**PRESIDENT’S MESSAGE**

by Ray Kelly

**SOUNDING GIDEON’S TRUMPET**

Why does the dream of *Gideon v. Wainwright*, i.e., that all New Yorkers will be capably and adequately defended, remain a dream? Why has New York countenanced mockery of legal representation for more than 40 years? Why have New Yorkers tolerated such unfairness? Is there a unique opportunity presented to New York by this year’s gubernatorial race?

Human beings charged with crime and those dedicated to defending them have little or no political power. Members of the legislative and executive branches of government see no votes in creating a system of competent criminal defense representation with adequate resources to do the job properly. Until now, the Clarence Earl Gideons of New York have been constituents who can safely be ignored.

NYSACDL resoundingly recognizes the dedication and commitment of lawyers who have worked long hours under the burden of overwhelming caseloads and the immense pressure of the responsibility for the lives and liberty of far too many fellow human beings. Many of our brothers and sisters at the bar have not been adequately compensated and are routinely denied necessary expert and investigative assistance needed to furnish effective representation. Many have repeatedly endured the hostility of segments of the press, public, prosecutors and judges for providing zealous representation day after day, year after year, trying to make real the promise of Gideon even though the larger society has failed to share the burden.

The winds of change are stirring. At the Court of Appeals on June 28, 2006, the Kaye Commission on the Future of Indigent Defense Services announced that New York's "system" is in such disarray and so dismally fails to meet constitutional standards that it must be dismantled and replaced with a new, statewide, state-funded system governed by uniform regulations and standards. In concluding that there is a crisis in the delivery of defense services across New York, the Commission relies for its findings on the Spangenberg Final Report on the Future of Indigent Services dated June 16, 2006. The Kaye Commission and Spangenberg reports are must reading and may be viewed online at NYSACDL’s website at www.nysacdl.org on the Indigent Defense page. NYSACDL’s proposed legislation creating a statewide office was included in the Kaye Commission Report and can be viewed online.

Because of the nature of our state and federal constitutions, each generation of New York attorneys has a unique opportunity to articulate, define and redefine our basic values as a people. The opportunity to establish fundamental fairness in the delivery of indigent defense services across New York is the paramount constitutional challenge now confronting us. This challenge requires all of us to continue to champion, in a unified voice, that justice is a process, not a result and that New York’s delivery of indigent defense services must be scrapped and replaced with a statewide system which fully sounds Gideon’s trumpet.

"As long as the world shall last there will be wrongs, and if no man objected and no man rebelled, those wrongs would last forever."

— Clarence E. Darrow
Ed. Note: William T. Martin, Esq. serenaded our own Murray Richman at the Bronx Black Bar Association Dinner where Murray was honored as Man of the Year. Ted was kind enough to share the lyrics with Atticus. The song is rapped to the tune of It's Hard Out Here for a Pimp.

YOU KNOW IT’S HARD OUT HERE FOR A DEFENSE ATTORNEY

Your clients don’t wanna pay
Get them an acquittal and they’re on their way

Chorus: You know it’s hard out here for a defense attorney

Get a conviction don’t expect no pay – that day

Chorus: You know it’s hard out here for a defense attorney

There are constitutional amendments which don’t hold no sway
Especially with a judge who’s had a bad day
Some who’ve been heard to say “suppress no way”

Chorus: You know it’s hard out here for a defense attorney

And the prosecutors are rough and tough and they don’t take no guff

Chorus: You know it’s hard out here for a defense attorney

Time comes when jurors arrive and you wish more than ever that your client wasn’t so jive

Chorus: You know it’s hard out here for a defense attorney

“Reasonable doubt” - what’s that about
Some hocus pocus to make you lose focus"

Chorus: You know it’s hard out here for a defense attorney

If you’re true to your craft you’ll have a good laugh

Chorus: If it’s hard out here for a pimp
It’s doubly hard for his defense attorney

With all of those admissions against penal interest - the videotape

Chorus: You know it’s hard out here for a defense attorney
CAN A DEPORTED DEFENDANT CHALLENGE HIS CONVICTION FROM OUTSIDE THE UNITED STATES?

by Labe M. Richman

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Labe M. Richman is a member of the NYSACDL. He is in private practice in Manhattan where he specializes in challenging convictions which are causing immigration problems.

As a result of extensive plea bargaining, there were over 168,000 convictions last year in New York City alone, a mind-boggling number. Of course, the millions of convictions attained in New York over the past decades have led to numerous deportations. Obviously, once deported, many of these individuals are motivated to investigate the propriety of their conviction in an effort to re-enter the United States. It is the purpose of this article to examine whether an individual may challenge the legality of his conviction after being expelled from the country. Despite the practical difficulties of litigating from outside the jurisdiction, there is no absolute bar to the filing of a constitutional challenge by appeal or by way of Criminal Procedure Law § 440.10.

Most criminal appeals lawyers assume the opposite. This is because there are numerous summary Appellate Division decisions where appeals were dismissed because the defendant-appellant was deported. In some cases, CPL § 440.10 challenges were also summarily dismissed for the same reason. However, none of these decisions contain a discussion of the legal rationale for the dismissal nor do they contain a description of the facts surrounding the deportations or the convictions. Therefore, the opinions are of little precedential value.

Furthermore, and probably more important, all of the above summary decisions cite People v. Del Rio to support the dismissal of the appeal of a defendant who has been deported. Del Rio is a very interesting case that deserves extended discussion. Not only does it not bar a challenge by a deported individual, it actually contains language that supports a defendant’s right to challenge a conviction when he has been involuntarily removed from the jurisdiction, as in a deportation.

In 1961, Del Rio, a Cuban national, was convicted of murder after trial and sentenced to 20 years to life. As part of a prisoner exchange with the Cuban government, the governor commuted Del Rio’s sentence and allowed him to be paroled, provided that he agreed to never return to the United States. After Del Rio accepted this commutation and left the United States, the prosecution sought to dismiss his appeal. The Court granted the motion, but, in reaching that decision, it spent the better part of the opinion determining whether Del Rio’s departure from the United States was voluntary. Indeed, it noted the compelling fact that when the assistant attorney general presented the governor’s agreement for commutation of his sentence, Del Rio immediately signed it without waiting for the guard to remove his handcuffs. The legal importance of the voluntariness of Del Rio’s removal from the United States was made even more clear when the Court noted in the procedural history of the case that it had dismissed the appeal on an earlier occasion and had vacated that order when it was alleged that his removal was not voluntary. This implies that an involuntary removal from New York, such as during a deportation, could not strip jurisdiction from the Court.

In reaching its decision, the Del Rio court relied on the fugitive disentitlement doctrine which holds that a convict who has escaped or absconded cannot avail himself of the court’s jurisdiction.

(continued on page 4)
Such a rule is good public policy because it discourages flight while an appeal is pending. It would be a dishonor to the Court to allow a defendant to flee and still appeal his sentence and conviction when he would not have to fulfill his sentence or be retried once the appeal was decided. Such action, of course, flouts the authority of the court. However, it is indisputable that the application of this doctrine also requires a voluntary absence by the defendant. As the Eleventh Circuit stated in United States v. Ortega-Rodriguez, a fugitive defendant forfeits his right to contest the conviction on appeal unless his absence from the jurisdiction “was due to matters beyond his control.” This exception to the doctrine applies to deportees because they are normally expelled from the country against their will which is, by definition, beyond their control.

Even though the fugitive disentitlement doctrine and Del Rio are clearly distinguishable from involuntary deportations, as noted above, there are still numerous summary appellate division opinions which dismissed appeals because the defendant was deported. These decisions must be addressed and, in reality, they can be reconciled with the above analysis. First, it may be that the substance of these appeals were meritless, that counsel lost touch with the defendant after his deportation, and that the motion to dismiss the appeal was, thus, unopposed by defense counsel. This explains the summary nature of the order. Second, it may also be that the deportations occurred for immigration violations unrelated to the convictions on appeal. Therefore, in that situation, even if the challenged conviction was reversed on appeal, the defendant might never be able to return for trial because he is inadmissible to the United States for other reasons. This circumstance would bring the case within the ambit of Del Rio, where the defendant agreed to never return to the United States. It would not make sense to review a conviction when the defendant is forever banned from the United States for entirely independent reasons. In such a situation, the Court would have to expend great effort to decide the case, and then if the conviction was vacated, it would never be able to try the defendant on the indictment. This would be another reason that a defendant might not oppose a motion to dismiss an appeal – that is, reversal would have no effect on his right to re-enter the United States and the conviction might not affect his life in his home country.

However, the situation is much different when the conviction which the defendant seeks to challenge actually caused his deportation and keeps him from re-entering the United States. This was exactly the reasoning of the Washington State Supreme Court when it ruled that a defendant may challenge his conviction on appeal when he is outside the United States. In such cases, the appeal (and for that matter a collateral challenge), would not be moot at all but would impact on the defendant’s right to re-enter the United States, a critical issue for any prior resident.

To guarantee fairness, New York law should be interpreted similarly. A defendant whose rights are violated and is then deported against his will should not be denied redress in our courts simply because he is not situated in the country. New York State should not be able to win post-conviction litigation simply because the federal government expelled the defendant against his will before he could vindicate his constitutional and statutory rights.

6. Id. at 1476
11. It should be noted, however, that DHS cannot deport individuals on convictions which are still on appeal. Matter of Thomas, 21 I&N Dec. 20 (BIA 1995) citing Pino v. Landon, 349 U.S. 901 (1955); Matter of Ozkok, 19 I&N 546, 552 n. 7 (BIA 1988); 8 U.S.C. §§ 1101 (f)(3), (7) & (8). The situation discussed in this article will arise more often for defendants who failed to appeal in the first instance but whose rights were otherwise violated, see, People v. Corso, 40 N.Y.2d 578 (1976), or DHS obtained misinformation about a pending appeal.
**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.

NYSACDL was victorious in two important recent cases.

In People v. Kennedy, 2006 NY LEXIS 1363 (June 6, 2006), the State Court of Appeals acknowledged, as we argued, that the record was unclear whether Kennedy, then in the Navy, was actually convicted of indecent assault or ordinary assault under military law. The people argued that the offense was registerable under SORA because a conviction for indecent assault required Kennedy to register as a sex offender in the military. In fact, Navy regulations did not require the defendant to register at all. Unless the prosecutor can show, on remand, that the conviction met all the elements of an offense for which SORA registration would be required under New York law. Amicus author Donald G. Rekhopf, Jr.'s arguments elucidating military law appear to have been appreciated by the Court. The successful appellant's counsel was NYSACDL member Gary Muldoon.

Nearly a year after oral argument, the Second Circuit Court of Appeals reversed the district court's judgment in Levine v. Apker, 2006 U.S. App. LEXIS 17434 (July 10, 2006) holding that the Bureau of Prisons' February 2005 rule (like its earlier December 2002 rule) was inconsistent with the statutory scheme for assignment of federal prisoners to halfway houses also known as "CCCs." NYSACDL joined NACDL and Families Against Mandatory Minimums in opposing the BOP's rule. Our brief was jointly authored by Peter Goldberger of Ardmore, Pennsylvania, Todd Bussert of New Haven, Connecticut, Richard Willstatter, Mary Price (FAMM's General Counsel) and Michael Waldman of Fried, Frank, Harris, Shriver & Jacobson, LLP in Washington, D.C. The Court held that, since CCCs are available as "re-entry" facilities, the statute requires Kennedy to register as a sex offender in the military. In fact, Navy regulations did not require Kennedy to register as a sex offender in the military. The people argued that the offense was registerable under SORA because a conviction for indecent assault required Kennedy to register as a sex offender in the military. In fact, Navy regulations did not require the defendant to register at all. Unless the prosecutor can show, on remand, that the conviction met all the elements of an offense for which SORA registration would be required under New York law. Amicus author Donald G. Rekhopf, Jr.'s arguments elucidating military law appear to have been appreciated by the Court. The successful appellant's counsel was NYSACDL member Gary Muldoon.

We have filed an amicus curiae brief in the matter of Gorghan v. DeAngelis, which will be heard in the State Court of Appeals. This case will address whether the prosecutor's misconduct — which was bad enough to reverse a judgment — is so egregious that double jeopardy should bar a retrial. See People v. Gorghan, 13 A.D.3d 908, 911 (3d Dept. 2004). After the remand, the defendant filed an Article 78 proceeding which was denied in Matter of Gorghan v. DeAngelis, 25 A.D.3d 872 (3d Dept. 2006). NYSACDL's brief was authored by Pace Law School Professor Bennett L. Gersman. We argued that:

A fair trial is not simply an abstract and aspirational concept. A fair trial is a constitutional imperative. A public prosecutor has the constitutional and ethical duty to respect and protect that imperative responsibly and professionally. And when that imperative has been cynically ignored and subverted by a prosecutor, as in appellant's trial, then this Court's dictum in People v. Adames, 83 N.Y.2d 89, 91 (1993), that "some prosecutorial error may be so egregious or provocative as to warrant the interposition of the double jeopardy bar" should be invoked to deny the prosecutor another opportunity to prosecute the case.

Mr. Gorghan is represented by NYSACDL member Randi J. Bianco of Syracuse. She will argue the case on September 5, 2006. We hope the Court of Appeals will put some teeth into the concept that there is a line over which prosecutors cannot step.

NYSACDL members may volunteer to prepare an amicus brief for NYSACDL and such assistance would be greatly appreciated. Volunteers are invited to e-mail me at willstatter@msn.com or to call (914) 948-5656. Requests for amicus assistance will be accepted only from counsel (and not from their clients). Please note that you should bring important issues to our attention as early as possible to increase the chances we can assist in your case.
DRUG RECOGNITION: SCIENCE OR GUESSWORK?

by Gene Gietzen

Gene Gietzen is a forensic scientist with Forensic Consulting Associates in Springfield, Missouri.

In the 1970’s, the Drug Recognition Program was devised to detect those persons driving under the influence of drugs. According to the design of the program, a trained police officer conducts various tests and based upon the results of those tests is able to determine if an individual is under the effects of:

1. Central Nervous System Depressants
2. Central Nervous System Stimulants
3. Hallucinogen
4. PCP
5. Narcotic Analgesic
6. Inhalant
7. Cannabis
8. Alcohol

The Drug Recognition Program training involves 80 hours of classroom training in drug origins, drug symptomology and physiology. After this, there is about 100 hours of practical experience. The program ends after a day long final exam.

Most persons trained in drug recognition have little, if any science background. The drug recognition assessment encompasses major science areas such as physiology, biochemistry, pharmacology and toxicology. These classes would amount to at least 15 hours of upper level college credit, not including labs.

Training in this area is considered “closed,” meaning it is available only to those in law enforcement. This is compared to the scientific community in which most training areas are open to those who meet the minimum standards. “Closed societies” or “closed training” do not allow for input from others and modification to enhance or improve the process.

Before we start the discussion of some of the physiological factors/observations to be considered, here is a table that demonstrates what is expected in the various categories of drugs as derived from my research into the program:

<table>
<thead>
<tr>
<th>Drug Classification</th>
<th>HGN</th>
<th>VGN</th>
<th>B.P.</th>
<th>Pulse</th>
<th>Temp</th>
<th>Pupils</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNS Depressant</td>
<td>Present</td>
<td>Present</td>
<td>Depressed</td>
<td>Depressed</td>
<td>Normal</td>
<td>Normal</td>
<td>No Eye Convergence, Muscle flaccidity</td>
</tr>
<tr>
<td>CNS Stimulant</td>
<td>None</td>
<td>None</td>
<td>Markedly Elevated</td>
<td>Markedly Elevated</td>
<td>Elevated</td>
<td>Dilated</td>
<td>Extremities cold to the touch</td>
</tr>
<tr>
<td>Cannabis</td>
<td>None</td>
<td>None</td>
<td>Normal</td>
<td>Increased</td>
<td>Normal</td>
<td>Normal</td>
<td>Heat bumps on tongue</td>
</tr>
<tr>
<td>Narcotics Analgesic</td>
<td>None</td>
<td>None</td>
<td>Depressed</td>
<td>Depressed</td>
<td>Depressed</td>
<td>Constricted</td>
<td></td>
</tr>
<tr>
<td>Inhalants</td>
<td>Present</td>
<td>N/A</td>
<td>Elevated</td>
<td>Elevated</td>
<td>Normal to Elevated</td>
<td>Normal</td>
<td>Vital signs will vary according to substance, tell tale odor. Subjects hot to touch</td>
</tr>
<tr>
<td>PCP</td>
<td>Obvious</td>
<td>Present</td>
<td>Elevated</td>
<td>Elevated</td>
<td>Elevated</td>
<td>Normal</td>
<td></td>
</tr>
<tr>
<td>Hallucinogens</td>
<td>None</td>
<td>None</td>
<td>Enhanced</td>
<td>Enhanced</td>
<td>Enhanced</td>
<td>Dilated</td>
<td></td>
</tr>
</tbody>
</table>
Most attorneys are aware of the requirements for the administration of the HGN and VGN. The National Traffic Highway Safety Administration (NTHSA) has “standardized” the procedure noting that failure to provide the test in the prescribed manner can affect the interpretation of the results. In my experience this “standardization” is not always followed. I have seen videos where the HGN and VGN tests were administered in a “Zorro” fashion, not coming close to the required distances and times.

**Blood Pressure**

According to the U.S. Department of Health and Human Services and the National Institutes of Health¹ the following table represents blood pressure information.

<table>
<thead>
<tr>
<th>Category</th>
<th>Systolic (top number)</th>
<th>Diastolic (bottom number)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Normal</td>
<td>Less than 120</td>
<td>Less than 80</td>
</tr>
<tr>
<td>Prehypertension</td>
<td>120–139</td>
<td>80–89</td>
</tr>
<tr>
<td>High blood pressure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stage 1</td>
<td>140–159</td>
<td>90–99</td>
</tr>
<tr>
<td>Stage 2</td>
<td>160 or higher</td>
<td>100 or higher</td>
</tr>
</tbody>
</table>

Blood pressure is well known to be “situational” meaning during times of stress the body’s natural reaction is to elevate the blood pressure. Most would consider being placed under arrest, transported to jail and undergoing these tests as being “under stress.” That begs the question whether the obtained data accurately reflects this subject’s “actual” blood pressure or the result of a stressful situation. A doctor does not prescribe blood pressure medication on the first visit this is encountered.

**Pulse**

The Franklin Institute Online provides the following chart for pulse rates.²

<table>
<thead>
<tr>
<th>Average Pulse Rates (bpm)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult Males</td>
</tr>
<tr>
<td>Adult Females</td>
</tr>
<tr>
<td>Athlete</td>
</tr>
<tr>
<td>Newborns</td>
</tr>
<tr>
<td>Children</td>
</tr>
<tr>
<td>Elderly</td>
</tr>
</tbody>
</table>

Medline Plus³ a service of the U.S. Library of Medicine and the National Institutes of Health indicates a “normal” pulse for adults is between 60 – 100 beats per minute.

This information is provided to demonstrate that pulses have variables, it is not an empirical value. Blood pressure varies between sex and age. Pulse is also “situational.” There can be variations depending on where and how it was taken. Most people take the pulse at the wrist area, others depress the carotid. Some are taught to count the beats for 10 seconds and then multiply by 6, others take it for 30 seconds and multiply by 2 and the best method is to count for 1 minute. If the individual has an irregular heart beat, the pulse taken via the multiplication method can be erroneous.

**Temperature**

The “normal” body temperature is taught to be 98.6°. Like other vitals it can also demonstrate a range between 96.8 – 99.5°.⁴ A person with an infection would show a higher temperature which could be falsely interpreted as drug induced.

(continued on page 8)

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2. The Franklin Institute Online found at http://slm.fi.edu/biosci/monitor/vital.html
Circadian Rhythms

Circadian Rhythms are a key player in the discussion on vital signs that explains their variability and the problems associated with the use of vitals in the DR assessment.

Circadian rhythms refer to the cycle of plants and animals, the “internal clock.” Much of it has to do with the body’s response to sunlight and temperature. The Circadian “clock” is located in the suprachiasmatic nucleus, a group of cells in the hypothalamus. Our circadian rhythms are basically controlled by retinal inputs and affects such things as brain wave activity, hormone production and cell regeneration. Because of the “internal clock” the day human vital signs will vary and is demonstrated in the charts below:5

It is this variation that can create the potential for someone’s vital signs to be misinterpreted as being high or low. As previously discussed, add the effects of the “situational” environment the interpretation of the data becomes even more difficult and prone to error.

Interview

Included in the Drug Recognition Process is an interview section. During this phase of the assessment the subject is asked a variety of questions regarding drinking, drug usage and other questions to provide an insight into their condition. This process is supposed to be conducted under Miranda.

What is interesting to find during deposition some DR officers do not follow the step by step procedures. As with DWI cases the officer may chose to conduct the interview prior to taking vitals or other parts of the process. This makes this program “standardized” in a variable way.

The Officer’s Opinion

Based upon the tests and the interview the drug recognition officer renders his or her opinion before the results of the urinalysis is known. I fashion this process to the old skit “Carnak the Magnificent” on the Tonight Show when hosted by Johnny Carson. For those of you too young to remember, the Great Carnak would provide answers to heretofor unseen questions.

I would encourage you to pay close attention to the interview portion and determine if your client admitted to certain drug uses. Compare those statements to the officer’s opinion and see if you don’t find a correlation. Now compare the results of the various factors from you client to what is expected for the opinion’s classification of drug. It has been my experience little attention is paid to the vitals, HGN and VGN in the formulation of the opinion.

I could understand the potential for such a process in those cases where only one drug is involved, but multiple drugs pose greater difficulties in assessment. The vitals for a CNS stimulant are elevated, the reverse for a CNS depressant. Does that mean if all vitals are normal, this is indicia of a combination of these drugs? Can you imagine what would happen if the drug recognition officers were “experts” and were allowed to testify without the benefit of some form of analysis? Stayed tuned, we’ll get to the case studies shortly.

Urine Samples

Currently, a urine sample analysis from the subject is required for Drug Recognition Officer’s testimony. This is another area of debate during the formulation of the DR process.

Urine is a sample that is the easiest to obtain and to analyze. The bladder is “holding tank” of the body. Once something is placed in the bladder it no longer has any effect on the individual. The real question to be posed is whether it is possible to interpret the analytical information obtained from a single urinalysis to the time of driving?

There were scientists during the formation of the process who advocated the requirement of two urine samples; one taken at the time of arrest and a second 20 minutes or so later. Why? The time of the last urination by the subject is unknown. If it was a matter of hours, whatever is in the urine could have been there for that time, therefore no one can state at the time of driving these substances were actually present in the body then deposited in the bladder. The second urine sample would provide analytical information as to what has been metabolized since the first urination and is a tacit indicator of what was present about the time of driving. The dual urine samples were not implemented mainly due to time constraint issues.

5. Circadian Rhythm Laboratory as found at http://www.circadian.org/vital.htm
For example, Methamphetamine's primary "active" metabolite is Amphetamine. The primary metabolites are further broken down and often form "inactive" metabolites. In Marijuana, the parent drug is Tetrahydrocannabinol. The primary “active” metabolite is 11-nor-Delta THC. The inactive metabolite is Carboxy-THC.

Most laboratory reports on urine samples will indicate the analytical findings; very few that I have encountered will explain whether the substance is an active or inactive metabolite. This information can be critical to your case preparation. To put urinalysis in perspective, let me quote what Barry Levine, Ph.D. wrote in his book Principles of Forensic Toxicology: “a positive urine test for cannabinoids indicates only that drug exposure has occurred. The result does not provide information on the route of the administration, the amount of drug exposure, when the drug exposure occurred, or the degree of impairment.”

Pharmaceuticals present another type of dilemma in interpretation. According to the National Center for Health Statistics between 1999 – 2002 45.3% of the population was taking at least one prescription drug one month. There were a total of 1,844.1 total number of drugs prescribed per 100 population. Sixty six percent of those going to a physician were given drug therapy resulting in 1.6 billion drugs being prescribed. What this shows is the number of people taking prescription medications is staggering.

Many pharmaceuticals, especially those that can create effects on the person, bear warnings to avoid operating heavy equipment and driving until the reaction of the drug is known. It is a foregone fact that not everyone reacts to the same medication in the same way. Individuals have differing sensitivities, tolerances and reactions to the meds. As with other issues, making a blanket statement regarding the responses to these medications is erroneous.

Most labs do not quantitate or conduct the examinations to reveal the actual amounts of the pharmaceuticals present. There is no way to know if the drug as at, above or below therapeutic dosages. At was previously noted, there is no authoritative or recognized source that indicates levels considered to be impairing for the various prescription meds.

The lab results are to confirm the officer’s opinion. If an inactive metabolite is found, does this actually confirm the opinion? If a painkilling prescription medication is found in the urine, does this mean the individual is impaired? From the standpoint of the criminal justice system is “mere presence” sufficient to warrant a conviction?

When dealing with Drug Recognition cases I would strongly urge all attorneys to obtain the services of someone who can assist in your understanding of the lab report. This person can inform you whether you are dealing with an active or inactive metabolite and whether the report actually sustains the opinion of the officer.
Case Presentations

Direct from the files of Forensic Consulting, here are examples of the types of “actual” cases that have come across my desk to demonstrate what is encountered during the review process. Hopefully as you review the observations, opinions and discussions you will become familiar with the types of situations you can find in your own cases.

Case #1  

Officer’s Opinion: CNS Depressants

<table>
<thead>
<tr>
<th>Drug Classification</th>
<th>HGN</th>
<th>VGN</th>
<th>B.P.</th>
<th>Pulse</th>
<th>Temp</th>
<th>Pupils</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNS Depressant</td>
<td>Present</td>
<td>Present</td>
<td>Depressed</td>
<td>Depressed</td>
<td>Normal</td>
<td>Normal</td>
<td>No Eye Convergence, Muscle flaccidity</td>
</tr>
<tr>
<td>Defendant Observations</td>
<td>Present</td>
<td>None</td>
<td>Not Taken</td>
<td>96.99.100</td>
<td>96.4</td>
<td>Normal</td>
<td></td>
</tr>
</tbody>
</table>

Interview:  
Subject admitted taking Xanax (Alprazolam) and Ephexor (Venlataxine)

Lab Result:  
Cocaine, Benzocaine, Ecgonine methyl ester, Novocaine, Cocaethylene, Alprazolam.

Discussion:  
Cocaine is considered a CNS Stimulant. The pulse would be considered within normal limits and is not depressed as would be expected for a CNS Depressant. It appears the officer used the interview information to formulate the opinion and missing the CNS stimulant is an example of the problems associated with multiple drug interactions. This is also an example of what could be considered an “erroneous” opinion.

Case #2  

Officer’s Opinion: Cannabis

<table>
<thead>
<tr>
<th>Drug Classification</th>
<th>HGN</th>
<th>VGN</th>
<th>B.P.</th>
<th>Pulse</th>
<th>Temp</th>
<th>Pupils</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>CANIBUS</td>
<td>None</td>
<td>Present</td>
<td>Normal</td>
<td>Increased</td>
<td>Normal</td>
<td>Normal</td>
<td>Heat bumps on tongue</td>
</tr>
<tr>
<td>Defendant</td>
<td>Present</td>
<td>None</td>
<td>150/92</td>
<td>92, 102, 100</td>
<td>98.2</td>
<td>Normal</td>
<td>Heat bumps on tongue</td>
</tr>
</tbody>
</table>

Interview:  
Admitted to smoking Marijuana.

Lab Result:  
Carboxy-THC

Discussion:  
HGN was present but not expected with cannabis. The blood pressure is elevated which the protocol indicates should be normal. The heat bumps are claimed to be highly indicative of marijuana use. The reality is heat bumps are also found in smokers whereas a green film and heat bumps are more indicative of Marijuana use. The Inactive metabolite was found. There is an argument the lab report indicates use but not impairment.
Case #3  

**Officer’s Opinion: CNS Depressant and Stimulant**

<table>
<thead>
<tr>
<th>Drug Classification</th>
<th>HGN</th>
<th>VGN</th>
<th>B.P.</th>
<th>Pulse</th>
<th>Temp</th>
<th>Pupils</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>CNS Depressant</td>
<td>Present</td>
<td>Present</td>
<td>Depressed</td>
<td>Depressed</td>
<td>Normal</td>
<td>Normal</td>
<td>No Eye Convergence Muscle flaccidity</td>
</tr>
<tr>
<td>CNS Stimulant</td>
<td>None</td>
<td>None</td>
<td>Markedly Elevated</td>
<td>Markedly Elevated</td>
<td>Elevated</td>
<td>Dilated</td>
<td>Extremities cold to the touch</td>
</tr>
<tr>
<td>Defendant's Observations</td>
<td>Lack of Smooth Pursuit</td>
<td>None</td>
<td>110/90</td>
<td>102, 110, 100</td>
<td>98.4</td>
<td>Normal</td>
<td>Heat bumps on tongue</td>
</tr>
</tbody>
</table>

**Interview:**  Prescription medications including Luvox, Adderall, Trazadone and Clomipramine.

**Lab Result:**  Amphetamine, Butalbital, Propoxyphene, Clomipramine, Fluvoxamine and Trazadone.

**Discussion:**  Amphetamine is a CNS stimulant and the parent drug in Adderall. Butalbital a CNS Depressant and Barbituate, Propoxyphene a Narcotic Analgesic, Clomipramine, fluvoxamine and trazodone are anti-depressants. This is another case of multi-drug interaction as it relates to the vital signs. The systolic blood pressure is low but the diastolic is borderline high. The Propoxyphene was not accounted for as a narcotic analgesic in the opinion. In this case all the drugs could be accounted for via prescriptions and without some form of quantity, there is no means to determine if any impairment was the result of these pharmaceuticals.

Case #4  

**Officer’s Opinion: Cannabis and Alcohol**

<table>
<thead>
<tr>
<th>Drug Classification</th>
<th>HGN</th>
<th>VGN</th>
<th>B.P.</th>
<th>Pulse</th>
<th>Temp</th>
<th>Pupils</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>CANIBUS</td>
<td>None</td>
<td>Present</td>
<td>Normal</td>
<td>Increased</td>
<td>Normal</td>
<td>Normal</td>
<td>Heat bumps on tongue</td>
</tr>
<tr>
<td>Defendant</td>
<td>Lack of Smooth Pursuit</td>
<td>None</td>
<td>150/92</td>
<td>84, 104, 96</td>
<td>96.3</td>
<td>Normal</td>
<td>Heat bumps on tongue</td>
</tr>
</tbody>
</table>

**Interview:**  Admitted to smoking a joint

**Alcohol:**  0.038%

**Lab Result:**  Carboxy-THC

**Discussion:**  Alcohol is classified as a depressant so many of these vitals will be comparable to those of depressants. None of the vitals are considered to be depressed, the B.P. is high and note the variation in pulse. The interesting thing about this case is the referral to Alcohol as being one of the impairing substances at levels below 0.04%, the value many assign as where alcohol effects begin. By now you should know what the presence of Carboxy-THC means.

(continued on page 12)
The Drug Recognition Program was devised to assist law enforcement with the detection of those under the influence of drugs. What they have created is something, as shown in the case studies, which can be unreliable when dealing with the various drugs, pharmaceutical, clandestine and multiple drug cases. It is not uncommon to find lab results that do not support the opinion in those cases where the inactive metabolite is identified.

It is interesting to note that from the research I have conducted on the DR program even if the lab detects an “inactive” metabolite, if that substance falls into the classification of drug stated in the opinion, the opinion is considered valid and passing.

Over the years I have listened intently to both sides of the “expert” status debate. From the side of the advocates of Drug Recognition, they talk about the rigorous, nationally standardized training, the use of this 12 step evaluation process, they boast of the very high percentages of “correct” determinations, and the use of some form of “proficiency testing,” of sorts, to maintain the skills and accuracy of their certified officers.

Those against profess the methodology is not specific enough for the opinion to be rendered within a reasonable degree of scientific certainty. The use of urine samples, while easily obtained, do not correlate to what is in the blood, therefore is of little probative value. They argue against the “expert” status due to lack of required qualifications (science background specifically) in the determination of who becomes a drug recognition officer and the lack of general acceptance among the members of the medical and other scientific communities.

Whether you are for or against the DR program, I would hope that you can see the shortcomings of the existing process. I have conducted some minor research in the area of saliva testing for drugs. There are “six panel” kits that will detect Cannabis, Cocaine, the Amphetamines, Opiates and PCP which are mainly used for pre-employment screening and to check for drug use in the workplace. If such a process was employed in the criminal justice system, the PC for a blood sample could be established and through the use of blood a better indication of what drugs are present that could affect an individual. Even with this process, there remains the issue about what is considered “impairing.”

Until such time as a general agreement can be made within the scientific and medical fields as defining drug impairment, the levels impairment can be established and the best means of sampling to demonstrate the presence and levels of these substances, adjudication of Driving Under the Influence of Drugs will remain a hotly debated issue.

Colleagues:

I have eaten your bread and salt,
I have drunk your water and wine,
The deaths you died I have watched beside,
and the lives you led were mine

— Rudyard Kipling

It’s been quite a day. To you, who have lived my life, and whose lives I have lived, thank you for your kind words and support. How often I’ve said “This sucks,” and then someone – Marty or Cappy or Bill or Gary or Greg or Jim or Ray or Dan or Janice or Howard or Dennis or Beth or some other of our merry band – my heroes – will say something intelligent, or inspirational, or just damn funny, on the phone, or in the hall, or on the listserv that leads me to reconsideration and then “Oh what the hell, I’ll give it one more day. Let’s see what happens tomorrow.” Your support made this victory possible. We share in it together.

I don’t know what the other counsel involved in this got from it, but I can tell you what I got – as we sat in court this morning and heard the DA admit that Douglas Warney was wrongfully convicted and imprisoned for a crime he didn’t commit and as we heard the judge vacate his conviction, and order him immediately released, in those few moments, every shithole apartment, every can of tuna fish (dry), every night shift at the steel warehouse followed by an 8 a.m. class, every fight with a creditor, every broken relationship that it took to get here – they were all worth it.

“Whosoever destroys a single life is as guilty as though he had destroyed the whole world; and whosoever rescues a single life earns as much merit as though he had rescued the entire world.” This may be as much as we can hope for.

— Don Thompson


7. National Center for Health Statistics as found at http://cdc.gov/nchs

Ed. Note: Here is a message posted to the NYSACDL listserv on May 16, by member Don Thompson, who along with the Innocence Project, was instrumental in having wrongfully convicted Douglas Warney released from jail after serving 20 years for a crime he did not commit.
Several years ago, the FBI executed a search warrant on the office of a local attorney, including searching his computers. An attorney who shared space with me at the time said that I had nothing to fear about. “If the FBI ever takes your computer, they’ll never be able to find anything on it. After all, you can’t find anything on it yourself!”

At the time I had heard of a “subdirectory,” but hadn’t ever used one on my computer. Everything was on the C drive in one subdirectory, My Files, and a gargantuan subdirectory it was. Since then I’ve learned that having a set of computer subdirectories is essential. The system, described here, is one that I’ve stuck with it. The second thing was to create a set of naming conventions for files, and again, I’ve stuck to those conventions.

SUBDIRECTORIES

For law office work, I created a set of subdirectories, based mostly on the areas of law that I work in, as well as organizations and projects I’m involved in. The main subdirectories are: Bar Association, Forms, Letters, Personal, Teaching, and Writing and CLE. Thus:

C drive
  My Files
    Bar Association
    Forms
    Letters
    Personal
    Teaching
    Writing and CLE

FORMS SUBDIRECTORY

The Forms subdirectory is the main subdirectory for my law practice. It is divided into 11 subdirectories: Affidavit of service, Appeals, Attorney fees, Civil, Criminal, Estates, Family, Federal, Office, Personal injury, and Real estate. Most of these have a subdirectory, called Individual clients.

With a form for a civil case, e.g., a standard “substitution of attorney” form, that is a file found in the Civil subdirectory, along with many other forms -- notice of appearance, complaint, answer, answer and counterclaim, discovery demands, notice of motion, order granting summary judgment, and the like. Standard letters, e.g., a cover letter to a client before an examination before trial, also come inside the Civil subdirectory. Each of these is a separate file within the Civil subdirectory.

In the Family subdirectory are placed documents for that area of law: petition, answer and cross-petition, discovery demand, motions, orders, DRL 76-h affidavit, statement of client rights and responsibilities, and the like.

INDIVIDUAL CLIENT DIRECTORIES

In each of the substantive law categories is another subdirectory -- Individual clients. When representing a client, a subdirectory in that client’s name is created. Thus, hypothetically speaking, if I represent a client named, say, Thompson, on a criminal charge of Aggravated Mopery 2nd degree, under the Criminal subdirectory, Individual clients sub-subdirectory, comes another subdirectory named Thompson. Inside that sub-sub-subdirectory are files specific for that client: retainer, letters, motions, orders, and the like.

When drafting a motion on this client’s case, I typically open up a file called “Crim motion omnibus” from the Criminal subdirectory and save it under that client’s subdirectory as a new file, called Thompson motion omnibus.

Once a client’s case is closed, that subdirectory can be deleted or perhaps better, just removed to a different location on the computer, still accessible at some later point.

The Attorney Fees subdirectory has retainer agreements for various types: civil, family, criminal (traffic, misdemeanor, felony); trial, appeal; flat-fee or hourly.

The Affidavit of service subdirectory has forms for civil personal service, divorce personal service, civil motions, appeals service of briefs and record, and the like.

What’s been described are within the Forms subdirectory. Outside of this are subdirectories for other areas where I manage to accumulate a lot of “stuff”: Bar Association, CLE, Letters, Personal, and Teaching. For example, the Letters subdirectory contains letters that are typically not associated with to any individual case.

The subdirectory titled Personal contains non-office matters, like my resume, personal correspondence and my acceptance speech upon being awarded the Nobel Peace Prize (still in draft stage).

(continued on page 14)
SUBDIRECTORY PLEA

The “tree” of subdirectories on the Forms subdirectory looks something like this:

Forms
  Affidavit of service
  Appeals
    Appeals individual cases
  Attorneys fees forms
    Attorneys fees individual cases
  Civil
    Civil individual cases
  Computer
  Criminal
    Criminal individual cases
  Estates and elder law
    Estates individual cases
  Family
    Family individual cases
  Federal
    Federal individual cases
  Office
  Personal injury
    Personal injury individual cases
  Real Estate
    Real estate individual cases

NAMING FILES

The second trick to organizing my computer was to have a standardized way of naming individual files. Every form gets a name: the omnibus motion is “Crim motion omnibus.” Other forms are: “Crim notice of appeal,” “Crim GJ notice,” “Crim discovery demand” and “Appeal PSI order and affirmation.”

CONCLUSION

This approach is hardly the ultimate answer in computer sophistication; it’s just something that has worked for me. With this fairly simple set of subdirectories and naming conventions, I’ve been able to make my computer comprehensible. Not only can I quickly find a file that was used before, but other people in the office can do so as well.

Now, if only I could organize my sock drawer.
THE MOTION FOR A TRIAL ORDER OF DISMISSAL

by Gary Muldoon

Gary Muldoon is a member of the NYSACDL. He is the author of Handling a Criminal Case in New York.

The motion for a trial order of dismissal is the criminal law equivalent of the civil law’s motion for a directed verdict, CPLR 4401. As with other legal arguments, the motion is made outside the presence of the jury.

It is perhaps the most important motion that can be made in a criminal trial. The Trial Order Dismissal motion is provided for in CPL 290.10. The motion should be made whether it is a jury or bench trial.

Legal standard

The motion addresses only the issue of legal sufficiency of the evidence: the judge does not have the power to dismiss the case on the basis that the proof was not established beyond a reasonable doubt. Such a decision usurps the function of the jury. Holtzman v. Bonomo, 93 AD2d 574, 462 NYS2d 690 (2d Dept 1983). The trial judge must review the evidence in the light most favorable to the prosecution. People v. Beecher, 225 AD2d 943, 639 NYS2d 863 (3d Dept 1996).

The trial judge may grant or deny the motion, or may reserve decision until after the verdict. In fact, reserving decision is the preferred method. People v. Key, 45 NY2d 111, 408 NYS2d 16 (1978). If decision is reserved and the jury’s verdict is guilty, the trial court must determine the motion as it would have been authorized had it not reserved decision. CPL 290.10(1).

Making the motion

The defense can make a Trial Order of Dismissal motion quite simply, e.g.: “The defense moves to dismiss the indictment on the basis that the proof was not established beyond a reasonable doubt.” The result of such a perfunctory motion is usually a perfunctory denial.

To be sufficient, the motion must be detailed. Each element of each crime charged should be addressed in the motion. Drafting the motion before trial is one way to cover all the likely issues. If accomplice testimony or a defendant’s statement is introduced, the motion should address lack of corroboration. People v. McGrath, 262 AD2d 1043, 693 NYS2d 358 (4th Dept 1999).

Renewal of motion

In People v. Hines, 97 NY2d 56, 736 NYS2d 643 (2001), the motion for a trial order of dismissal at the end of the People’s case was denied. Defendant then put on substantial proof in his case that actually bolstered the prosecution’s case. Defendant subsequently moved to reconsider the ruling that had denied defendant’s motion for a trial order of dismissal after the People’s case, and argued that only the evidence elicited during the People’s case-in-chief should be considered (to avoid having to deal with damaging evidence inadvertently elicited during the defendant’s case.

The Court of Appeals held that by choosing to put on evidence, defendant waived his right to have only the People’s evidence examined for legal sufficiency, and could not avoid the adverse evidence elicited during the defendant’s case on his subsequent motion. Hines stated: “we have held that ‘a defendant who does not rest after the court fails to grant a motion to dismiss at the close of the People’s case, proceeds with the risk that he will inadvertently supply a deficiency in the people’s case.’ Thus, a defendant who presents evidence after a court has declined to grant a trial motion to dismiss made at the close of the People’s case waives subsequent review of that determination. Consistent with the overall truth-seeking function of a jury trial, the rationale underlying this rule is that a reviewing court should not disturb a guilty verdict by reversing a judgment based on insufficient evidence without taking into account all of the evidence the jury considered in reaching that verdict, including proof adduced by the defense.” People v. Hines, 97 NY2d at 61. See also, People v. Matuszek, 300 AD2d 1131, 752 NYS2d 774 (4th Dept 2002).

The Second Department has held that a detailed TOD motion at end of the prosecution’s case was sufficient to preserve the issue of legal sufficiency. People v. Soto, 8 AD3d 683, 779 NYS2d 251 (2d Dept 2004).

Postverdict motion

If the defense puts on a case, a postverdict motion under CPL 330.30 on the basis of legal insufficiency is improper. People v. Hines, 97 NY2d 56, 736 NYS2d 643 (2001).

Importance of the motion

Part of the importance of the TOD motion is that if granted, double jeopardy bars retrial. People v. Brown, 40 NY2d 381, 386 NYS2d 848 (1976). But its greater importance relates to preservation: if the defense fails to make the motion at trial, the defense does not have the right to raise the issue of legal sufficiency of the evidence on appeal. People v. Gray, 86 NY2d 10, 629 NYS2d 173 (1995).

Gray holds that unless the TOD motion is specifically directed at the alleged error, the issue is unpreserved for appeal.

Later Court of Appeals decisions suggest that the dictum in Hines — that a challenge to legal sufficiency is not “preserved for review at trial in the absence of a motion to dismiss at the close of all the evidence” – is not the law. The Court of Appeals in People v. Payne, 3 NY3d 266, 273, 786 NYS2d 116 (2004) read Hines to stand for the limited proposition that, “When a trial court denies such a motion at the close of the People’s case, a defendant who thereafter introduces proof waives the right to have the court con

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sider the motion solely on the basis of the People’s evidence. . . . Where, however, the court has reserved decision, the defendant has preserved a claim of insufficiency, and the trial court would then rule on the CPL 290.10 motion as if the motion were made at the close of all the evidence. We decline to expand Hines and elevate preservation to a formality that would bar an appeal even though the trial court, aware that the motion was pending, had a full opportunity to review the issue in question.” People v. Payne, 3 NY3d at 273.

Beyond exceptions to Hines, the concurring opinion of Judge Robert S. Smith in Payne questioned the Hines rule itself.

The Second Department reached a similar conclusion in People v. Soto, 8 AD3d 683, 684-685, 779 NYS2d 251 (2d Dept 2004): “Contrary to the People’s contentions, the defendant’s appellate challenge to the legal sufficiency of the evidence of his intent to commit attempted murder in the second degree is preserved for review, as the defendant raised this issue with sufficient specificity in his motion . . . for a trial order of dismissal at the close of the People’s case. The People’s reliance upon People v. Hines to support their assertion that the issue is not preserved is misplaced. Hines clearly holds that when a defendant’s motion for a trial order of dismissal at the close of the People’s case is denied, and the defendant thereafter presents witnesses whose testimony supplies additional evidence of guilt, the defendant waives his right to attack the quantum of proof adduced by the People during their case-in-chief. The issue is one of waiver, not preservation. The Court of Appeals in Hines clearly did not intend to announce sweeping changes in the rules of preservation applicable to legal sufficiency challenges generally. . . . We take this opportunity to reiterate our adherence to the prevailing rule that a motion pursuant to CPL 290.10 made at the close of the People’s case asserting specific grounds is sufficient to preserve those arguments in a challenge to the legal sufficiency of the evidence on appeal.” See also, People v. Garrett, 8 AD3d 676, 677, 780 NYS2d 605 (2d Dept 2004).

Review in interest of justice

Though unpreserved, legal sufficiency may be raised on appeal in the interest of justice. People v Butler, 273 AD2d 613, 711 NYS2d 525 (3d Dept 2000).

Trial Order of Dismissal motion and effective assistance of counsel

Given the importance that appellate courts have given the motion, no conceivable reason exists why the motion should not be made in every trial. Failure to make the motion cannot be attributable to “strategy.” Pavel v Hollins, 261 F3d 210, 216-217 (2d Cir 2001); People v. Lindo, 167 AD2d 558, 562 NYS2d 229 (2d Dept 1990).

People v. Gray was decided more than a decade ago. Many trial lawyers, seemingly oblivious to the need to make a specific motion for a trial order of dismissal, are candidates for ineffective assistance of counsel. See Riley v. Berghius, 388 F Supp 2d 789 (ED Mich 2005).
In this section we set forth the relevant facts regarding the failure of the Office of the District Attorney of __________ (name of) County to observe the minimal requirements of having on file a current statement under Public Officers Law § 9. This is the section by which a deputy is formally designated and legally authorized to act in the District Attorney’s actual absence or disability. Only a validly designated deputy may apply for an eavesdropping warrant, as set forth in CPL § 700.05(5). We contend here that there was a fatal failure to adequately comply with that section and with CPL § 700.20(2)(a), to have previously properly designated a deputy, or to make even a facial showing that the “applicants” for the eavesdropping warrants employed herein were so qualified. The Memorandum of Law submitted in support of this motion will review the applicable authority, here we set forth the factual basis for the motion.

Expired Designations of “Acting District Attorney(s) of _____ County:

A review of the numerous eavesdropping applications, issued from _____200_ to ____ 200_, is striking for the fact that several were not initiated on application of the elected District Attorney of ______ (name of) County, but either by __________(name) and ______________ (name) each describing himself as “Acting District Attorney” therein.

A comprehensive search was conducted in the office of the Clerk of ________ (name of) County for any “designations” which might authorize the persons filing as Acting District Attorneys to initiate eavesdropping applications. The result of that research, established by the annexed certifications from the County Clerk (County Law § 925), is:

•  - there is on file a designation dated _____ 200_, filed on ________ 200_ (certified copy attached hereto as Exhibit ___)
•  - there is no other designation on file for the period from _____, 200_ to the date the certificate of no record - ________, 200_ (certified copy attached hereto as Exhibit ___)

We request the Court take judicial notice that the term of the District Attorney of ________ (name of) County was and is co-terminus with those of the elected officials of the _______ (name of city or town), i.e., the District Attorney was last elected in November 200_. took office on _____ 200_ there will be a new election in ______ 200_ and whomever is elected District Attorney will take office in ______ 200_. (See, County Law, § 926).

Thus, we will contend, a designation filed in 2000 had expired and was of no legal force and effect, when the _____, 200_ term of the District Attorney concluded, and certainly not in the one year period during which the eavesdropping applications herein were made, from _____, 200_ to ______, 200_.

The chart of the eavesdropping applications (Exhibit __ ) establishes that early on in the chain of applications and renewals on virtually all the score of “plants”, the applicant was not the District Attorney, but either Mr. __________ or Mr __________, purporting to act as the “Acting District Attorney of ______(name of) County.” Annexed hereto are the first and last pages of those applications, the following are the self-provided description of the applicant and of authority:

•  _____, 200_ -_________ ________“I am the Acting District Attorney of ______(name of) County. I make this application for an order pursuant to C.P.L. Section 700.65 …” Exhibit _____;
•  _____, 200_ - ____  ________: (name of ADA) “I am the Acting District Attorney of the County of __________ authorized to apply for eavesdropping warrants and pen register and trap and trace orders pursuant to Criminal Procedure Law Articles 700 and 705.” Exhibit _____;
•  ____ __ , 200_- ______ _______: (name of ADA) “I am the Acting District Attorney of the County of ___ ____. I am authorized to apply for eavesdropping warrants pursuant to Article 700 of the Criminal Procedure Law.” Exhibit _____;
• _____ __, 200_- ______ ______: (name of ADA) “I am the Acting District Attorney of the County of _________I am authorized to apply for eavesdropping warrants and pen register and trap and trace orders pursuant to Article 700 of the Criminal Procedure Law.” Exhibit _____;
• ____ __, 200_ - _______ ____: (name of ADA) “I am the Acting District Attorney of the County of ________. I am authorized to apply for eavesdropping warrants and pen register and trap and trace orders pursuant to Article 700 of the Criminal Procedure Law.” Exhibit _____;

(continued on page 18)
OMNIBUS MOTION ON WIRETAP CASES
continued from page 17

* ______, ________: (name of the ADA) “I am the Acting District Attorney of the County of ________. I am authorized to apply for eavesdropping warrants pursuant to Article 700 of the Criminal Procedure Law.” Exhibit _____:_____, 200_.

* __________ : (name of the ADA) “I am the Acting District Attorney of the County of _______. I am authorized to apply for eavesdropping warrants pen register and trap and trace orders pursuant Articles 700 and 705 of the Criminal Procedure Law” Exhibit _____.

We note that a press release of this very same date, _____, 200_, from the “District Attorney –_________County” website commences with the statement “District Attorney ___________ . . . today announced the indictments of . . .” (available at ___________, last visited _____ 200_, attached as Exhibit __).

We contend in the Memorandum of Law submitted in support:

(1) The applicants, Messers. _________ and ______, in fact had no then-current authority to submit any application as “Acting District Attorney of __________County,” and

(2) The applications’ failed to describe the specific, then-current “actual absence or inability to act” of the District Attorney, and

(3) There is an factual question as to whether the District Attorney was, in fact, in his office and was not “actually absent or disabled.”

Individually and collectively, these questions render the applications and ensuing eavesdropping authority improvidently granted and require suppression of the products and fruits thereof.

These questioned applications involved virtually all the various “plants” thus one application might cover a half-dozen telephonic lines or locations. Further, and most significantly, the product of the eavesdropping so authorized would be proffered as the basis of the next successive application, either for renewal of the same authority or in seeking permission to eavesdrop on new or additional plants.

Finally, the product of all the eavesdropping, extending over a year and on a score locations and telephone lines was proffered as the basis for search warrants sought for and executed at the various locations, discussed below. As the eavesdropping warrants issued on application of Messers. _________ and ________ should be controverted, further review is required, to establish if any of the interceptions or if the product of the searches are to be admitted at trial.

RENEWED APPLICATION FOR DISCLOSURE OF (NAME OF) AFFIDAVIT IN SUPPORT OF FIRST WIRETAP APPLICATION

In aid of developing additional issues for the defense Omnibus Motion, the defendants earlier moved for an order vacate the Court’s protective order, pursuant to CPL § 700.70 (allowing a Court, on good cause shown, to extend the statutory 15-day post arraignment time for People to provide “a copy of the eavesdropping warrant and accompanying application”).

By Decision and Order dated __________ __, 200_, the Court ruled (at pg. 3) “defendant’s request for full disclosure of the CPL 700.70 material, i.e., an unredacted copy of the____(name of) Affidavit, is denied at this time.” (emphasis added) As can be seen from the above heading, the defense renews its request for disclosure of the unredacted _______ affidavit, so it can competently challenge this first wiretap application.

As matters stand now, the defendants cannot speak specifically to the showing made as to the geographical nexus showing made, nor probable cause, nor the staleness or currency of the information, nor the demonstration of reliability of the informant, or of the informant’s information, all requisite for a proper eavesdropping application.

In the following sections we highlight for the Court several issues on which the defendants would examine or question. If the Court is still disinclined to permit disclosure “at this time”, we ask the Court to scrupulously review the unredacted (name of) affidavit for satisfaction of these essential elements of a proper eavesdropping application.

THE WARRANT APPLICATION FAILED TO SHOW CRITICAL ELEMENTS ESSENTIAL TO PROPER ISSUANCE

Failure to Demonstrate a “Sufficient Nexus” to ______(name of) County A prosecutor seeking an eavesdropping warrant must be one who is “authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application.” CPL § 700.10(1). In other words, to use the language of the Court of Appeals in sustaining the ______ District Attorney’s authority to seek such a warrant, there must be a “sufficient nexus” between the crime being investigated and the potential for a prosecution in the applicant prosecutor’s county.
In People v. DiPasquale, 47 NY2d 764, 417 NNYS2d 678 (1979), a scheme was apparently afoot to aid a state prisoner, then at Walkill State prison, to gain early parole. In aid of that scheme, telephone records confirmed, calls were made to various corrections officers from a telephone in a bar in ______ County, including one call to a cooperating correction officer, from an identified individual, named Prunty. Because observations placed Prunty in the _____ County bar when the calls were made; the Court held that ______ County has a “sufficient nexus” to prosecute the attempted bribery plot, and thus the _____ County District Attorney’s authority, as a proper applicant under CPL 700.10(1).

Here, Det. Walsh’s affidavit, dated _____ 200_ (Exhibit __), in support of the very first eavesdropping warrant, reveals absolutely no facts which establish any contacts between ______ (name of) County and the alleged bribery scheme involving the CI. Whatever geographical references are visible are to either ______ or ______. True, page after page are redacted by heavy black lines through the text, a “sufficient nexus” to ______ (name of) County may be concealed therein. Unless the Court allows the defense to examine Det. ______’s affidavit, we can only rely on the Court’s ex parte review and our urging that this aspect be closely examined, under the requisite high standards of “scrupulous compliance” “meticulous adherence” and “strict application” of all CPL Article 700’s statutory elements. We will review these cases imposing these high standards and employing these strong cautionary words in the Memorandum of Law in support, submitted herewith.

Lack of Probable Cause

We note that Det. ______’s application recites (Exhibit ______, p. 10, ¶ 13) that a so-called Confidential Informant (hereafter “the CI”) used an intermediary, “to report that he had been contacted by two Local 8 officials, and that he believed they were soliciting a bribe from him and his company.” It supplies a “Statement of Facts” apparently concerning earlier contacts and conversations between defendant ______ (name) and the CI.

All information concerning the conversations is redacted on the copy of the ______ affidavit provided to the defense, in sum, there is no probable cause showing at all in the material supplied us, based on the transactions between ______ (name of defendant) and the CI. Further, there is no indication, from what was supplied to the defense, that any similar transactions were occurring between any of the defendants and any other individuals similarly situated as the CI.

In short, we are unable to intelligently discuss the probable cause showing. Unless the Court lifts its protective order, the defense is simply left to ask the Court to act as counsel for the defense would, if we had the unredacted application in hand, and to closely review same regarding its probable cause showing and devise the arguments which we would supply. In so asking, we do not yield our claim that the earlier order declining full disclosure was, respectfully, improvidently granted, or that the Court’s scrupulous review is a substitute for defendants’ constitutionally guaranteed right to the effective assistance of counsel.

Staleness of Information

Here we note that in the redacted ______ (name of) affidavit provided to us, there are no legible indications of the dates on which the supposed contacts with the CI occurred. It is, of course, axiomatic that information forming the basis for a probable cause determination supporting a court-authorized intrusion must not be “stale”.

If the most recent was none-too-current, issues of staleness might well arise. (See, People v. Edwards, 69 NY2d 814, 513 NYS2d 960 (1987)(10-day hiatus between underlying events and issuance of warrant). We accept that far longer periods of lapse between underlying events and a warrant’s issuance are sustained in various circumstances, but note here that aside from introductory allegations of a past prosecution of a prior group of individuals at Local 8 [1], long-past unrelated criminal history of current targets of the investigation, there is no indication, visible to us, of any defendant’s bribery-related activity with any person, other than as alleged with the CI. This is in contrast to those cases sustaining the issuance of a warrant, even on old information, on a showing of seeming “continuous criminal activity” (see, e.g., People v. Clarke, 173 AD2d 550, 570 NYS2d 305 (2d Dept., 1991).)

Hence we ask the Court to carefully note the time-lapse between the acts alleged in Det. ______’s affidavit, above cited, and the earliest application to the issuing Court, keeping the above arguments in mind.

Note:

[1] While the ______ (name of) affidavit discusses the earlier investigation and its fruits, also based on wiretaps, the Detective notes (Exhibit ______, at page 7, fn. 3) “this affidavit is not based on information obtained through the earlier eavesdropping investigation.”
A Criminal Law Update, coordinated by Jim Kerrigan, Don Rehkopp and Dan Henry, will be held at the Hilton Inn in Ithaca, Saturday, September 9.

David Goldstein will coordinate a Criminal Law Update at the Palisades Center Mall, Friday afternoon, September 29.

Syracuse College of Law is the site of the Criminal Law Update coordinated by Craig Schlanger on Saturday, October 14.

The Annual Weapons for the Firefight seminar will be held at St. Francis College in Brooklyn, on Friday, October 20. The program will be coordinated by Kevin O’Connell and Stephanie Zaro.

The Annual Mid-Hudson Trainer will be held at the Grand Hotel in Poughkeepsie on Friday, October 27.

A Last Chance Ethics Seminar will be held in New York City on Saturday, December 2. Those attorneys attending the program will be able to satisfy their 4-credit Ethics requirement.

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

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To promote study and research in the field of criminal defense law and the related arts.
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To promote the proper administration of criminal justice.
To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases.
To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby
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(Please print or type.)

Name:__________________________________________________________________________

❑ 18-B COUNSEL  ❑ PRIVATE PRACTICE
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❑ FEDERAL PRACTICE  ❑ STATE PRACTICE
❑ LEGAL AID

(check all that apply)

Firm Name:____________________________________________________________________

Address:_______________________________________________________________________

City/State/ZIP ________________________County__________________________________

Phone: (         )_________________________ Fax: (          )_____________________________

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( ) Regular Member $175
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( ) Associate Member $150
( ) Law Student $25

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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 intemperate 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.

FOR THE RECORD...

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