital recording devices, stipulated that he “forgot” to turn on the recording device which is usually turned on by his Court Clerk.

There is no indication in the stipulated record that the judge engaged in any type of inquiry, other than accepting the defendant’s plea of guilty. It does not appear from the “record” that the judge advised the defendant of the various constitutional rights the defendant had and was waiving by pleading guilty.

Wasn’t the defendant entitled to the full protection of the Constitution and laws of the State of New York? Why didn’t the judge simply set bail and assign counsel even though the defendant had declined representation? Why did the judge not help the defendant arrange to have counsel?

One explanation for the Judge’s conduct may be that the defendant’s father, the complainant, had been the other town justice since 1979.

In July 2011, the town judge was censured by the Commission on Judicial Conduct with one dissent. The dissenter was not willing to accept the “record”, which were the stipulated facts. He wanted the judge to testify under oath and be subjected to cross examination and required to explain his actions. The dissenter scoffed at the suggestion that the judge simply forgot to turn on the digital recorder, likening it to the “dog ate my homework” elementary school excuse. While no one is suggesting that what occurred in this town court that night is the usual way town and village courts operate, that it happened at all casts doubt on the effectiveness of the requirement of digital recording of justice court proceedings.

Digital recording of all proceedings in the justice courts can provide valuable information necessary to evaluate judicial adherence to due process requirements; to evaluate judicial training programs; and provide records of what is said in court. That is, of course, contingent on the recording device being turned on, operating properly, the participants properly using the equipment, and the transcriber accurately transcribing the recording. This does not ensure, however, that due process is being afforded criminal defendants.

If OCA is going to rely upon digital recording as an attempted panacea for the infirmities that exist in our justice courts, either the Legislature or OCA must develop and fund a program of frequent periodic and random review of the recordings must be developed and funded. The evaluation of said reviews and swift corrective measures taken by administrators when problems are identified can improve the ‘system’ somewhat. However, until all criminal defendants are assured of attorney judges presiding over every critical stage of their case, due process will remain both illusory and elusive.

Every society is measured by how it treats its most vulnerable.

Hon. Jonathan Lippman
For Rehabilitation Through The Arts, a small program that provides huge benefits inside New York State prisons, the effects of across-the-board budget cuts would be disproportionately devastating to the people it serves.

Where else could you find a group of men in a maximum security prison singing a rousing rendition of *There is Nothing Like a Dame*? RTA participants can be found wearing clown noses in a physical theatre workshop, or in a men’s modern dance group, gracefully performing to the surprised admiration of their peers. Women prisoners gain confidence exploring Shakespeare’s female archetypes and find their voice in monologues, art and music composition. These are some of the activities typical of RTA, a program that operates in five New York State maximum and medium security, men’s and women’s prisons across three NYS counties.

Starting as a theatre group in 1996 with a few men in Sing Sing who wanted to write a play, RTA now leads innovative productions and workshops in drama, dance, music, voice, visual arts and creative writing. RTA produces original, classic and contemporary plays, as varied as *Oedipus Rex*, *One Flew Over the Cuckoo’s Nest* and *West Side Story*. Every year, the hottest ticket in town is *Up the River* in Sing Sing, where 300 invited members of the community attend an unforgettable performance by prisoner-participants.

RTA uses the arts to develop critical life skills often lacking in the prison population, breaking through cultural, language and academic barriers to build community, while encouraging self-expression, discipline and tolerance. These so-called “soft” skills - communication, problem-solving, collaboration and presentation - are necessary first steps in the long process of becoming a well-grounded, employable individual, able to succeed on the outside.

*The workshop taught me public speaking but in so many more ways gave me a tool for every aspect of my life. This is a skill that is valued in prison and in society because you learn how to say what you mean and mean what you say. It helped me realize that what I want to do with reaching out to youth - which will involve much public speaking – is very possible.*

~ RTA participant in Public Speaking Through Theatre workshop, Sing Sing
In addition to a profound change in attitude and behavior that leads even the “thug in the yard” to become a responsible, tax-paying citizen, RTA participants become role models within the prison, raising morale and creating a less hostile, safer environment. As one correction officer in Sing Sing said, “RTA makes my job easier”. Through creative exercises that promote empathy and self-reflection, RTA participants also become more fully engaged in family, fostering closer ties with children, many of whom are in danger of becoming the next generation on the inside.

RTA’s effectiveness is supported by two important research studies. John Jay College of Criminal Justice, City University of New York, in collaboration with the New York State Department of Corrections and Community Supervision (DOCCS), looked at the impact of RTA on institutional and social behavior. The study concluded that, compared to a control group, RTA participants showed a marked decrease in aggressive behavior, committing fewer and less serious infractions (Moller, Lorraine, *International Journal of the Arts in Society*, Project Slam: Rehabilitation through Theatre at Sing Sing Correctional Facility). A second study, conducted by Purchase College, State University of New York and DOCCS, looked at the effect of RTA participation on pursuit of higher education, which has a well-established record of reducing recidivism. This study demonstrated that participation in RTA led to a three-fold increase in time spent in higher education, and the effect increased with the amount of time in the program.

RTA has long waiting lists in the prisons it currently serves, and standing invitations to launch programs in additional facilities, but is stymied by its current capacity. Prisoners are an unloved population and an unpopular cause. The public believes they “got what they deserved”, few private foundations support prison causes and corporate foundations have no marketing advantage to gain by an association with crime. Between this rock and hard place, RTA derives its funding from a patchwork of sources; one quarter of its budget is supplied by DOCCS, which reimburses program supplies.

It costs roughly $50,000 per prisoner per year to provide “3 hots and a cot” in the NYS correctional system, and about $1,500 per prisoner per year to fund RTA operations. The return on investment in RTA is astronomical: each person who does not recidivate represents a savings of $1,000,000 over 20 years. Of the approximately 100 participants released in RTA’s 15 year history, only three have been convicted of new crimes.

NYS DOCCS Commissioner Brian Fischer leads an enlightened administration that values and encourages higher education and arts-based programs. What is missing is the political will to change its narrow mandate from the safe keeping of residents and the safety of its staff to a more comprehensive investment in the future of prisoners, their families and the communities to which they return. Let’s stop talking about budget cuts, and increase funding for low-cost, evidence-based programs that keep people out of prison.

RTA is the lead program of Prison Communities International, a 501c3 non-profit organization.

“For a few wonderful moments, I was more than my crime, more than an “inmate.” I was a man again in the eyes of others and perhaps even myself. For that, I am grateful.”

RTA Prisoner-Participant

Following his performance in “Macbeth”
We at the Fortune Society (Fortune) were very encouraged by both the tone and the content of Governor Cuomo’s comments regarding criminal justice issues in his recent State of the State address. In particular, his phrase, “prison development is not economic development” demonstrates that the Governor and Fortune share common values and vision. Fortune is a longstanding member of the NYS Alternatives to Incarceration (ATI)/Reentry Coalition, composed of community service providers offering ATI and/or reentry services across NYS. These organizations – CASES, Osborne Association, Women’s Prison Association, Center for Community Alternatives, TASC, Center for Employment Opportunities, and the Legal Action Center – coordinate services and target populations to serve the maximum number of criminal justice clients effectively without duplication. By providing jobs,
housing, and healthcare, all necessary ingredients for a re-invigorated New York, we save lives and communities. We are the embodiment of economic development. These programs have been proven to be safe and effective, supported by both sides of the aisle, and achieve considerable cost savings to the state.

However, Fortune and other members of the ATI/Reentry Coalition have experienced considerable cuts in funding, including the loss of millions of dollars in local and state-level legislative support. In tough economic times, New York State should be strategically investing its limited criminal justice resources to help programs which have proven effective. Recent reforms to the state’s harsh mandatory minimum drug laws, and the closure of surplus prisons, were steps in the right direction, but instead of reinvesting the dollars saved in expanding programs that work, since 2008 we’ve experienced a steady erosion of our nationally recognized and highly effective network of ATI and reentry programs.

These programs have been critical to the State’s success in simultaneously reducing both crime and reliance on mass incarceration. Saving taxpayers many millions of dollars, they are essential to successful implementation of Rockefeller drug law reform, and ending the cycle of addiction and crime. Because of its support for community-based sanctions, the contrast between New York and other large states continues to be dramatic. New York has the lowest crime rate of the largest states, and by far the lowest number of persons incarcerated. As of January 1, 2010, California’s prison population was 169,413, Texas’s was 171,249, and Florida’s 103,915, while New York’s prison population was 58,648. It is no coincidence that New York has a strong network of ATI and reentry programs, and the other states do not. However, additional cuts to these programs in the upcoming budget cycle will only serve to further diminish their capacity to serve clients at a time of increased need, and erode their ability to remain an equal partner in the state’s efforts to reduce crime and recidivism.

As an example, since its founding in 1967, Fortune has served as a primary resource for tens of thousands of New Yorkers released from jail and prison seeking to build constructive lives in their communities; it now serves more than 3,000 men and women with criminal justice histories. All of our programs are designed and implemented to meet the unique needs of this population. Clients also benefit from the cultural competency of Fortune’s staff: over 70% have
histories of incarceration and/or substance abuse, 80% are persons of color, and 30% are Latino. The agency has evolved into one of the most prominent ATI and reentry services organizations in the country, offering a comprehensive array of services to people with criminal records through a holistic, one-stop model of service provision, including: housing, education, employment services, substance abuse treatment, HIV/AIDS services, discharge planning, case management, and lifetime aftercare, along with a new mental health treatment program.

Fortune’s programs enable New York State to reduce crime and break the cycle of incarceration, while saving tax dollars and communities. For instance, in 2010 it cost $171 and $71 per day, respectively, to incarcerate a person in jail and prison. Fortune’s Alternative to Incarceration (ATI) programs helped participants avoid over 88,000 days in jail and prison, thereby saving the state over $8 million in one year. Every dollar invested in Fortune’s ATI programs saves three dollars in incarceration costs. The ATI/Reentry Coalition programs have an annual cost of $11,000 per person, compared with $272,000 per child for juvenile placement, $37,000 per person for prison and $76,000 per person for jail.

However, recent budget cuts have forced a drastic scaling back of many successful ATI programs. The impact of this loss on programs included:

- **CASES** eliminated its drug treatment education and referral program serving 4,000 Brooklyn misdemeanor defendants.
- The **Fortune Society** closed its discharge planning and reentry program that served detainees leaving Rikers Island.
- The **Women’s Prison Association** closed Hopper Home, a transitional residential program used as an alternative-to-incarceration for 30 women a year, and the East New York / Brownsville case management, life skills and employment readiness program serving almost 150 women a year.
- The **Osborne Association** eliminated El Rio substance abuse treatment services for Bronx misdemeanor defendants.
- **EAC / TASC** narrowly saved its Staten Island ATI program last June, which would have left that borough without any ATI services.
- The **Center for Employment Opportunities**’ transitional work slots have been reduced, resulting in at least 150 fewer clients in paid transitional work.
- The **Legal Action Center** reduced its legal services/ technical assistance services by 47%.

During the past year the Governor, recognizing the crucial role played by the ATI and reentry system and the grave risk to the programs’ survival, came to the rescue by allocating, with support from the State Legislature, more than $1.5 million in American Recovery and Reinvestment Act (ARRA) Funding to ATI and reentry programs. We are most grateful for this support. However, this funding is temporary, terminates in 2012, and was not enough to restore all services. The programs which received additional ARRA funding in 2008 were able to expand their employment services, a critical service for ATI and reentry clients, but this funding will also end in 2012. Funding for core ATI program components, including court-based advocacy, remain sorely underfunded. Governor Cuomo, in his 2012 State of the State address, said “We have worked to put a greater emphasis on prevention and on community-based alternatives to incarceration.”

If the money dries up, though, Fortune and the other providers will no longer be able to maintain the level of service needed. Now it’s time for the Governor to reinforce the priorities laid out in the State of the State Address, by making it clear in his 2013 budget proposal that ATI and Reentry programs are valued partners in helping the state to reduce crime and increase public safety, as well as key components in overall economic development. To create long-term sustainability for these vital programs, Fortune encourages the Governor to urge the Legislative leadership to protect and institutionalize ATI and reentry resources. If not, we will continue down the road of inefficiencies in government spending, when scarce resources are better placed in front-end diversion and proven effective reentry initiatives, and the very successes that allowed prison closings and reductions in crime will be undercut.
Andre Vitale, Esq. is a Special Assistant Public Defender at the Monroe County Public Defender’s Office, currently supervising the office’s Non–Violent Felony Section as well as carrying his own caseload. Andre has served with the PD’s office for more than 10 years, handling violent felony and major drug cases. He has significant trial experience having handled more than 50 jury trials including two murders—one of which involved challenging the DNA evidence offered by the Government. He can be reached at avitale@monroecounty.gov.

CPL §390.20 should be amended to allow a Defense Attorney to be Present During the PSI Interview

As a State Court practitioner you’ve seen the following scenario a hundred times:

You’ve worked out a good disposition for the person you are representing. After meeting with the Judge and receiving the Court’s approval, you discuss the offer with the client. You and your client discuss the risks of rejecting the offer and his chances of being successful at trial, after which he indicates he wants to take the offer … and a furlough. You set up the plea. In open court the client waives his rights and enters a plea of guilty, followed by a full factual colloquy. Then weeks later, when the case is returned for sentencing you open the pre-sentence investigation (or pre-sentence report) and you read that the client has told the probation officer that he is innocent of the charges; didn’t do anything wrong; and only plead guilty because you—as his lawyer—told him he had to plead guilty.

A PSI report which includes this language causes different reactions with the sentencing court. Some will ignore the statement completely; others will give the person the opportunity to explain his answer and if sufficient, allow him to reaffirm his earlier colloquy. Some Courts refuse to accept the plea and give the person the choice of either accepting a longer sentence or vacate his plea and go to trial. There are also those courts which treat this type of statement as a violation of the enhancement warning that the person be “honest with the Probation Officer during the PSI” and give the individual a greater sentence without the opportunity to withdraw his plea. See People v. Hicks, 98 NY2d 185 (2002). Regardless of which option a court may choose, what is clear to any lawyer is that for this reason and for many others the Pre Sentence Interview process is an important stage of a criminal case. It is a stage that could cause great prejudice to an individual; a harm which could be avoided if an attorney were present during the PSI interview; a harm which may not be able to be corrected if the attorney is only allowed to become involved after the PSI interview has occurred.

There is a general consensus amongst defense counsel that the preparation of the pre–sentence report is an extremely important aspect of an individual’s criminal case. The contents of that report could affect the sentence an individual receives or his chances for being placed in a position to be granted Parole release. It could lead to long term civil consequences which could impact the individual
for the remainder of his life (e.g., Sex Offender Registration Act (SORA) civil confinement …); as well as the person’s legal status if the conviction is overturned. The Court of Appeals shares this position, stating that the “pre-sentence report may well be the single most important document at both the sentencing and correctional levels of the criminal process”. Hicks, 98 NY2d at 189. Yet, in spite of universal acknowledgement of the harm that could result from what occurs during the PSI interview, New York Courts have held that the completion of a pre–sentence report is not a “critical stage” of the adversarial process and as a result, the presence of counsel is not required. People v. Perry, 36 NY2d 114 (1975); People v. Bogart, 148 Misc2d 327 (S. Ct., Richmond Cnty, 1990). These competing positions do not make any logical sense. It is the Defendants in this State who are harmed as a result. The negative impact that can, and many times does, occur as a result of a bad PSI interview should mean that under standards of fundamental due process, an attorney should be allowed to be present during the Defendant’s interview.

The Supreme Court has identified a number of factors that must exist in order for an aspect of the proceedings to be considered a “critical stage”. US v. Wade, 388 US 218 (1967). The most important factors in this analysis as applied to the completion of a pre–sentence report are whether there is (a) the possibility the proceeding will prejudice the Defendant substantially; and (b) the presence of counsel must help avoid the prejudice. Id. at 227. Practicing attorneys understand that under this analysis, the pre–sentence report is a critical stage due to the potential for prejudice and ability for the attorney to protect the client from this prejudice by being present.

In addition to the situation described at the beginning of this article, there are numerous other examples in which a Defendant can be greatly prejudiced as a result of not having an attorney present during his PSI interview.

1. In a case involving a sexual offense, the results of the PSI interview may result in the individual receiving a much higher SORA score and could significantly increase the chances of that person being civilly confined following the completion of his State sentence. These results could occur if the Defendant is labeled as having denied responsibility for a crime if he denies forcible compulsion (when that is part of the original allegations) even if the plea only involved admitting to an age–based crime. The same label will be given if the person stated he thought the complainant was older than her actual age or if he states he did not know it was a crime to have sex with a 15 year old girl because the intercourse was completely consensual. In addition, depending on how the interview goes, the person could end up facing additional charges based upon revelations of another victim, other sexual conduct in which the client participated, or due to the individual’s use of a computer or camera for certain purposes.

2. A person who is being sentenced for a robbery or a burglary might reveal facts which enable the police to charge that person with additional incidents, while prior to the interview they did not have the facts necessary to
If an individual is convicted after trial, or pleads guilty without a sentence promise, the PSI becomes that much more important. The potential for prejudice is heightened exponentially. It is critical that the attorney for the individual convicted be present during the PSI interview. The individual’s description of the offense and acceptance of responsibility, his description of factors that could be beneficial for mitigation, the sincerity of his expression of remorse, and his willingness to abide by the rules of probation and seek community based treatment programs, all will play important roles in the ultimate sentence handed down. It is absolutely critical for the attorney to be present to try to protect the individual’s long term interests if the plan is to appeal the verdict. If there is a chance the verdict could be successfully appealed, an attorney will not want the client to make any admissions that could be used against him on retrial. At the same time, it would be not be in the best interest of the client not to express some form of remorse for what occurred. There is a delicate balance to be struck. A client’s best interests at this stage demand that his attorney be present to try to help the individual achieve that balance with respect to the matter on for sentencing as well as in the long term should the case be successfully appealed.

4. For individuals being sentenced to State prison, the information included in the PSI will have a significant impact on any programs or placement made by the Department of Corrections, which in turn will play a critical role in that person’s chances for being granted release to Parole supervision. The Parole Board is required to consider the pre-sentence report as a factor in making its parole release decision. Exec. Law §259–i(2)[c](A). Prior to appearing before the Parole Board, Department of Corrections officials may use information in an inmate’s pre-sentence report to determine the prisoner’s classification/ designation, boot camp eligibility, temporary release programming, and transfers. Sentencing Tips for New York Lawyers: Obtain a Copy of the Presentence Report, Alan Rosenthal, Center for Community Alternatives (2009)

Similarly to New York, most courts at the federal level continue to hold that the completion of the pre-sentence report is not a critical stage. Some have acknowledged the great risks for harm to Defendants and have taken steps to allow attorneys to be present during these interviews. See US v. Herrera–Figueroa, 918 F.2d 1430 (9th Cir., 1990) (ruling that attorneys must be allowed to attend presentence interviews). Efforts—such as those undertaken by the 9th Circuit—to afford greater protections to criminal defendants are not the same across all circuits. In New York, the rights and protections afforded criminal defendants are not consistent throughout the State. In some jurisdictions, attorneys are allowed to request notification of and be present with their clients during the PSI interview, whereas in other counties, attorneys are not provided notice. In some counties, attorneys are completely prohibited from being able to present with their clients during these interviews.

True justice requires that rights be afforded to all individuals, equally across all jurisdictions. Individuals in Buffalo should be afforded the same protections as those in Syracuse. As Martin Luther King, Jr. stated in Birmingham in 1963, “Injustice anywhere, is a threat to justice
“everywhere”. Efforts should be made to amend the Criminal Procedure Law to allow attorneys to request notice of and be present with their clients during the pre-sentence report interview. Section 390.20 of the Criminal Procedure Law should be amended to provide that upon request a Defendant’s attorney should be provided reasonable notice of the date, time, and location when a Defendant is going to be interviewed by probation for completion of a pre-sentence report and that attorney shall be allowed to be present when the interview is conducted. This right will not cost the probation department anything. It will not delay the completion of the pre-sentence report or delay the Court proceedings in any way.

Some will argue that there is no need for this amendment, as an attorney can find out from his client the date and time of a pre-sentence interview. However, this is simply not true. When a Defendant is incarcerated, he receives no advance notice of when a pre-sentence investigation interview will be conducted. The recommended provision will protect the rights of Defendant in those counties which seek to completely prohibit defense lawyers from accompanying their clients to PSI interviews. The concern is that if this protective measure is not undertaken, more and more counties will start to prohibit defense lawyers from being present.

There is simply no legitimate reason why a Defendant’s attorney should not be allowed to be present during the pre-sentence report interview. It will not slow the process in any way and the benefits it provides to the rights of Defendants greatly outweigh any burdens placed on Probation in having to notify an attorney who makes a proper request and allowing that attorney to be present during the interview.
IN SEARCH OF A WORKABLE SENTENCING MODEL:

UPDATE ON THE STATUS OF THE
Temporary Release Program

In the Winter 2011 edition of *Atticus*, we urged the Permanent Sentencing Commission established by Chief Judge Lippman to revitalize and strengthen the Department of Corrections and Community Supervision’s (DOCCS’s) Temporary Release Program. By providing incarcerated people nearing the end of their sentences (usually about two years) the opportunity to be released to the community for work and other rehabilitative programming, the Temporary Release Program preserves the important goal of reintegration as we move toward a determinate sentencing scheme, which tends to favor simplicity over reintegration. The Temporary Release Program is often considered a reentry “best practice” that can save taxpayers millions of dollars each year. Yet, for the past 16 years, “tough on crime” politics has led to the program’s significant decline, and each year fewer incarcerated people are afforded the opportunity to participate.

Since last winter’s article, there has been good and bad news about the Temporary Release Program’s status. First, the bad news: participation in the Temporary Release Program continues to decline. Currently only about 4% of the incarcerated people who apply to the program are accepted, which makes the Temporary Release Program more exclusive than our nation’s most prestigious law schools. (Yale, for example, has an acceptance rate of 7.3%, while Stanford’s is 9% and Harvard’s is 11.8%). Now the good news: New York State Senator Velmanette Montgomery has introduced legislation, Bill No. S05920, intended to roll back restrictions to the program and increase the number of people eligible for the program.1 While this legislation will not by itself be enough to revitalize the program (since many eligible applicants are currently being denied a chance to participate in the program), it will signal a shift in policy and serve as an important first step. NYSACDL members are encouraged to inform their legislators of their support for Bill No. S5920.

Timothy Donaher
Monroe County Public Defender

He can be reached at: tdonaher@monroecounty.gov

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1 The bill proposes to expand eligibility to include people who are currently serving a sentence for a violent felony offense. It also allows incarcerated people an opportunity to begin the program when they are within three rather than two years of their conditional release or parole eligibility date. The bill can be found at: http://assembly.state.ny.us/leg/?bn=S05920&term=2011.
All eyes turned as the detective strode confidently to the stand, brimming with self-assurance and credibility. With hundreds of homicide investigations and over twenty years of experience under his belt, he raised his right hand, looked the jurors in the eyes, and promised to tell them the truth, the whole truth and nothing but the truth. They had no doubt that he would. The jury leaned forward in their seats, hanging on every word. I rose from my seat to begin my examination, but rather than get that sinking feeling that we have all experienced in the face of such a devastating witness, I smiled at the jury, cleared my throat, and began my direct. That’s right, this was no dream, the witness was my investigator, and he was about to irreparably undermine the prosecution’s main witness.

As criminal defense attorneys, we often fall into the trap that our cases are as “open and shut” as the prosecutor and law enforcement want us to believe that they are; most of the time, they are not. Most of us recognize that our role as defense counsel requires us to investigate our cases. In fact, we are constitutionally obligated to do so. A criminal defense attorney’s duty to conduct competent, reasonable pretrial investigation is founded in the Sixth Amendment right to the effective assistance of counsel as a means to protect a defendant’s right to a fair trial.1 In Strickland v. Washington, the seminal ineffective assistance of counsel case, the U.S. Supreme Court held that defense counsel has an obligation to investigate those aspects of the defense which are deemed meritorious. Similarly, New York Courts have routinely held that a defendant’s right to representation entitles him to an attorney who conducts “appropriate investigations, both factual and legal, to determine if matters of defense can be developed.”2 A complete abdication of the duty to investigate, for no strategic reason, renders counsel ineffective.3

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2 People v. Reid, NY Slip Op 21088 (Sup., NY, Decided March 14, 2011)(“Defense counsel’s . . . failure to investigate was not part of a legitimate strategy, it was the result of neglect. Because defendant was denied meaningful representation, he is entitled to a new trial”).
3 People v. Bussey, 6 A.D.3d 621, 623 (2nd Dept 2004); People v. Fogle, 10 A.D.3d 618 (2nd Dept 2004).
So, although the courts tell us that we have to, they don’t really tell us how to. What does constitute an effective and thorough investigation? Is a telephone call by counsel to a potential witness sufficient? An internet search? A discovery motion?! This article argues that in most cases, it is absolutely essential for an attorney – no matter how skilled or experienced - to have the assistance of an experienced, licensed, private investigator; preferably someone with prior law enforcement experience. A private investigator not only brings a unique and invaluable perspective to a case, but can serve as a powerful investigatory tool in a criminal defense attorney’s somewhat limited informational toolbox. Trained eyes and boots “on the ground” can locate and speak with witnesses, uncover facts and clues which law enforcement may have overlooked, and pursue avenues of defense which we, mostly non-law-enforcement types, may have failed to even consider. Yet, despite the seemingly endless list of reasons to use a private investigators, it appears that few of us regularly do.

The following charts represent information provided by the New York City Criminal Justice Coordinator’s Office pursuant to the author’s FOIL request. Chart A represents the total number of criminal defendants referred to members of the Assigned Counsel Plans for the First and Second Departments for calendar years 2008, 2009 and 2010. Chart B represents the number of experts designated as investigators for which County Law 18-b vouchers were submitted by the Assigned Counsel Plan for payment during the same period.

With less than 4,000 private investigators used in approximately 125,000 assigned counsel cases citywide over a three year period – or roughly 3.2% - the numbers seem to indicate that assigned counsel attorneys are not using investigators to the extent that they should or could be.4 This is true despite the fact that the Assigned Counsel Plans in both Departments recognize the importance of private investigators and have implemented relatively simple procedures to obtain the funding to retain one.5 Moreover, given the state of the law, even the stingiest judge would think twice before denying counsel’s application for funds to hire a private investigator once a genuine need has been demonstrated. The same generally holds true for CJA matters in federal court.

So, at least in assigned cases where funding is readily available, what explains this apparent aversion to using private investigators? Belief in a predetermined outcome, neglect, unfamiliarity with the procedure for obtaining funds in an assigned case, unwillingness to relinquish control over your cases, a combination of all of the above? Perhaps you simply don’t know a private investigator or don’t understand how an investigator can benefit your case. Regardless, none of these reasons are sufficient to overcome the constitutional mandate to properly and thoroughly investigate a client’s case. We fail to do so at our own peril and often, to the client’s detriment.

So just how does the defense benefit from the assistance of a private investigator and why does it make good sense to use one? A private investigator is an asset to any criminal defense team. They can free up your time to work on legal matters, locate and speak to witnesses

### Chart A

<table>
<thead>
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<th>Year</th>
<th>1st Department</th>
<th>2nd Department</th>
</tr>
</thead>
<tbody>
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<td>2008</td>
<td>23,788</td>
<td>18,897</td>
</tr>
<tr>
<td>2009</td>
<td>22,926</td>
<td>19,826</td>
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<tr>
<td>2010</td>
<td>149,908*</td>
<td>18,078</td>
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*(The number of cases listed here includes the number of misdemeanors and violations that were disposed of at arraignment. In previous reporting years, those cases were not included.)*

### Chart B

<table>
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<tr>
<th>Year</th>
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<th>2nd Department</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>860</td>
<td>412</td>
</tr>
<tr>
<td>2009</td>
<td>885</td>
<td>424</td>
</tr>
<tr>
<td>2010</td>
<td>840</td>
<td>497</td>
</tr>
</tbody>
</table>
and follow-up on the information they receive, get information from contacts who would never speak to you without being ordered to do so, and evaluate the case from a different perspective, often times pointing out investigative strategies that may not have occurred to you. According to Investigator Claude O’Shea, a Principal at Cadre Investigative Consultants with offices in White Plains and Manhattan, a defense attorney must recognize that the odds are skewed from the start. The Prosecution has most of its case developed from the outset. Witnesses have been interviewed, statements have been taken, identification procedures have been performed, and evidence has been gathered, evaluated and tested. The defense attorney, on the other hand, generally has only the story of the accused, which, as we know, is fraught with uncertainty, to say the least. Metaphorically speaking, the defense attorney is engaged in a poker game with a pair of deuces against a prosecutor with a full house. A practical person would fold; the defense attorney cannot.

Retired from the New York City Police Department with over 20 years of service, O’Shea was assigned to the Bronx Homicide Squad where he was involved in the investigation of over 250 homicides. “It has been said,” O’Shea says smiling, “that a person who represents himself has a fool for a client. Similarly, a defense attorney who decides to prepare a case for trial by themselves should assume the same philosophy.” It is at this point, O’Shea notes, that a criminal investigator becomes the corner-stone of the defense team. The purpose of the investigator is not to replace the attorney, but rather to become another member of the defense team who brings specialized skills and experience to the table, skills and experience that an attorney often lacks. For example: were proper police procedures employed during the course of the investigation, were identification procedures conducted properly, were witness statements taken and memorialized properly, was the crime scene properly secured and inventoried, or was the scene contaminated, potentially tainting the evidence? These are all areas where an investigator, with particularized knowledge, training, and skill, can assist the attorney in evaluating and defending the case.

In a battle of investigatory resources, the defense is always at a decided disadvantage. The prosecutor has the police, investigators assigned to the district attorney’s office, and other municipal resources at their disposal to ensure that they are presenting the strongest, most extensively investigated case. How could a defense attorney, standing alone, expect to stand up to this inequity? Legal skills alone are rarely enough to even the playing field. A qualified and licensed criminal investigator is a necessity for the defense team. “In the end,” says O’Shea, “a dedicated attorney and a good investigator are a force to be reckoned with. Your prosecutorial counterpart is using his or her investigators and pushing them hard - I know this because I was one.”

Most attorneys are aware of the various pitfalls, including possible removal from the case, inherent in interviewing and taking statements from our own witnesses. Yet, whether for financial reasons or otherwise, the statistics above seem to indicate that defense attorneys are routinely doing their own witness interviews and investigations. In most cases, this does you and your client a disservice. Perhaps the most well known role of the private investigator is to interview known witnesses or locate and interview witnesses who may have been previously unidentified. “Witness statements can make or break a case,” says O’Shea. A skilled interviewer should be able to illicit information from a witness, which, for many reasons, the witness may have been previously unwilling, or unable, to share. In addition to the facts of the case, additional areas should be explored, such as the witness’ relationship to the accused, use of drugs or alcohol, level of education, and employment history. If possible, a thorough background check, including criminal history and asset searches, should be conducted as well.”

Case-law and newspapers are replete with examples of defendants, many of whom were wrongly convicted, who were denied an effective defense due to an attorney’s failure to properly investigate a potential alibi defense, visit the crime scene, or locate an important witness who may have altered the outcome of the case.

To truly give meaning to the constitutional mandate to thoroughly investigate our cases, then we must avail ourselves of the services of a qualified private investigator. If we as defense attorneys fail to recognize the importance of an investigator, then we shouldn’t be surprised when the court does so as well.

In the end, you should not do a thorough investigation or use the services of an investigator simply because the court says you should;
you should do it because it will benefit you, your client and the case. Your time is better spent working on the legal aspects of the case - leave the investigation to a trained professional. Your client will rest assured knowing that his case is being handled by a competent, professional legal team that is leaving no stone - whether legal or investigatory - unturned. Ultimately, the case results will be better because whether for better or for worse, a thorough investigation provides information, and information allows you and your client to make better, more informed decisions about how best to handle the case.
NYSACDL 2012 Annual Dinner

NYSACDL Foundation hosted the 2012 Annual Dinner and Awards Ceremony on January 26 at the Prince George Ballroom in Manhattan and honored New York State Chief Judge Jonathan Lippman with the William Brennan Award for Outstanding Jurist. Criminal defense attorney David Ruhnke received the Thurgood S. Marshall Award for Outstanding Criminal Practitioner for his commitment to defense of those facing the death penalty. Colleagues from around the state were on hand as Richard D. Willstatter of White Plains was sworn in as NYSACDL president for 2012.

RICHARD D. WILLSTATTER OF WHITE PLAINS WAS SWORN IN AS ASSOCIATION PRESIDENT FOR 2012

Richard Willstatter, partner in the White Plains law firm Green & Willstatter, has been a criminal defense lawyer his entire career starting as a staff attorney with The Legal Aid Society Criminal Defense Division in the Bronx. Richard has served as the NYSACDL’s Amicus Curiae Committee Chair and the co-chair of NACDL’s Second Circuit Amicus Committee. He has been instrumental in pressing NYSACDL’s position on issues of state and national importance including the Brown v. Blumenfeld Article 78 proceeding challenging the Queens’ DA’s practice of delaying arraignment and the appointment of counsel to “interview” arrestees and the challenge to police use of a GPS to track movements of vehicle as a warrantless and unjustified search.

THE HON. WILLIAM BRENNAN AWARD FOR OUTSTANDING JURIST WAS PRESENTED TO THE HON. JONATHAN LIPPMAN

In accepting the Award, Chief Judge Lippman strongly advocated the reforms he passionately seeks to enact: moving the prosecution of children for nonviolent offenses out of criminal court; ensuring the appointment of counsel at arraignment throughout the State’s city, town and village courts; according the right to counsel at arraignment throughout the State’s city, town and village courts; according the right to counsel to poor civil litigants threatened, for example, with homelessness or deportation. NYSACDL recognizes and commends Judge Lippman for commissioning the New York State Justice Task Force, his efforts to ensure more reliable eyewitness identification procedures, greater access to DNA for convicted defendants, and the prevention of wrongful convictions.

THE HON. THURGOOD S. MARSHALL AWARD FOR OUTSTANDING CRIMINAL PRACTITIONER WAS PRESENTED TO DAVID RUHNKE

NYSACDL’s Hon. Thurgood S. Marshall Award for Outstanding Criminal Practitioner was given to David Ruhnke, a National Death Penalty Resource Counsel. Mr. Ruhnke was introduced by his law partner and wife, Jean D. Barrett, who is also a Resource Counsel and an equally impressive death penalty lawyer. David’s legal expertise is matched by his compassion for those facing the ultimate penalty. Of 16 capital cases tried, 14 resulted in non-death verdicts; the two death verdicts were reversed on appeal.
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The Largest Criminal Defense Bar Association in New York State

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This nation was founded by many men of many nations and backgrounds. It was founded on the principle that all men are created equal, and the rights of every man are diminished when the rights of one man are threatened.

John F. Kennedy  June 11, 1963 radio and TV address to the American People
NYSACDL standing committees are chaired by members in good standing who are appointed by the President. Committee membership is a rewarding opportunity for members to network with colleagues throughout the state and to explore various issues in depth. Members are invited to join committees to further the important work of our association. If you are interested in joining a standing committee (listed below), please contact the committee chair or the Executive Director’s office: Malverson@nysacdl.org 212-532-4434, for more information.

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

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

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

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

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

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

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

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

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

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

“ The quality of a person’s life is in direct proportion to their commitment to excellence regardless of their chosen field of endeavor.”

Vincent T. Lombardi
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