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PRESIDENT’S MESSAGE

by Daniel N. Arshack

I first joined the NYSACDL about 17 years ago, shortly after leaving the Legal Aid Society. I had been in private practice about 10 minutes when I was shocked to receive a grand jury subpoena arising out of a dispute I had with a prosecutor in a stolen car case. My first call was to the NYSACDL Attorney Strike Force. Ben Brafman was assigned to help me. He invited me to his office, had me breathe into a paper bag, and encouraged me to explain the situation. An hour later, we were in front of a judge in Manhattan. Ben, with the appropriate citations in hand, convinced the judge to quash the subpoena. I followed up with a successful motion to dismiss the charges against my client and all was good in the world. It was clear to me then, that the NYSACDL was MY organization and that it existed to help ME in MY practice.

During the years of my activity in NYSACDL, time and again, I have been struck by the dedication of those who give so much time and effort to our organization. Why do they do that? The reasons are diverse. For many, it’s simply a good business decision. We feel comfortable referring cases to those lawyers whose intellectual bona fides has been established through their participation in NYSACDL activities. For others, it’s a policy interest. NYSACDL provides real-life opportunities to engage with policy makers on issues that affect our practices and our clients. Some become involved for the social camaraderie. The tangible benefits of membership are clear: CLE’s, the listserv, Strike Force Assistance, Amicus support, the Motion Bank, health insurance, disability insurance… the list goes on. What is clear, though, is that participation trumps mere membership every time. If you care deeply about criminal defense issues, participating in NYSACDL activities will expand your practice, increase your enjoyment of your work and provide the opportunity for you to address issues that matter to you and your clients on a larger stage.

The NYSACDL continues to exist to serve YOU and address YOUR concerns and interests. That is why this year I will focus on Member Benefits: In January we announced that the NYSACDL is offering an organization sponsored health care plan for members (See, the information contained in this month's Atticus). We are enhancing our continuing legal education opportunities commencing with the first New York City Henry Lee Forensic Sciences Institute Program which took place on January 27, 2007 with well over 100 attendees. Our Legislative Agenda is a focal point of our activities. We will continue to take a leadership role in promoting a statewide public defender system for one essential reason: It is good for defendants. We will promote an education campaign for legislators concerning the need for an expungement statute, the revamping of the state’s district courts, implementation of a statute requiring early and complete discovery in criminal cases and other issues relevant to our practice.

So, if you used to be more active, come back, the water is fine. If you’ve never really engaged with the NYSACDL, take the dive.

This year promises to be a watershed on a variety of legislative issues. Your input into CLE topics is valued. Our board meetings are entertaining and open to all members (and there’s free snacks). We meet in various locations throughout the State (See the list of Board Meetings in this issue.)

Join us, get involved, grow your practice and get the most out of YOUR organization.
NYSACDL ANNOUNCES MEMBERSHIP HEALTH INSURANCE PLAN

We are pleased to announce that NYSACDL members can now purchase health insurance benefits at savings that in the past have been available only to members of large firms, and access to health plans, a dental plan administered by Aetna Dental and a vision plan administered by Coast-to-Coast Vision.

Members can pick the plan that best suits their needs from a selection of health insurance options from a variety of carriers, as well as four different HIP Plans: two HMOs, a PPO and an EPO.

Some plans are available only to solo practitioners and others are open to firms with two or more employees.

Our rates are substantially below what you would pay if you were not a member of the NYSACDL and tried to secure similar coverage on your own. The plans all have low co-pays for office visits, and include a prescription plan.

If you are a firm with two or more employees, we can tailor a plan to meet your insurance needs.

Among the health insurance plans available to NYSACDL members are HIP, Atlantis, Oxford, Aetna, US Healthcare, Empire Blue Cross Blue Shield and Cigna.

The NYSACDL Membership Insurance Program is administered by Specialty Financial Advisors. For more information, contact Mark A. Kovler, JD PH.D. CTP at 914 923-1160 or via email at makesq@aol.com.

NEW YORK STATE BAR COMMITTEE LAWYER ASSISTANCE PROGRAM HELPS LAWYERS IN NEED

The Lawyer Assistance Committee is the new name of what had been known as the Committee on Lawyer Alcoholism and Drug Abuse. The committee brings together legal professionals who provide peer support to colleagues struggling with alcoholism, addiction, depression, mental illness and stress.

For information, contact Patricia Spataro, the Association’s Director at (800) 255-0569 or pspataro@nysba.org.

2007 BOARD MEETING SCHEDULE

Saturday, March 17.....................................New York City
Saturday, May 19..........................................Syracuse
Saturday, September 8.................................Rochester
Saturday, October 27.................................Syracuse
Saturday - December 8..............................New York City
Pursuant to Rule 410 of the Federal Rules of Evidence, the government, at trial, may not use statements made by a defendant to an attorney for the government during plea discussions.\(^1\) Congress passed this rule because it believed that candid and free discussions between the government and criminal defendants would lead to more dispositions and less cluttered court trial calendars. Despite the value inherent in such a law, the U.S. Attorney’s Office in the Southern District of New York requires full waivers of Rule 410 during non-cooperation proffer sessions. This article addresses the legality of such a policy.

As a result of the harsh mandatory minimum sentences being meted out in our nation’s federal courts,\(^2\) defense attorneys often bring their clients to speak with prosecutors to convince the government that the minimums should not apply: (i) because the client has valuable information with which to cooperate; (ii) the criminal conduct is not as heinous as the government initially believed; \(^3\) or (iii) the defendant qualifies for relief from these minimums under the so called “safety-valve” provision. \(^4\) Attorneys have become accustomed to the fact that during such proffer sessions U.S. Attorneys’ Offices require that their clients sign limited waivers of Rule 410 rights – that if they raise defenses at trial which conflict factually with statements made during these plea discussions, the government may offer the statements to impeach or rebut such defenses.\(^5\) However, in recent years, when proffer sessions do not involve the prospect of cooperation, Southern District prosecutors have required defendants to go further and allow the use of plea-discussion statements during the government’s case-in-chief. \(^6\) The legality of requiring such a full waiver of Rule 410 at a proffer session has never been directly addressed by the federal courts.

A limited waiver of Rule 410 was upheld by the U.S. Supreme Court in \textit{United States v. Mezzanato}, \(^7\) where the Supreme Court reviewed the legality of a defendant’s proffer agreement that any statements he made could be used to impeach him if he testified at trial. However, in a very short concurrence, Justice Ginsberg, joined by Justices O’Connor and Breyer, indicated that a waiver to use the statements on the case-in-chief might violate Congress’ intent to encourage plea bargaining because it would inhibit a “defendant’s incentive to negotiate.” \(^8\) Justice Souter wrote a dissent, joined by Justice Stevens, which argued that Rule 410 could never be waived without undermining Congress’s intent. In contrast, Justice Thomas’s majority opinion which was joined by Justices Rehnquist, Scalia, Kennedy, and the three concurring justices used language which implied that the government could obtain a 410 waiver to use statements at any time.

Since three Justices added a concurrence which stated that a defendant might not be able to waive the use of plea discussions on

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1. Rule 11(e)(6), Fed Rule Crim P. provides the same rule.
3. This often involves a client convincing the government that his drug offense involved lesser weights than charged in the indictment. This can avoid mandatory minimums and reduce the U.S. Sentencing Guideline offense levels. \textit{See, Drug Quantity Table, U.S.S.G. §2D1.1.}
4. 18 U.S.C. §3553(f). To obtain relief from mandatory minimum sentences under the so-called “safety-valve” provision, the defendant must meet with the government and truthfully proffer all facts and evidence surrounding his involvement in the offense. 18 U.S.C. §3553(f)(5).
5. \textit{See, United States v. Velez}, 354 F. 3d 190 (2d Cir. 2004); Zabel and Benjamin, “Are ‘Queens for a Day’ Pacts Courtesans,” \textit{N.Y.L.J.}, June 13, 2001, p. 3. It should be noted that the Supreme Court has never directly approved any waiver of Rule 410 beyond a waiver that the proffer session statements may be used to impeach the defendant should he testify.
6. Southern District cooperation proffer agreements still contain the more limited waiver provisions because prosecutors have a greater incentive to offer some immunity to defendants who are attempting to cooperate with law enforcement.
8. 513 U.S. at 211.
the government’s case-in-chief, and two justices believed Rule 410
could never be waived, a majority of the Supreme Court did not
expressly approve of the full waiver contained in the Southern Dis-
trict non-cooperation-proffer-session agreements.

The closest case on the issue is United States v. Burch, 9 where
the D.C. Circuit authorized a full 410 waiver in a non-proffer-ses-
son context. 10 In Burch, the court approved a cooperation plea
agreement which called for a full waiver of Rule 410 if the defen-
dant withdrew his plea. [Not only does Rule 410 forbid the use of
plea discussions but it precludes the use of guilty pleas which are
eventually withdrawn]. Before the D.C. Circuit truly delved into
the issue raised by the concurrence in Mezzanato, it noted that the
concern that use of 410 statements on the case-in-chief would un-
dermine plea bargaining was not significant in the context presented
in Burch, where the waiver was the result of plea discussions, not a
pre-condition to such discussions. 11

In contrast, the acceptance of the proffer agreement is a pre-
condition to plea discussions. Without a full 410 waiver, the defen-
dant will not obtain a face-to-face meeting with Southern District
prosecutors where he can explain the facts which might mitigate
his sentence. However, with such a full waiver, the defendant would
essentially be pleading guilty to any conduct admitted during the
meeting. For example, if a defendant came to a proffer session and
said that his drug amount for sentencing purposes in a cocaine dis-
tribution conspiracy was four kilos, and not forty kilos as charged,
he would be offering an admissible confession to a twenty-year
crime – conspiracy to distribute cocaine. 12 The only issue left for
trial would be whether the drug weight of the conspiracy satisfied
the mandatory minimum provisions of the Controlled Substances
Act. 13 It is hard to argue that such a significant result of the proffer
session would not discourage defendants from participating in such
discussions.

In short, under these facts, a defendant would have to essen-
tially plead guilty to a twenty-year crime just to have the prosecu-
tion listen to him. This may offend members of the federal judi-

ciary. On this point, Judge Denise Cote and members of the Second
Circuit have said in regard to limited waivers of Rule 410:

While courts must consider general fairness principles in inter-
preting and enforcing agreements between defendants and the gov-
ernment, “with respect to federal prosecutions, the courts’ concerns
run even wider than protection of the defendant’s individual constitu-
tional rights – to concerns for the honor of the government, and
public confidence in the fair administration of justice in a federal
scheme of government.” 14

It may it not be honorary for the government to require such
full waivers “just to listen,” because they should be interested in
hearing mitigating information when offered by a defendant simply
to do justice. Moreover, such a full waiver, beyond the limited one
upheld in Mezzanato, might not marginally support any significant
jurisprudential function. In Mezzanato and Velez, the government
argued that the limited waivers were required to ensure that defen-
dants were telling the truth in their proffer sessions. To ensure this
end, the defendant needed to know that he would be impeached
with his proffer statements if he deviated from them on the stand.
The waiver which allows use of the statements on the government’s
case-in-chief does not marginally support this value but it inhibits
free discussion in a much more significant way.

Of course, the government will argue that, because of the in-
surmountable cases they develop, defendants will have plenty of
incentive to “essentially plead guilty” so that the government will
listen to their mitigating evidence. However, in cases where the
government’s case is not so overwhelming, a defendant will be put
in a significant quandary if he wants to present evidence to the gov-
ernment in search of a better disposition. Unless the Southern Dis-
trict prosecutors change their policies, federal courts will soon be
grappling with whether this quandary should exist. These cases will
have to answer the query posed by the concurrence in Mezzanato –
whether requiring full waivers of Rule 410 in proffer agreements
violates Congressional intent.

9. 156 F.3d 1315 (D.C. Cir. 1998).
10. The agreement also allowed the use of statements made by the cooperator in meetings held after the plea. It does not appear that
these were statements made to government attorneys during plea bargaining under Rule 410.
11. Id. at 1321-22.
(2d Cir. 1996).
TWELVE “NEVERS” IN REPRESENTING DWI CLIENTS – TO AVOID “CLASSIC BLUNDERS”

by Glen Edward Murray

Glenn Edward Murray is a member of the NYSACDL in private practice in Buffalo. He is the author of Collateral Consequences of Criminal Conduct and Criminal Law Slanguage of New York 3rd edition. Michael Dwan contributed to this article with his insightful comments.

You fell victim to one of the classic blunders! The most famous is never get involved in a land war in Asia, but only slightly less well-known is this: never go in against a Sicilian when death is on the line!

— Vizzini: The Princess Bride (“Battle of Wits” scene)

In representing DUI defendants for over twenty years, I have learned of many “Classic Blunders.” I’ve listed several below, some of which I have “learned the hard way.” The following list reflects my self-admonitions.

1. Never fail to obtain the motorist’s driver abstract at the first client interview. Clients are notoriously inaccurate in remembering the particulars of past transgressions and any rehabilitation programs completed. Some have violations they are unaware of or which need to be corrected. Failure to consider the motorist’s DMV history, point accumulation and rehabilitation treatment may cause counsel to misadvise a client concerning the consequences of conviction. During an intake interview, it is critical to review the motorist’s DMV driver abstract. (Information concerning how to establish an online DMV account is available at: http://www.nysdmv.com/dialin.htm). Having on-line access also shows the prospective client that counsel is equipped and capable to handle DUI representation. A NYS Division of Criminal Justice Services “Rap Sheet” should also be obtained from the court at arraignment, since the DMV abstract will not report offenses older than ten years.

2. Never fail to view the scene of the alleged crime, or at least review a map thereof. Detailed knowledge of the scene of an arrest can be crucial on cross-examination of a police officer or other witness. Factors such as weather, traffic conditions and environmental conditions under which field sobriety tests were performed can be grist for effective cross-examination. In order to avoid subjecting the defendant to cross-examination, it is best that someone other than the defendant take any photographs of the arrest scene. (Maps and satellite images may be obtained at: http://www.google.com/maps?ie=UTF-8&oe=UTF-8&hl=en&tab=wl&q=. Archived weather data may be obtained at: http://www.erh.noaa.gov/data/obhistory/KBUF.html, or at: http://www.noaa.gov/). Police accident reports (MV-104A) can also provide valuable information in evaluating the case and for cross-examination.

3. Never fail to consider the collateral consequences of a DUI conviction. Any drinking-driving conviction (including DWAI) may have drastic collateral consequences (indirect and civil), including exclusion from entry into Canada and potential loss of professional licenses. (Statutory Vehicle and Traffic Law and Penal Law sentencing parameters for drinking driving convictions are obtainable at: http://www.georgedentes.com/)

4. Never fail to provide copies of documents to the client, including papers provided from the client at intake interview, arraignment and discovery. I have often been stunned by clients who review documents and remark about the accusations that are inconceivable, like: “It was impossible for that 15-year-old girl to drive my truck while sitting in my lap because there is not enough room between the steering wheel and the seat!” Also, the incriminating evidence described in the papers often show the client why the charges are not frivolous, such as CPL §710.30 notices like: “I never should have drank those ten shots - Yep. I’m drunk, so just arrest me!” or “Aw c’mon, I’m not drunk, I just smoked a lot of pot.” (Providing such papers to the client also demonstrates that counsel is working to obtain the most favorable result possible under the circumstances.)

5. Never fail to scrutinize the court paperwork pertaining to suspensions, revocations and plea dispositions. An incorrectly noted subdivision of a conviction offense and/or penalty can take hours of counsel’s unbillable time to rectify the error after the fact, when an immediate correction could have avoided the problem. For example, the wrong notation on a plea authorization form, or the wrong block checked on a suspension pending prosecution order, can disqualify a motorist from limited driving privileges, causing loss of employment and catastrophic consequences.

(continued on page 6)
6. Never fail to defend incidental traffic infractions.
Don’t fall in the habit of thinking: “Those are the least of our concerns.” A negotiated plea bargain, including dismissal of moving violations incidental to the DWI charge, or counsel’s aggressive defense of insufficiently proven moving violations, might avoid automatic ineligibility for a conditional license. Always review the elements of the every incidental traffic infraction, which if acquitted or dismissed may avoid points, fines and suspensions. In a recent case, my client was most appreciative after I obtained dismissal of a failure to signal citation, because I pointed out in closing argument that the officer never testified that my client did not use a hand signal.

7. Never fail to promptly contact the Court to confirm the date, time and presiding judge.
In evaluating any case, it is critical to evaluate all four Cs: the Client, the Case, the Consequences – and especially the Court! Contacting the court clerk can also avoid counsel making an unnecessary court appearance if the appearance has been adjourned since the tickets were issued. Sometimes the court will schedule an appearance date earlier than the date shown on the traffic tickets. The client’s failure to appear on that earlier date can result in arrest warrant and bail forfeiture for the client.

8. Never fail to refer DUI clients for prompt evaluation and treatment by a provider acceptable to the Court.
Many clients are reluctant to engage in such evaluation and treatment because they think it will imply to the court that the client has a “drinking problem.” They should be assured that with a DWI charge filed against them, the Court already thinks they have a “drinking problem” and that a favorable treatment report (“cooperative and compliant”) might help ally the Court’s concern regarding public safety. Under the law effective November 1, 2006, only OASAS providers are acceptable for mandated DUI evaluation and treatment.

9. Never fail to humanize your client at sentencing by succinctly noting to the court the client’s positive qualities.
You might say something like: “He’s a good natured youth, with excellent school grades, who has been self-supporting, making only $8.00 per hour. Always accentuate the impact of substantial collateral consequences of conviction sans incarceration. A DUI charge typically costs over $8,000.00, because of the cumulative retainer, fines, DMV costs, insurance increases, etc. For example, you might mention that at $8.00 per hour it will take 1,000 work-hours to pay off the financial consequences. When representing youth, counsel should surely advise the court if there has already been parental intervention such as “taking the car away,” noting that the youth must repay the parents for “fronting” all such expenses.

10. Never fail to have the client sign a retainer agreement.
A written retainer agreement is not required in a criminal case where the total fee is less than $3,000.00. 22 NYCRR § 2515.2. However, retainer agreements avoid misunderstandings that can lead to disgruntled clients. Retainer agreements may also avoid time-consuming fee disputes. If at the intake interview the client did not sign a retainer agreement, one should be provided for the prospective client to sign and remit with the retainer payment.

11. Never fail to send the client a “Closing Letter” that reports on the charges, disposition and penalties.
The closing letter should note the penalties avoided and imposed, along with the sentencing and relicensure conditions. Also send a copy of the closing letter to any attorney who referred the case, to demonstrate the favorable result obtained.

12. Never fail to send a thank you note or gift to anyone who refers you a case.
I don’t share retainer fees, but I think it’s rude and foolish not to thank someone who refers a client, whomever the source (lawyer, client, former client, friend, etc.). I routinely send a token of my appreciation, such as a book or a dinner gift certificate, to anyone who refers a case to me. Such gift certificates often have the synergistic marketing effect of reminding restaurateur clients of my gratitude. They appreciate my patronage and are more likely to refer future clients to me.
NOTICE OF ALIBI: AN OVERVIEW AND ANALYSIS

by Andrew J. Schatkin

Andrew J. Schatkin practices law in Jericho, New York and has written over 150 legal articles and contributed to five books. He is a member of the NYSACDL.

Section 250.20 of the Criminal Procedure Law entitled, “Notice of alibi” sets forth the parameters and time frames governing the defendant, in a criminal case, serving upon the People a, “Notice of alibi.” This statutory section also contains a section governing service upon defendant or his counsel of a list of witnesses, the People propose to offer in rebuttal to discredit the defendant’s alibi at the trial together with the residential addresses, the places of employment, and the addresses thereof of any such rebuttal witnesses. (Secs. 1, 2 CPL Sec. 250.20)

Subsection 3 of this statute states that if at the trial the defendant call such an alibi witness without having served the demanded Notice of alibi, or if having served such a Notice, he calls a witness, not specified therein, the Court may either exclude any testimony of such witness relating to the alibi defense or, in its discretion, receive such testimony.

Subsection 4 of this statute states that if the People fail to serve and file a list of any rebuttal witnesses the provisions of subdivision 3, set forth above, should reciprocally apply.

Subsection 5 of the statute states that both the defendant and the People will be under a continuing duty to properly disclose the names and addresses of additional witnesses as come to the attention of either party subsequent to filing their witness list as provided in this section.

It should be noted that subsection 1 of this statutory section, CPL Sec. 250.20, states, mores specifically, and in pertinent part, that not more than 20 days after the arraignment, the People may serve upon the defendant or his counsel, and file a copy thereof with the Court, a “Notice of alibi” reciting (a) the days of service of such demand, serve upon the defendant or his counsel, and file a copy thereof with the Court, a “Notice of alibi” reciting (a) the days of service of such demand, serve upon the defendant or his counsel, and file a copy thereof with the Court, a “Notice of alibi” reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the Court may extend the period for service of the notice.

The Notice of Alibi statute, contained in CPL 250.20, would appear to be simple, and subject to obvious interpretation on its face. However, there has been much case law interpreting and construing the meaning and import of these statutory sections. Hence, it is the purpose of this article to provide an analysis and overview of the case law interpreting the various sections of this statute.

In general, the law is that the purpose of the Notice of alibi is to allow the state a reasonable opportunity to investigate the merits of the defense and check the information that, in effect, states to the jury that at the time and place of the alleged crime, the defendant was elsewhere. Since, the defense is relevantly easy to manufacture and create, the idea of the alibi statutory scheme is, as has been stated, to afford the prosecutor the opportunity to fully investigate the merits of the alibi.

It has been further held that subdivision 2 of this section, requiring the People to furnish a list of witnesses to rebut alibi evidence, was not intended to reveal eyewitnesses to the crime.

It is within the discretion of the Court to accept the testimony of an alibi witness, even if the defendant does not file a Notice of alibi, and, although the Court does have discretion to extend the period in which the defendant must serve his Notice of alibi, an application for such an extension may be denied where the defendant does not appropriately demonstrate good cause for the delay.

There is also law to the effect that the denial of the defendant’s application to preclude the People from calling alibi rebuttal witnesses, made on the ground that the People’s alibi rebuttal Notice was untimely, was a proper exercise of discretion. The Court held that the defendant did not avail himself of a statutory right to an adjournment, and did not establish incurable prejudice.

It has also been held that the trial court acted within its discretion in precluding the defendant from presenting alibi witnesses on the ground that the defendant did not provide adequate notice, where the defendant did not proffer sufficient reason for his failure to comply.

(continued on page 8)
There is a great deal of case law on the issue of late notice of the Notice of alibi. For example, the late entry of defense counsel into the case may provide a reasonable excuse for delay in the service of the Notice of alibi.

Again, where the defendant offered no explanation for his tardy application for leave to call a witness, the trial court did not abuse its discretion in denying defense counsel’s application to call an alibi witness, since no timely Notice of alibi was furnished to the People.

Again, it has been held, on the matter of late notice, that the late entry of defense counsel into the case, thirty days before trial, did not excuse defendant’s untimely filing of the Notice of alibi, at least five days before trial, where the tardiness of the Notice of alibi prejudiced the State’s ability to adequately investigate defendant’s claims prior to trial.

On the matter of late notice, People v. Castro is instructive on the interpretation of what constitutes late notice. In that case, the Appellate Division First Department held that defense counsel was not entitled to file a late notice of alibi defense, on the day of trial, nearly a year after defendant’s arrest for murder, where the only reasons given for late notice where simple forgetfulness and the unexplained failure to interview prospective witnesses until the eve of trial.

There is also a great deal of case law concerning the issue of the sufficiency of the notice and the notice requirements set forth in the statute. For example, in People v. Peterson, the Appellate Division Second Department held that the defendant’s Notice of alibi was not fatally defective for its failure to list the witnesses’ places of employment, where one of the witnesses was an unemployed student and places of employment, if any, of other witnesses were unknown to counsel. The Appellate Court, held in Peterson, that it was sufficient for a notice to have listed names and residential addresses of prospective witnesses.

People v. Elliott presents an interesting gloss and interpretation of the requirement of the People to provide rebuttal witnesses in response to the defendant’s list of alibi witnesses. In that case, the trial court held that the People must provide to the defendant, not only a list of the contra-alibi witnesses who might testify in rebuttal, but also to a list of contra-alibi witnesses who might testify on the People’s direct case.

It has been held that the People cannot impeach the defendant who testifies at trial with assertions contained in the alibi notices that contradict trial testimony.

There is much case law interpreting the ability of the State to preclude the defendant from offering alibi testimony, based on the failure to file an alibi notice. In general, the law is that the defendant is not able to offer alibi testimony based on his failure to file an alibi notice, when he fails to offer a reasonable excuse.

On the other hand, the Appellate Division Second Department held in People v. Peterson that despite the fact that the defendant had failed initially to proffer any explanation for service of his Notice of alibi approximately six months after the People’s demand, the People were not unduly prejudiced so as to warrant preclusion of the defendant’s witnesses from testifying as to the proposed alibi defense, when the Notice of alibi was served two weeks prior to the tentative scheduling of trial.

7. People v. Mensche, Supra.
9. Id.
10. 263 A.D.2d 373, 695 N.Y.S. 306 (1st Dept. 1999)
11. On other cases interpreting late notice See People v. Mensche, Supra. and People v. Caputto, 175 A.D.2d 290, 572 N.Y.S. 922 (2nd Dept. 1991)
14. People v. Taylor, Supra. It should be noted that the Court added in People v. Taylor, that while the State could not impeach the defendant at trial with assertions contained within his alibi notice contradicting his trial testimony, he would be entitled to show alibi notice to the defendant under the doctrine of refreshing the recollection of the witness.
16. Supra.
17. On this See also People v. Morales, 43 A.D. 2d 917, 352 N.Y.S. 938 (1st Dept. 1974) where the Appellate Division First Department held that the refusal to permit a proposed alibi witness to testify because her name was not set forth in the Notice of Alibi served by the defendant was prejudicial error.
Finally, there is law to the effect that the failure to file an alibi notice may be considered ineffective assistance of counsel. Thus, in Noble v. Kelly where the Federal District Court held that a murder defendant’s counsel was ineffective for failure to file a Notice of Intent to offer alibi evidence, resulting in exclusion of such evidence at trial. The failure was due to counsel’s misinterpretation of governing discovery rules and the defendant was prejudiced by the exclusion. Again, in People v. Watson where the Appellate Division Fourth Department held that the failure to file an alibi notice may be considered ineffective assistance of counsel if it precludes a viable alibi defense.

CONCLUSION

As has been stated previously, the alibi statute itself is facially clear in its language and apparent meaning. The extensive case law, however, reveals what the purpose of the Notice of alibi is, which is to afford the State a reasonable opportunity to investigate the merits of the case; that the Court has wide discretion to extend the period in which the defendant must file and serve his notice of alibi, as long as the defendant shows good cause. The law is also, on the issue of the discretion of the Court in this respect, that even if the defendant does not file a Notice of alibi, it is within the trial judge’s discretion, under New York law, to accept the testimony of the alibi witnesses.

There is also extensive case law on what constitutes a reasonable excuse or delay in the service of the Notice of Alibi, or, better put, on the issue of late notice, and as well there is substantial case law on what constitutes a sufficient notice. Finally, this article has touched upon whether the People may impeach the defendant with his alibi notice and on what constitutes the parameters and criteria whereby the defendant may be precluded from offering alibi testimony when he has failed to provide an alibi notice. This article concludes with the law on whether the failure to file an alibi notice may be considered ineffective assistance of counsel. It is hoped that this brief overview and analysis of the alibi statute and the case law interpreting it and explaining it will be a guide to the full understanding of this statute.

18. 89 F.Supp.2d 443 (S.D.N.Y. 2000)
19. Supra.
20. Cf. on this, however, People v. Battle, 249 A.D.2d 116, 672 N.Y.S. 21 (1st Dept. 1998) where the Appellate Division First Department held that the defense counsel’s failure to provide timely alibi notice with respect to the defendant charged with multiple criminal offenses did not constitute ineffective assistance of counsel, where the alibi witness the defendant wished to call had previously indicated that he would not testify under any circumstances, that defendant only renewed the request that the witness testify after trial had begun, the defendant never consistently pursued alibi defense and counsel made a substantial effort to comply with the defendant’s request.
STARTING MITIGATION IMMEDIATELY: USING FACTS TO BROADLY CONSIDER ALTERNATE THEORIES OF THE ALLEGED CRIME

by Mark Silver, MA, MSW, LCSW, CPFT, PsyD., JD

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Introduction

Most lawyers begin the mitigation process just before sentencing by hiring a mitigation expert. This article argues that it is essential to begin mitigation when the lawyer first meets his client as a means of presenting to the prosecutor all of the available information at the earliest opportunity, preferably even before formal charges have been brought and / or before arraignment. This will permit the prosecutor to consider, weigh, and possibly investigate the factual issues in the broadest reasonable light. Additionally, relevant factual issues are often prohibited material at trial due to evidentiary rules. As such, defense lawyers must adopt a “use it or lose it” appreciation whereby failure to make the prosecutor aware of such issues early on will necessarily mean that such material cannot be used at a later time.

Mitigation Consult

A mitigation consult concerns the investigation of factual information about the defendant’s biopsychosocial history that may enlighten and inform the lawyers – both defense and prosecution – about the crime the defendant has allegedly committed. Thus, from a few relatively innocuous facts major considerations about the case can produce alternate theories and reasonable doubt that can be presented to the prosecutor for consideration.

Mitigation experts deal with facts alone and usually leave the legal standards of law for the lawyers to contend with. Lawyers benefit from a mitigation consultation as a means to:

1) Better examine the implications of facts,
2) Consider what facts in the case may be missing or needed for clarification,
3) Evaluate the quality of the present facts, and
4) Reflect on the origin and integrity of facts presented by the prosecutor at the earliest stage of the process.

After a mitigation report is sent for a lawyer’s review before sentencing, I am often told that while the report will be very helpful to the defendant it would have been even more helpful if the evaluation had been undertaken much earlier in the case. This is because the evaluation uncovers important areas of factual information for the criminal defense lawyer that could have been useful when negotiating with the prosecutor initially or for purposes of trial preparation to construct reasonable doubt and alternative theories to the prosecutor’s theory of the alleged crime. While some of the information may be ultimately excluded from trial under evidentiary rules, the information can certainly be brought to the prosecutor’s attention at an early point in time to broaden the prosecutor’s grasp of all relevant facts and present a more comprehensive view of the issues.

This invaluable resource can best be illustrated by a real case example.

CASE EXAMPLE:

An eight-year-old boy (“Bobby”) accuses the defendant of touching his penis. There are no witnesses or physical evidence, and the mental health of the boy cannot be ascertained. Most criminal lawyers would recommend a plea so that the defendant will be spared the humiliation and exorbitant cost of a trial, which may well result in a longer sentence than a plea agreement.

A lawyer who requested a consult from myself presented the following few facts to me.

1) Bobby lives with his parents who apparently have a history of illicit substance abuse (quality and quantity unknown),
2) Bobby has an older teenage brother, Joe, with mental retardation, and
3) Some years before Joe had made a similar accusation against a different person concerning a sexual assault.
4) The defendant has no history of illegal conduct.
I suggested to the lawyer that if I was a juror I could not convict the defendant knowing these facts, as there stood various psychosocial mitigating issues of reasonable doubt and alternative theories that required further exploration and clarification. Moreover, there were many issues that the prosecutor should be told immediately to help the prosecutor seriously reconsider the stated charge and whether or not further police and/or forensic investigation is necessary.

1) **Fact** - Illicit substance abuse by one person can create a contact high in another person. This is particularly true when there is continual exposure to such substances, such as THC, in the confines of a home.

**Implication** - It seems perfectly reasonable to think that Bobby may have experienced various psychotic ideation, including hallucinations and delusions, as a result of residing in his parents’ home and being exposed to long-term inhalation of illicit drugs. An eight-year-old boy’s mind is creative and wild at the best of times and exposure to such substances may have erratic and unpredictable consequences making Bobby’s thoughts and beliefs unreliable at best and total fabrications at worst. Bobby’s older brother, Joe, may also have been exposed to such substances and experienced psychotic ideation, or behavioral effects. As such, their statements must be regarded with guarded skepticism.

2) **Fact** - Exposing a minor to illicit substances is neglect (or abuse) and the parents can potentially lose custody of the child.

**Implication** - One must consider if there are other forms of abuse or neglect in the home; could someone in Bobby’s immediate family sexually harmed him. Perhaps Bobby now accuses another person as a means of indirectly drawing attention to the abuse or neglect that occurs in his home.

**Implication** - Another important consideration is that Bobby may be concerned that Joe, his older brother with mental retardation, may not be well cared for by their parents and Bobby’s accusation against the defendant is his only means to draw attention to Joe’s helplessness.

3) **Fact** - Persons who are intoxicated, beit with alcohol or illicit substances, typically experience disinhibition, which permits the person to speak about private and inappropriate matters without a sense of self-restraint or appreciation of either context or who else is present at the time.

**Implication** - Bobby’s parents may have experienced looseness of associations or spoke about private, inappropriate, or nonsense matters while under the influence of illicit substances, which Bobby in turn picked up on and expressed as either his own thoughts or as what he thought was real.

4) **Fact** - Siblings of persons with mental retardation (and developmental disabilities) can have profound feelings, thoughts, and behaviors resulting from the guilt, anger, sadness, fears, or close identification with the mentally retarded sibling.

**Implication** - Bobby may feel that by mimicking Joe’s past allegation of sexual assault he would have an opportunity to gain the same attention and love as his older brother. Bobby may well feel that he cannot compete with the attention his older brother gets from their parents, especially as his parents are probably overprotective, due to the older brother’s lower level of functioning. Bobby may have either invented the story to gain attention or perhaps he repeated Joe’s past accusations of sexual assault, as he thought it would bring him sympathy. As such, it is possible that Bobby has had little opportunity for attention and believes that only an extraordinary lie will force his parents and other adults to direct their attention toward him in a serious manner.

**Implication** – Joe may have sexually done to Bobby what someone else did to him. As Joe has mental retardation he may have imitated this behavior as a normative act of play or interpersonal communication. Bobby may have become frightened and accused a person outside of the home as a means to protect Joe.

**Implication** - It is possible that Bobby feels guilt about the sexual assault that Joe, his older and helpless brother experienced, and can only negotiate these awful feelings by accusing someone of the same act and thereby forcing others to ask him the same kinds of questions that Joe endured. Or perhaps Bobby believes that he can show his brother that he is not alone with his fears and anger. As such, Bobby may be identifying with Joe in the only manner in which he knows how.

(continued on page 12)
5) **Fact** - Persons with mental retardation function at an intellectual level of a young child or below. Such person’s do not necessarily appreciate right from wrong and truth from lie.

**Implication** - It is impossible to discern what Bobby’s mentally retarded brother told Bobby regarding his alleged sexually assault and what Bobby internalized or filled in about the story. Joe could have convinced Bobby that this occurs to everybody, that people who experience this are special, that this is a way of gaining attention, or that the experience was awful and that he needs someone who can make a similar accusation so that people will stop asking him questions that are overwhelming and confusing.

6) **Fact** – When a perpetrator sexually assaults one vulnerable person in a family then others may also be targets of abuse.

**Implication** – It is reasonable to believe that the person who sexually assaulted Joe also targeted Bobby. The brothers live in the same home and community and the person who assaulted Joe may well have had equal access to Bobby.

**Mitigation Implications**

Given the absence of any physical evidence or witnesses, these alternative theories and facts concerning reasonable doubt based on a few simple facts can now provide the defense lawyer with viable lines of argument based on the mitigating biopsychosocial facts concerning the defendant’s case. These concerns can be brought to the prosecutor at the earliest possible time so that the he may in turn inquire directly from the family about these matters, or the prosecutor may permit a social work expert to interview Bobby and clarify relevant issues, or he may order the police to undertake further investigation. At the very least the prosecutor now has several important factors and alternate theories and avenues to consider, which may not serve to undermine the prosecutor’s case, but may at least direct the prosecutor toward a more holistically informed and fair-minded consideration of the case.

**Conclusion**

The defendant accused of sexual assault by young Bobby no longer stands alone with a finger pointing at him, but can in turn suggest alternate theories. In conclusion, the Bill of Rights, relevant criminal procedures, case law, and statutes can protect defendants, but ultimately it is the integrity and value of relevant facts that influence a prosecutor (or jury) about reasonable doubt and alternative explanations. Starting mitigation when the defendant first walks in the lawyer’s door is both the best defense and also the best offense.

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**EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE NYSACDL’S PROSECUTORIAL AND JUDICIAL COMPLAINT CENTER**

The New York State Association of Criminal Defense Lawyers’ Prosecutorial and Judicial Complaint Center (PJCC) was formed in 2004 to deal with the persistent problem of prosecutorial and judicial misconduct. The committee receives reports and complaints of misconduct from whatever sources, including published newspaper accounts. The PJCC conducts investigations and, where appropriate, files complaints, referrals or asks for investigations by the Commission on Judicial Misconduct, or the appropriate department disciplinary committees.

Despite the increase in prosecutorial misconduct reported in the media and growing complaints from the defense bar, few if any complaints are actually filed against prosecutors. Some attribute this to fear by defense attorneys of potential repercussions, while others cynically believe that it is futile to file, since “nothing will be done anyway.” The study committee met with officials from the New York State Commission on Judicial Conduct and the Departmental Disciplinary Committees, and reported that contrary to the popular perception, these agencies would respond to complaints from the NYSACDL.

The NYSACDL is the filing party when forwarding a complaint or referral. It is expected that the PJCC will not limit itself to single episodes of misconduct, but tries to establish systemic and repeated abuses as well. One area of growing concern has been the perceived lack of respect for counsel as evidenced by unnecessarily caustic or intemperant remarks. There has also been the belief that in some courtrooms a failure to agree to a particular course of action can result in an increase of bail and a client’s incarceration.

If you wish to file a complaint, contact Eric Seiff at (212) 371-4500. For more information on the PJCC, visit our website at www.nysacdl.org.

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**ATTICUS REQUESTS**

**SUBMISSION OF ARTICLES**

Members wishing to submit articles for inclusion in *Atticus* should send them to the attention of Patricia Marcus, Executive Director, NYSACDL 245 Fifth Avenue, 19th Floor, New York, New York 10016. The editor reserves the right to modify any submissions for style, grammar, space and accuracy.

Authors are requested to follow these guidelines:

1. Use footnotes rather than endnotes.
2. When a case is mentioned in the text, its citation should be in the text as well.
3. Submit articles in hard copy with disk in either WordPerfect or Word.
4. Articles longer than 3-4 pages will be edited.
WHY WE DO WHAT WE DO

From time to time we are inspired when we win, when we hear a Not Guilty verdict, or by Don Thompson’s words after he walks out of a Rochester courtroom with an innocent, wrongfully convicted client. Some times we lose.

Recently, on a case which has been to the Court of Appeals, and in which a defendant has another 10 years to serve of his minimum 20 to Life sentence, a member of this association sent a letter advising that because of a change in appellate law that a motion to reopen a conviction and obtain a new trial had been denied. One major issue had been the claimed ineffective assistance of the same counsel for failing to raise and preserve the issue. Prior to commencing the new proceeding a conversation took place about the risk of creating false hopes of release.

The inmate’s response is as follows, word for word, with only two identifying words deleted.

Dear Mr. ________:

Thanks for your letter. I know it has taken me a few weeks to respond to your last letter; well I just needed time to get over the shock that I knew all along were very much possible.

I just wrote my son yesterday to tell him of the decision. I had planned to never mention about what was going on with my case because I didn’t want to get his hopes up, as well as my two older sisters. But my 13 year old kept asking me when I were getting out, he said he just wanted to spend time with me and get to know me better. I tried not to get his hopes up but told him that you were working on my case.

It was disappointing to receive and review the decision but do I regret taking the shot, absolutely not. Would I do it all over again, yes! Would I want you in my corner, absolutely. I recognize how you put yourself out there and were willing to sacrifice. I could ask for nothing more. I have been proud and is proud to call you my lawyer; but even more, I am proud to call you my friend.

You see ________, the real test to our character and who we really are, comes when we are at a low and sad time in our life. If we hate when we feel life hasn’t been fair to us, then we are nothing but a person of hate all along. When terrible and bad things happen to us, and we can still find kindness, love and hope in chaos, maybe this is who we were all along, or maybe we really have changed for the better. Finding even a small jewel in the mist of junk, is worth the search. Like I’ve said before, maybe I’ve already had all of my second chances, but as long as there’s life, there’s hope and even though giving up, sometimes seems like the easiest path.

I continue to work hard in my business and computer classes, not with a guarantee that one day I will be able to utilize these skills in the real world one day, but because the possible will exist; I know that a person who fail to prepare for life, will have to make navigation without readiness, though life will throw you some curves.

I don’t know what the future hold, maybe another door will be opened; maybe not, but in any event we just hope and watch, and watch and hope. And if it still doesn’t happen, no one ever promised that life will go the way we wanted it too. We just buckle up for this crazy ride called life and hope we survive, and at least at the end of it, find that we are a better person from all of it’s experiences, both good and bad.

We will both keep up the fight because its what we know how to do best. I understand the points you made in the letter. I’m not sure the issue is entirely over yet.

Take care and update me please on how things are progressing or, on any new 2nd Circuit decision relating to issue.

Sincerely,
Barry Kamins, recipient of the Hon. Thurgood Marshall Award for Outstanding Criminal Practitioner and NYSACDL Past-President Ray Kelly. Kamins is a Charter Member of the NYSACDL and President of the Association of the Bar of the City of New York.

Ben Brafman with Annual Dinner Chair and Past-President Murray Richman

Ben Brafman, Barry Kamins, Honorable George Bundy Smith and President Daniel N. Arshack.
January 25, 2007

Dear Friends:

It is a pleasure to welcome everyone to the Annual Dinner for the New York State Association of Criminal Defense Lawyers.

On behalf of the City of New York, I extend warm congratulations to tonight’s honorees:

Ray Kelly, Judge George Bundy Smith, Barry Kamins, and Benjamin Brafman. These individuals have each made many lasting contributions to strengthen New York’s legal community, and I applaud their commitment to serving the people of our great City and State.

In addition, I recognize the members of the New York State Association of Criminal Defense Lawyers for hosting tonight’s festivities. Since 1986, you have been an important source of support for the legal profession, and I wish your incoming president, Daniel N. Arshack, the very best as he assumes his new duties.

For more than two decades, NYSACDL has worked “not for the few, but for the rights of all.” Indeed, passionate and qualified legal professionals such as this organization’s members play a crucial role in ensuring a more fair and perfect justice system for all New Yorkers and Americans. My best wishes for an enjoyable event and continued success.

Sincerely,

Michael R Bloomberg
Mayor

The 2007 NYSACDL Annual Dinner was held Thursday, January 25th at the Marriott Financial Center Hotel in New York City. The evening featured Past-President Ray Kelly swearing in Daniel N. Arshack as President of the Association.

Barry Kamins, President of the Association of the Bar of the City of New York and an NYSACDL Charter Member was honored with the Hon. Thurgood Marshall Award for Outstanding Practitioner. Hon. George Bundy Smith was presented the Hon. William Brennan Award for Outstanding Jurist.

Benjamin Brafman received the first Clarence Darrow Award for Outstanding Achievement.
(Items not archived.)
(Items not archived.)
2007 CLE SCHEDULE

Friday, March 9
Mid-Hudson Trainer
Grand Hotel - Poughkeepsie

Friday, March 16
Federal Practice Update
United States Courthouse
Eastern District of New York
Brooklyn

Saturday, March 24
Federal Criminal Law Update
Holiday Inn - New Hartford

Friday, April 20
DNA Update
New York City

Saturday, April 28
Annual Syracuse Trainer
Syracuse College of Law - Syracuse

Saturday, May 5
Cross to Kill
Binghamton Club - Binghamton

Friday, May 18
Cross to Kill
St. Francis College - Brooklyn

Friday, September 7
Appellate Practice
St. Francis College - Brooklyn

Friday, October 13
Weapons for the Firefight
St. Francis College - Brooklyn

Saturday, October 14
Criminal Law Update
Syracuse College of Law - Syracuse

Friday, November 2
Criminal Law Update
Best Western on Nyack - West Nyack

Friday, November 16
Trial Practice Seminar
St. Francis College - Brooklyn

Saturday, December 1
Last Chance Ethics Seminar
St. Francis College - Brooklyn

Dr. Henry C. Lee and Ira Peserilo at the Law and Forensic Science seminar, held January 27 at the Marriott Financial Center Hotel.

Dr. Albert Harper, Executive Director of The Henry C. Lee Institute, Mark Weinstein and President Daniel N. Arshack.

Major Timothy Palmbach of the Dr. Henry C. Lee Institute and Nathan Dershowitz.

The New York State Association of Criminal Defense Lawyers is an accredited New York State Continuing Legal Education Provider.

To register or for information on our 2007 CLE Schedule, please contact Patricia Marcus at (212) 532-4434 or via email at nysacdl@aol.com or visit our website at www.nysacdl.org.
AMICUS REPORT

by Richard D. Willstatter

Richard D. Willstatter is a Director of NYSACDL and serves as Amicus Chair. He is a partner at the White Plains firm of Green & Willstatter.

We finally filed a brief amici curiae in the case People v. Martin Tankleff, in the Appellate Division, Second Department. Our brief was by newly-elected Board Member Donald Thompson who wrote that, while Mr. Tankleff has demonstrated his innocence by clear and convincing but that the correct standard of proof to obtain a new trial on actual innocence claims should be by preponderance of the evidence. Our brief was joined by the National Association of Criminal Defense Lawyers, the New York State Defenders’ Association, as well as retired Judges John S. Martin and Herbert Posner. Additional briefs were filed by Innocence Project, among others. Our application to file as amici was granted without opposition from the People.

We have filed an outstanding brief in the matter of People v. Nico LeGrand, an appeal in our State Court of Appeals on the issue of the standard by which a trial court must decide whether to admit expert testimony in one witness identification cases. Lorca Morello of the Criminal Appeals Bureau of the New York City Legal Aid Society and Robert Garcia of Neighborhood Defender Services of Harlem drafted our brief which was jointly submitted all three organizations. It is an excellent and thorough 20,000-word exposition arguing that (1) qualified expert testimony on the factors affecting eyewitness identification should be presumptively admissible, (2) that the trial court’s preclusion of such testimony deprived the appellant of a fair trial, and (3) the hearing court’s findings were based on a misunderstanding of the scientific principles underlying eyewitness identification research. Our application to file as amici was granted.

After our brief amici curiae was filed on December 1, 2006 in the matter of Walton v. NYSDOCS and before the scheduled New York State Court of Appeals oral argument, Governor Spitzer repealed the State rules that permitted the State and Verizon/MCI to charge exorbitant rates to the family members of prisoners. Our brief, originally sponsored by The Sentencing Project, argued that the rate structure was an enormous burden on state prisoners and their families. NYSACDL and NACDL sought and received the inclusion of our concerns that the high cost of calls interferes with our clients’ right to counsel in connection with appellate and other post-conviction representation, forces poor defendants to choose between spending money on calls to home and calls to attorneys, and is a burden on financially strapped public defender organizations who must accept these collect calls. Our brief was described in an NACDL press release, is featured in the January/February issue of the Champion. The issue made the New York Times before the new Governor finally decided to reverse the prior governor’s ill-advised policy. Thanks are due NACDL President-Elect Carmen Hernandez and NACDL Executive Director Norman Reimer for their interest in this important matter and in the amicus effort.
SIR OR MADAM:

PLEASE TAKE NOTICE, that the defendant in the above-captioned action demands, pursuant to Section 240.20 of the Criminal Procedure Law, that within 20 days the District Attorney disclose to the defendant, and make available for inspection, photographing, copying and testing the following property which the District Attorney has in his or her possession, control or custody, or which he or she ascertains the existence of, after making a good faith effort to so ascertain:

(a) any written, recorded or oral statement or statements of the defendant and/or a co-defendant, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him;

(b) Any transcript of testimony relating to the criminal action or proceeding pending against the defendant, given by defendant, or by a co-defendant, before a grand jury;

(c) Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding and made by, or at the request or direction of a public servant engaged in law enforcement activity, including: NYPD or any other police agencies chemical test rules and regulations, Constantine v. Leto, 157 A.D. 3d 376, 378, 577, N.Y.S.2d 611, 613 (3d Dept 1990), order aff’d, 77 N.Y.2d 975, 571 N.Y.S.2d 906, 575 N.E.2d 392 (1991); Produce an alco-sensor breath screening test, see, People v. Vargulik, 130 A.D.2d 530 (2d Dept 1987); Produce DWI investigative notes, alcohol influence report (A.I.R.), Physical Condition Report, and similar forms, see People v. Lawrence, 74 Misc. 2d 1019, 1021, 346 N.Y.S. 2d 330, 333 (Dist. Ct. 1973); People v. DiLorenzo, 134 Misc2d 1000, 1002, 513 N.Y.S.2d 938 , 940 (County Ct. 1987) Documents including but not limited to the following: records indicating that the machine was not operating properly, People v. Crandall, 228 A.D.2d 794 (3d Dept. 1996), rules, regulations and checklist and calibration regulations for any machines involved in this matter, ibid; documents relating to ampule analysis and simulator solution analysis and breath analysis operator’s permit and the weekly test record, People v. Erickson, 156 A.D.2d 760, 762 (3d Dept 1989); produce all documentary evidence that the People intend to introduce to establish the foundation for the breathalyzer test results, People v. Amidon, 102 Misc 2d 850, 851 427 N.Y.2s 727 (City Ct. 1980) See 10 NYCRR Section 59.5(f);

(d) Any other property obtained from the defendant, or a co-defendant including blood samples People v. Karpeles, 146 Misc.2d 53, 549 N.Y.S.2d 903 (City Crim. Ct. 1989);

(e) Any photograph or drawing relating to the criminal action or proceeding made or completed by a public servant engaged in law enforcement activity, provide counsel with a copy of the defendant’s arrest photo (i.e. mug shot), People v. Dudley, 268 A.D.2d 442, 703 N.Y.S.2d 489 (2d Dept, 2000) produce any video tape recording made by the police in this matter, People v. Marr, 177 AD2d 964 (4th Dept 1991);

(f) Any tapes or other electronic recordings which the prosecutor intends to introduce at trial;

(g) Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the Constitution of this State or of the United States, including but not limited to “Brady” material hereinafter demanded.

Defendant demands that the People preserve any and all Rosario material, see, People v. Joseph, 86 N.Y.2d 565, 570-71 (1995).
BRADY DEMAND

A) NATURE OF MATERIAL SOUGHT

1. Any and all promises, understandings or agreements, formal or informal between the prosecution, its agents and representatives and persons (including counsel for such persons) whom the prosecution intends to call as witnesses at trial, together with copies of all documentation, pertaining thereto. This request includes, but is not limited to, such promises, understandings or agreements as may have been made in connection with other cases or investigations. This request includes information concerning any payment of monies to any prospective witness. See, United States v. Luc Levasseur, 826 F.2d 158 (1st Cir. 1987); People v. Novoa, 70 NY2d 490 (1987); United States v. Hastings, 667 F.Supp 888 (D. Mass. 1987).

2. Any and all actions, promises or efforts -formal or informal- on the part of the prosecution, its agents and representatives to aid, assist or obtain benefits of any kind for any person whom the prosecution considers a potential witness at trial, or a member of the immediate family of such witness.

This request includes but is not limited to (a) letters to anyone informing the recipient of the witnesses cooperation; (b) recommendations concerning federal or state aid or benefits; (c) recommendations concerning licensing, certification or registration; (d) promises to take affirmative action to help the status of the witness in a profession, business or employment or promises not to jeopardize such status; (e) aid or efforts in securing or maintaining the business or employment of a witness; (f) aid or efforts concerning a new identity for the witness and his family, together with all other actions incidental thereto; (g) direct payments of money or subsidies to the witness; or (h) any other activities, efforts, or promises similar in kind or related to the items listed in (a) through (g) above.

3. Any threat made to the witness or any member of his family by any law enforcement officer for the prosecution which could arguably be developed on cross examination. See, Moynahan v. Manson, 419 F.Supp. 1139 (D. Conn. 1976); Castleberry v. Crisp, 414 F.Supp. 945 (N.D. Okl. 1976).

4. A list of any and all requests, demands or complaints made to the government by the witness which arguably could be developed on cross examination to demonstrate any hope or expectation on the part of the witness for favorable action in his behalf (regardless of whether or not the government has agreed to provide any favorable action. See, Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989).

5. Any material not otherwise listed which reflects or evidences the motivation of the witness either to cooperate with the government or any bias or hostility against the defendant. See, People v. Wallert, 469 NYS2d 722 (App. Div. 1983).

6. Any and all evidence that any person who is a prosecution witness or prospective prosecution witness in this case is or was suffering from any physical or mental disability or emotional disturbance, drug addiction or alcohol addiction at any time during the period of the indictment or information or complaint to the present. This request includes records and reports of psychological or psychiatric testimony with respect to any such person who was an inmate of a federal or state prison or underwent such tests as a condition of entering the federal witness protection program.

7. Any and all statements -formal and informal, oral or written- by the prosecution, its agents and representatives to any person (including counsel for such persons) whom the prosecution intends to call as a witness at trial pertaining in any way to the possibility, likelihood, course or outcome of any government action -state or federal, civil or criminal- or immigration matters against the witness, or anyone related to the witness blood or marriage.

8. Any and all evidence of criminal conduct -state or federal- on the part of any person whom the prosecution intends to call as a witness at trial of which the prosecution, its agents and representatives have become aware.

9. Please inform us of all judicial proceedings in any criminal cases involving (as a witness, unindicted co-conspirator, aider or abettor, or defendant) any person who is a potential prosecution witness at the trial in this action. This request includes institutional disciplinary records, if such person was a federal or state inmate.

10. Any statements or documents, including but not limited to grand jury testimony and federal, state and local tax returns made or executed by any potential prosecution witness at the trial of this action which the prosecution knows, or through reasonable diligence, should have reason to know is false.

11. The names and addresses of all persons whom the prosecution, its agents and representatives believe to have relevant knowledge and/or information with reference to the charges contained in the indictment, information or complaint but whom the prosecution does not propose to call as witnesses at trial. United States v. Cadet, 727 F.2d 1543 (9th Cir. 1984) (Brady violation where government failed to disclose names and addresses of any witness it did not intend to call -"the fact that the government did not intend to call a witness to the crime [made it reasonable to conclude] that there was a reasonable possibility that such person would be able to provide evidence favorable to the defense."). People v. Sharpnars, 147 Cal. App 3d 190, 195 Cal. Rptr 39 (1983); Collins v. State, 642 SW2d 80 (Tex. Ct. App. 1982) (prosecution failure to reveal name of material witness constituted a violation of Brady). See also, e.g. People v. Johnson, 38 Cal App.3d 228, 113 Cal. Rptr. 303 (1974) (government required to divulge names of experts who corroborate defense).

(continued on page 22)
12. Any exculpatory information given before the grand jury.

13. Any report in which it is recited that persons other than the accused committed the crime or that the present theory of the government may be in error.

14. A list of all documents used, obtained or written in connection with the investigation preceding the indictment that the government destroyed, for whatever reason, including but not limited to rough notes to interviews, reports, memoranda, subpoenaed documents and other documents.

15. A list of all persons (and their counsel) who were asked by the government or its representatives whether they or their clients would and/or could implicate the defendant in any criminal wrongdoing.

16. Please inform me whether or not the government has used informants, undercover agents or any such entity or individual. If so, provide the names of such individuals and a means by which such individual may be located.

17. Please state whether evidence of similar acts is intended to be introduced against the defendant or any co-defendant or co-conspirator and what that evidence is.

18. Any prior inconsistent statements known to the government relating to any witnesses. See, United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989); Lindsey v. King, 769 F.2d 1034 (5th Cir. 1984) (State prosecutor’s failure to disclose police report in which one of the eyewitnesses had initially indicated that he did not see killer’s face and could not identify him was a denial of due process where eyewitness later changed his story after victim’s sister placed reward notice in local newspaper).

With respect to government witnesses, the following material is demanded:

a) The witness’ rap sheet.

b) Any statements of the witness which conflict with the government’s present theory of the case. See, e.g., Mills v. Scully, 653 F. Supp 885 (SDNY 1987) (false testimony about seeing the crime); United States, v. Sheehan, 442 F.Supp. 1003 (D. Mass) (hesitancy in making identification by eyewitness must be disclosed under Brady). See also, People v. Wright, 480 NYS2d 259 (Sup Ct. 1984) (prior indecisive identification must be disclosed and must be disclosed to grand jury if identification is the main issue - failure to do so resulted in dismissal of indictment).

c) Any promise of non-prosecution for any crime.

d) Any agreements or understandings by the prosecution to assist the witness.

e) Any fact or allegation concerning criminal or other misconduct which is not reflected on his written rap sheet.

f) Any situation known to the prosecutor where the witness could be named as a defendant or co-conspirator, but has not been charged.

g) Any materials reflecting possible motivation of such witness to cooperate with the prosecution.

h) Any other material bearing upon the witnesses’ hopes or expectations (regardless of whether the witness in fact realized his expectations) for his cooperation with the government.

B) AUTHORITY FOR SUCH RELIEF

Brady v. Maryland, 373 U.S. 83 (1963) has been extended to apply to material evidence that would impeach a prosecution witness whose “reliability...may well be determinative of guilt or innocence.” Giglio v. U.S., 405 U.S. 150, 154.

Evidence that might well alter the jury’s judgment of the credibility of a crucial prosecution witness is within Brady. Perkins v. LeFevre, 691 F.2d 616, 619(2d Cir. 1982).

The requirements of Brady are not based on Rule 16, but rather on a defendant’s due process right to a fair trial. U.S. v. Kaplan, 554 F.2d 577, 579 (3rd Cir. 1977).

The defense in seeking to attack the credibility of the prosecution witness, may explore any promises he has obtained from the government, this on the issue of whether he has a bias favoring the prosecution. Even where a witness’ request or demand has not been satisfied, the defense may explore this to the end of developing the witness’ hopes, expectations and motivation in testifying as a government witness.

The request for Grand Jury material is based on U.S. v. Herberman, 583 F.2d at 229; U.S. v. Campagnuolo, 592 F.2d at 859, footnote 5.

The rap sheet may not accurately reflect the number of convictions. Early turnover is necessary to investigate the accuracy of entries. See, Perkins, supra.

Requiring disclosure of material bearing adversely upon the witness’ mental state merely applies the principal that extrinsic evidence of a witness’ mental deficiency may be used to impeach his credibility. U.S. v. Pugliese, 153 F2d 497 (2d Cir. 1945).

The prosecutor’s duty requires him to canvass his law enforcement agents to determine if they possess such information. See, Barbee v. Warden, 331 F.2d 842.
C) TIMING OF DISCLOSURE
As to the timing of such disclosure, reliance is on the Circuit pronouncement in *Grant v. Alldredge*, 498 F. 2d 376, at 382 (1974) viz. advance disclosure “to allow for full exploration and exploitation by the defense” See also, *U.S. v. Baum*, 482 F.2d 1325 (2d Cir. 1973).

PLEASE TAKE NOTICE, that the defendant demands that any proceeding hearing or trial in this case at which the People call witnesses, that as to each such witness that the People call to testify, the People instruct said witness to bring to court or the People cause to be brought into court the following:

1. All written or otherwise recorded statements of the witness made in connection with this case, including but not limited to memo books, arrest and complaint and follow-up forms. *People v. Malinsky*, 15 N.Y. 2d 86, 255 N.Y.S. 2d 850(1965); *People v. Rosario*, 9 N.Y. 2d 286, 213 N.Y.S. 448(1961); *Butts v. Justices*, 37 A.D. 2d 607, 323 N.Y.S.2d 619(2d Dept. 1971)

2. Any record, paraphrase, or summary of any statement made by the witnesses, written by or at the request of the People, whether or not the People believe any such writing to constitute work product in-as-much as such decision is one to be made by the Court. *People v. Consalazio*, 40 N.Y. 2d 446, 387 N.Y.S. 2d 62 (1976).

Dated: New York, New York
________________, 200__

Yours, etc.,
______________________________
Attorney for Defendant
(Telephone) ____________________

MENTAL ILLNESS HIGH AMONG PRISONERS
According to a report by the Department of Justice, more than half of all those incarcerated in prisons and jails reported mental health problems last year. Researchers used a sample of about 25,000 prisoners and based their findings on interviews, the prisoners’ own reports, psychiatric treatments and prescribed medications.

The number of prisoners reporting mental health problems is higher than before because problems like major depression and mania were included, along with diagnosed psychiatric disorders. The report found that prisoners with mental health problems were more likely to have had repeated incarcerations and substance abuse problems and to have been homeless. Women reported higher rates of mental health problems than men, and whites had higher rates than black and Hispanic prisoners.

Separate findings were reported for state prisons, where 56 percent of prisoners were found to have mental health problems; federal prisons, where the figure was 45 percent; and jails, where it was 64 percent. The figure may be higher for jails, the report said, because they often hold mentally ill prisoners temporarily before they are moved to psychiatric facilities.

The report, “Mental Health Problems of Prison and Jail Inmates” (NCJ-213600), can be found at:


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It is a privilege for the New York State Association of Criminal Defense Lawyers to be invited to testify before these Committees. I am Greg D. Lubow, Esq., a Vice President of the New York State Association of Criminal Defense Lawyers, the leading statewide private criminal defense bar association, whose members practice in both the private and public sector. NYSACDL, nearly 1,000 members strong, is the New York affiliate of the National Association of Criminal Defense Lawyers, 30,000 members strong.

I am in private practice in Tannersville, New York and have appeared on a regular basis in Town and Village Justice Courts throughout the State for nearly 30 years.

Major changes to the Justice Court system in New York State is long overdue, with the initial call for reform occurring approximately 100 years ago. Criminal defense lawyers and conscientious prosecutors who regularly practice within the “system” are intimately aware of its shortcomings. Part-time judges (the great majority of whom are not lawyers or otherwise trained in the law) are invested with the extraordinary power to jail persons accused of crimes, without attorney’s present, set bail, review search warrant applications and issue search warrants, and to preside over trials that can affect a person’s freedom, their ability to operate a motor vehicle or the place they live. Such a ‘system’ demands not only adherence to the cornerstones of our justice system - - ‘equal protection under law’, ‘due process’ and ‘fundamental fairness’ - - but must also be perceived by the public as operating with such fairness.

We are pleased that the Legislature, perhaps based on its own initiatives, or the New York Times series of September 25-27, 2006, or the Spangenberg Report to Judge Kaye’s Commission on the Status of Indigent Defense, is taking a hard look at this part of our judicial system. In a very real sense, these are the courts that are ‘closest’ to the people in upstate New York, the courts most people interact with. It is here that the public gets to see ‘justice’ up close and personal. It is here that there is the greatest need for adherence to due process and the rule of law.

From the outset, let me be very clear about one aspect of the Justice Court system: many town and village justices are intelligent, conscientious, compassionate, well-meaning and dedicated public servants. They are people who have volunteered for a difficult task – that of being the judge that most of their neighbors appear before in their community. They want to help resolve disputes, and make certain that their neighbors are safe and satisfied that justice has been done. It is our belief that in your public hearings and investigation, you will discover that many judges do an excellent job in presiding over their local criminal and civil courts. Many are aware of and conscientiously attempt to protect the rights of persons accused. However well-intentioned such individual judges are, the ‘system’ as a whole does not pass constitutional muster.

The actions of more than a few judges have brought the system under long overdue scrutiny. Those are the judges who do not scrupulously protect the constitutional rights of the citizens who appear before them. Unfortunately, even among the group of ‘better’ judges, enough are not well schooled in the law, and do not fully appreciate that they are to be impartial judges, rather than imposing their personal sense of justice. The lack of meaningful oversight has allowed too many judges who do not display a commitment to constitutional mandates or those who abuse the enormous authority granted them to preside, autocratically, over their courts and the citizens who appear before them. These abuses and the ability of judges to act in such abusive ways must be eliminated.

Among the more egregious and obvious flaws in the current system are:

1. Since the vast majority of judges are non-lawyers, their education, training and experience with the law in often lacking. The minimal education provided by the Office of Court Administration teaches them with words, the ‘touchstones’ of our justice system, such as “presumption of innocence,” “proof beyond a reasonable doubt,” and “due process.” Unfortunately, they are not given sufficient time to absorb, or examples that let them fully appreciate, the meaning and concepts behind the words. OCA certainly does not test, in any meaningful way, their grasp of these principles. To some judges, the rules of evidence are a mystery. This lack of education has led some to complain that New Yorkers are being denied the right to appear in front of judges who understand the law. The rules of evidence are, to too many judges, simply a mystery.

2. The modern practice of criminal law (as well as landlord-tenant disputes) require judges to be more than ‘justices of the peace’ - dedicated to protecting the community at the expense of constitutional rights. Some judges, even those with years on the bench, truly...
do not understand the nature of due process and their role as impartial judges. One reason for this may be the familiarity with which some town and village justices are known by their community, as well as by their local police. In many instances, the people whose word they are being asked to question are their neighbors and friends. After court they will see these same officers and neighbors in the diners, or at work or school functions. Familiarity with citizens accused, their families or their attorney may, in some instances, be attractive and allow for a more lenient or reasonable disposition. A system of criminal justice cannot and should not be based on the personal connections between the judge and the public.

3. All court proceedings MUST be recorded, verbatim. It is only through exact recording, either on tape or by stenographer, that appellate courts can accurately maintain oversight and review allegations of misconduct effectively.

In light of all that we have said, it is the recommendation of the New York State Association of Criminal Defense Lawyers that the current Justice Court system be replaced with a State funded District Court system with a requirement that only practicing lawyers serve as District Court Judges. While a law degree is certainly no guarantee of perfection or integrity, the 'system' as a whole stands its best chance of affording due process and equal justice under law if persons trained and (hopefully) experienced in these areas of law are selected for the bench. OCA would only have to supplement existing knowledge that is ingrained in the practicing attorney, rather than teach an entire new value system to incoming lay judges. There should be as little delay as possible once the District Court system is enacted in making it effective.

From a fiscal standpoint, District Courts will allow for the consolidation of services rather than the continuation of the duplication of service providers (often part time) divided by geographic distinctions that in the context of providing a forum for the resolution of disputes, no longer is relevant, especially at the Town and Village level. This would allow for an 'economy of scale' that should facilitate greater efficiency at all levels: service to the public; in house processing of paperwork; collection of fines and other fees; reporting to DCIS, DMV and Audit and control. While case volume would be concentrated, there would be full time, rather than part time clerks, to process it, reducing the number of persons handling the paper work and the money. Transportation costs (often overtime) from the jail to the court, whether paid for by sheriff, local PD or State Police budgets, should be reduced with centralized locations, and fewer trips to 'night' court. The monetary savings to localities, including County agencies will be considerable.

A District Court system in rural, upstate New York makes sense. One or more full time lawyer judges would be available at all hours for immediate arraignment; courts would be more accessible to the attorneys rather than once a week, as many justice courts sit, and once a month when the assistant District Attorney is present. Case management would be enhanced, allowing for quicker dispositions, thereby reducing pre-trial 'in-jail' time. Depending on the size of the County, there is no reason that 'circuit' courts could not be established, so that citizens will still be able to access their 'local courts' within a reasonable travel distance.

Should the Legislature decide not to change to a District Court system but rather attempt to rehabilitate the current system, certain changes must be implemented in the Justice Courts:

A. Education of town and village judges must improve dramatically. Persons accused of criminal conduct are not only entitled to a defense lawyer educated, knowledgeable, and experienced in the procedural and substance of law, but also a prosecutor similarly qualified and finally, an impartial judge, with at least the same qualifications to not only recite the basic principles, but the ability to appreciate the arguments and to render decisions in accordance with judicial precedent;

B. All proceedings must be recorded to permit meaningful judicial review;

C. There should be legislation permitting the consolidation of local courts with not just their contiguous towns and villages, but those one or two towns over as well. In rural counties, the volume of cases in some towns is quite low, and the need for 2 town judges, in the town may not be warranted. Consolidation of such town courts would reduce local costs and in the long run serve the public better.

D. Stricter oversight by OCA is mandated. Currently there is great oversight of the financial end of the justice courts; the same level of scrutiny of the judicial aspect of the 'system' is equally required, to assure that it is providing its constitutional mandates. Reliance on the 'complaint' system has not been very effective or efficient.

On behalf of the NYSACDL I thank you for your attention and consideration of this matter and the opportunity to be heard. The members of the NYSACDL are available to you here in Albany, and in your home districts to lend our experience and expertise in this and other criminal justice matters.
It is a privilege for the New York State Association of Criminal Defense Lawyers to be invited to testify at this Public Forum. I am Ray Kelly, Esq., President of the New York State Association of Criminal Defense Lawyers, the leading statewide private criminal defense bar association, whose members practice in both the private and public sector. NYSACDL, nearly 1,000 members strong, is the New York affiliate of the National Association of Criminal Defense Lawyers, 30,000 members strong.

For the last 32 years and counting, I have devoted the entirety of my professional life to our criminal justice system, initially for five years as a prosecutor and then as a defender of fellow human-beings since 1979. After approximately 280 trials in more than half of New York’s 62 counties, none of my clients have ever had a trial presided over by a judge who was non-Caucasian. In arguing appeals, the only judge of color before whom I have appeared was recently “involuntarily retired,” the Honorable George Bundy Smith of the Court of Appeals.

New York is the leading state in the country in ethnic diversity - how is it that my clients have never had either a criminal or civil trial presided over by a non-Caucasian judge? Why is it that New York’s trial and appellate judges fail to resemble the rich and broad diversity of New York’s population?

It is critically important that New York State institute systemic change to ensure development of a robust and meaningful diverse cadre of jurists at both the trial and appellate levels of New York State’s court system. Far too often, in every county of this state, a New Yorker of minority descent is arrested by a white policeman, arraigned before a white judge, with a white prosecutor, represented by a white defense attorney and ultimately tried before a white jury - all without any sense of inclusion in the society which is about to impose sanction. Because our judiciary does not adequately reflect the gender, ethnic and geographic diversity of our citizenry, New Yorkers as a whole pay a price. The price we pay is cynicism about our judges. The price we pay is the ever increasing belief that there is one brand of justice for the rich and another for the poor. The price we pay is the belief that one is better off rich, white and guilty rather than poor, of color and innocent. The price we pay, ultimately, is the corrosion of our core values as a people.

The lesson is hardly new nor restricted to New York. Centuries ago, the Lord Chief Justice of England spoke for us all when he stated:

“Justice should not only be done but should manifestly and undoubtedly be seen to be done.”

As New Yorkers, we have always understood the importance of a judicial system that is not just fair but seen by John Q. Citizen to be fair. Since judges are the most visible symbol of our justice system, it is imperative that we implement wholesale change in the manner in which our judges are qualified and selected for service on the bench in order to ensure that they reflect the diversity of New York’s population. Simply stated, our judges should look like the rest of us!

For those who believe that Justice is a Process, Not a Result, it is imperative that we create an avenue of ascent to the bench for people who share the backgrounds and perspectives of all New Yorkers. Far too often, there are unnatural distances between our judges and our citizens. The great majority of New York’s judges grow from middle class roots, from lives of privilege, often with no experience of social pain, deprivation or loss. The intuitive expectation of discrimination in daily living is not part of middle class upbringing, the routine short-end-of-the-stick not its usual lot. Our judiciary must become attuned to the learned reactions of the underclass to challenge the structured injustice of institutional racism and the pounding power of class prejudice - all of which is reinforced daily in the courtrooms of our State by the lack of diversity in our judges.

We must implement a system of merit selection for judges which does away with the “go along, get along, good ‘ole boy network” by which lawyers with little or no trial experience ascend to the bench because of political connection or party loyalty. It is remarkably inadequate to send a lawyer to judge school for a week and then expect that s/he will conduct a highly complicated civil or criminal trial in a remotely competent fashion when that person has not been lead counsel in at least 20 trials which have gone to verdict. There are many outstanding trial lawyers, both civil and criminal, from varied ethnic backgrounds, who have toiled for years in the courtrooms of our State, who (1) possess the integrity, intellect, judgment, independence, temperament and experience to preside as trial judges and (2) more importantly, can help alleviate the structured injustice of institutional racism and the pounding power of class prejudice. New York’s civil and criminal trial lawyers have dedicated their lives to walking the road traveled by the maimed, the wrongfully killed and those accused of crime and their families. New York’s trial lawyers have toiled in the trenches fighting to save a system, not perfect, but light years ahead of suggested alternatives. We call upon the powers that be to appoint seasoned trial lawyers whose faces have been marred by the dust, blood, sweat and tears daring greatly to achieve or fail in the trial arena in zealously advocating for their clients rather than appointing those cold and timid souls who never know the thrill of victory or the agony of defeat.
If this panel believes as we do that Justice is a Process, Not a Result, it is imperative that New York create a merit selection mechanism that ensures a broad and diverse judiciary be seated throughout New York’s 62 counties so as to truly enhance public confidence in our judicial process. We join in this effort to implement a blueprint that improves existing opportunities for meaningful diversity in the State’s Judiciary so that the percentages of African-American, Latino, Asian and Native American judges keep pace with the increases in New York’s minority populations. As we continue our struggle to define fundamental fairness in this our third century of New York’s existence, it is imperative that those who preside over our criminal and civil trials reflect the insight and experience as varied as New York’s citizenry. Let the blueprint begin!

On behalf of NYSACDL, we thank you for your concern about a matter so important to all New Yorkers and we thank you for the invitation to share our thoughts with you. NYSACDL is available anywhere in New York, and in your home districts, to lend our experience and expertise in all matters involving New York’s criminal justice system.

In this the 150th Anniversary of Clarence Darrow’s birth, we close with:

“I have lived my life, and I have fought my battles, not against the weak and the poor - - - anyone can do that - - - but against power, against injustice, against oppression, and I have asked no odds from them and I never shall.”

— Clarence Darrow
THE PEOPLE OF THE STATE OF NEW YORK, -against-

Defendant.

(name of attorney), an attorney admitted to practice before the Courts of the State of New York affirms the following to be true under the penalties provided by law for perjury.

1. I am the attorney for defendant ___________ and make this affirmation in further support of the renewed motion to dismiss and in reply to the submission by the People. It will respond to the People’s argument, set forth in the affidavit of ADA___________, insofar as it contends that, based on the defense-procured Patrol Guide procedures and the special “Cash for Program,” both in effect on the date of defendant’s arrest, ________ (defendant) somehow did not comply with the procedures set forth therein and is not entitled to the statutory exemption from prosecution for one voluntarily surrendering a weapon.

2. After travails set forth at painful length in the affirmation in support of the renewed motion, the defense has provided an officially certified New York City Police Department Patrol Guide section “Voluntary Surrender of Weapons Without Prior Notice” (attached as Exhibit A). The defense and prosecution agree that it describes the program under which a Penal Law § 265.20 statutory “exemption from prosecution” existed for what otherwise would be prosecutable Criminal Possession of a Weapon, Article 265 crime on the date of defendant’s arrest.

3. The Legal Bureau of the Police Department also provided a copy of its “2002 Citywide Cash for Guns Program” (Exhibit B) and a certification that additional records “showing ongoing cash for guns programs & disbursements of fund[s] citywide from December 2002 to January 2004”, (Exhibit C), again covering the date of defendant’s arrest.

4. The People make a “last-gasp argument” that the defendant did not “follow the procedures” to effectuate a voluntary surrender of a weapon and thus should not get the benefit of the statutory exemption from prosecution. In making this argument, the People would assign responsibilities to one seeking to surrender a weapon which are not his or hers. More important, their argument would discourage members of the public from surrendering guns and flies in the face of the stated purpose of the policy and general rules of construction for the criminal law.

5. The Patrol Guide Provision’s (Procedure No. 207-26) first three items settle the question, they are as follows:

   **PURPOSE** To encourage and record the voluntary surrender of dangerous weapons.
   **PROCEDURE** When a person asks how to surrender a dangerous weapon
   **UNIFORMED** Direct person requesting such information to
   **MEMBER OF** Write a ‘notice of intent to surrender a weapon’
   **THE SERVICE** To the commanding officer of the precinct, including:
   a. Name and address
   b. Description of weapon
   c. Present location of weapon, and
   d. Time, date and place where weapon will be surrendered.
6. The People argue that as defendant did not fill out a “notice of intent to surrender a weapon” he failed to comply with the appropriate procedure and is denied the benefits of a voluntary surrender and exemption from prosecution.

7. Of course a reading of the section says that when a person does exactly what defendant ______________(name of defendant) did here, tell an officer he intended to surrender a weapon, it is the officer’s responsibility to tell the person to go to the local precinct and fill out the requisite paperwork.

8. Is the societally commendable purpose of contacting the Police to surrender a weapon to become a trap for the unwary, where responding officers either don’t know or don’t tell what the procedure is, and the person surrendering the weapon being subject to prosecution because he failed to inform the officer to be sure to fulfill the officer’s own responsibilities?

9. Further, the special “Guns for Cash” program’s terms (Exhibit B, ¶4, p.1) states that “Desk Officers will ensure a voucher and instruction sheet are delivered to the person surrendering the weapon.” So again, the burden on the person seeking to surrender a weapon is to notify the police and direct them to the weapon’s location; if further paperwork is required, it is the responding officer or Desk Officer’s responsibility to present it. Surely it is not the surrendering person’s obligation to ascertain the intricacies of internal Police Department required paperwork, which from counsel’s experience here, is almost impenetrable.

10. Thus, the plain language of the Penal Law 265.20(1)(f), the standing Patrol Guide and special “Guns for Cash” programs enacted under its authority, prior caselaw, the public policy interest in encouraging the voluntary surrender of weapons, publicized by the Police Commissioner and City Administration, compel dismissal of the Penal Law charge.

11. Alternatively, there are appropriate grounds, under C.P.L. § 170.40 for dismissal of all charges, in the interests of justice, particularly if the Court somehow accepted the People’s argument that defendant’s efforts to surrender these weapons constituted a “near miss” for failure to take some extra step the People now suggest.

WHEREFORE I respectfully pray the within motion be granted.
Dated: ________________, 2007

NAME OF ATTORNEY

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Nearly 3,500 people are in death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals, and others.

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I certify that I support the purposes of the NYSACDL. I am committed to the fair administration of criminal jus-
tice and the defense of individuals accused of crime. I hereby certify that I am not a judicial or prosecutorial of-
fer and that I am actively engaged in the defense of criminal cases.

Enclosed is my payment for membership in NYSACDL:

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Graduation date:____________________

Signature of applicant

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