“[O]ur courts are the great levelers. In our courts, all people are created equal...That is a living, working reality.”
— Atticus Finch, defense attorney, in *To Kill a Mockingbird*

**PRESIDENT’S MESSAGE**

*by Joshua L. Dratel*

Does NYSACDL make a difference? Since the most recent (inaugural) issue of *Atticus*, several examples establish most convincingly that it does. Foremost perhaps is the scenario in *People v. Williams*, in which a defendant was unrepresented in a prosecution appeal before the New York Court of Appeals. As reported in my previous column, the Court asked NYSACDL to file an *amicus* brief in support of the defendant. *Amicus* Committee Chair Richard Willstatter enlisted Past-President Mark Mahoney to write the *amicus* brief, which Mark did despite the impending deadline, and the defendant prevailed before the Court.

In addition to assisting the defendant in *Williams*, and all defendants who will benefit from the Court’s opinion, NYSACDL is also embarking on a campaign to remedy the more systemic problem: that indigent defendants often go unrepresented in prosecution appeals. Not only do those defendants deserve a lawyer in their corner, but in the adversary system the defense position is an integral component of any legal debate.

That principle was also at work in NYSACDL’s successful *amicus* participation in Court TV’s suit to permit it to place cameras in the courtroom in the absence of any enabling legislation. While the Attorney General’s office ably represented the position of the courts, NYSACDL’s *amicus* was necessary to present the point of view of an essential element of the criminal justice process: defense attorneys and their clients. As we go to press, NYSACDL’s position prevailed in the Court of Appeals, and Court TV’s effort at unilateral access to court proceedings was defeated.

NYSACDL has also been active in pursuing further reform of the Rockefeller Drug Laws, as we unite with like-minded organizations and legislators to bring further relief to those languishing in prison, or facing Draconian punishment under that antiquated legislation. In addition, NYSACDL is developing a template for attorneys and defendants who are in a position to benefit from the reforms that have already been implemented by the Legislature D again, real assistance for real people in real cases.

Of course, the listserv and *Atticus* regularly provide immeasurable aid to NYSACDL members in their practices, whether by offering solutions to problems mid-trial, streamlining research with a particular case, or referring attorneys, experts, and consultants.

Another aspect of NYSACDL’s tangible support for its members, and in turn their clients, is the outstanding program of Continuing Legal Education NYSACDL offers throughout the year and throughout the state. The faculties for these CLEs are knowledgeable and communicate their expertise in a manner easy to absorb. Upcoming seminars include a *Sex Abuse and Domestic Violence* program in Rochester, a *Cross to Kill* in Nyack, a *Weapons for the Firefight* in Brooklyn, a *Criminal Trial Skills Update* in Syracuse, and our *Annual Mid-Hudson Trainer* in Poughkeepsie. We invite all NYSACDL members to mark their calendars accordingly and to meet their CLE requirements via these programs, which are of course offered at a discount to members. We also urge NYSACDL members to alert other, non-member attorneys to attend our CLEs for that purpose D they, too, can benefit from a discount by joining NYSACDL at the CLE, and from the services I’ve described above.

In the context of a criminal defense organization, bigger is certainly better. Recruiting additional members by informing them of the concrete services NYSACDL provides improves our ability to assist even more defense attorneys and their clients, and increases our prestige and influence in the criminal defense community. That, too, will inure to the benefit of our membership, and the cause of justice.
Dear Members:

This letter addresses the “In My Opinion” column that appeared in the current issue of Atticus (May/June 2005), and which offered opinions with respect to Leslie Crocker Snyder’s candidacy for New York County District Attorney. The column does not reflect any position, formal or informal, on the part of NYSACDL, its Board, Executive Committee, or officers. It is the opinion solely of the author(s) of the column. While the author was Editor-in-Chief of Atticus, she did not set editorial policy for Atticus, and the column does not in any way represent an editorial position by Atticus. Indeed, the column appeared without prior notice to myself, and was not sent to the Board, Executive Committee, or me for review or approval, which was unfortunate. NYSACDL does not endorse candidates or adopt positions on political races, and this column should not be viewed as either (a) NYSACDL’s position on the matter; or (b) any informal means of stating any such position.

As a result, the column should not have appeared in Atticus, and I deeply regret that it did appear.

All announced candidates for New York County District Attorney will be informed by letter from me of the above, and that any effort to capitalize on the column will induce a vigorous public response from NYSACDL. This letter will also be printed in the next edition of Atticus. All NYSACDL members have a right to express their opinions. However, for a variety of reasons, the column was an inappropriate forum for such expression. I fully understand the consternation on the part of members who reacted to the column, and apologize for the aggravation they suffered as a result.

Thank you,
Joshua L. Dratel, Esq.
President
New York State Association of Criminal Defense Lawyers
The scene is familiar: you’re on trial in a RICO case identifying the XYZ enterprise as an association in fact. It might be an organized crime family or perhaps a lesser-known wannabe group. The government, having told the court and the defense it will present brief expert testimony concerning the structure of the charged enterprise (summarized in a two paragraph letter received shortly before trial), calls its FBI agent who, once qualified under Federal Rule of Evidence 702, draws upon his experience and expertise and briefly tells the jury (1) there is, indeed, an enterprise called the XYZ enterprise; (2) it is part of a larger abc criminal group; (3) it has a definable structure (which the agent relates, identifying the leadership, past and present); (4) it has been around for years and therefore has demonstrated the requisite RICO continuity; (5) it has certain rules and customs, as well as its own specialized coded language; and (6) it is heavily involved in certain types of criminal activity. By the time the agent is finished, the RICO enterprise, an essential element of the RICO and RICO conspiracy charges, has been established beyond any doubt. And the agent has imparted sufficient additional facts to the jury to put all but the last few nails in your client’s coffin.

But is this really what expert testimony was meant to be under Rules 702 and 703? And isn’t it offered in derogation of a defendant’s confrontation rights? After all, all this agent has done is culled facts from numerous hearsay sources such as post-arrest interviews with informants, plea allocutions, grand jury testimony and previous trial testimony, and regurgitated them to the jury, with far greater authority than would the declarants themselves had they testified. Serving as little more than a conduit between his sources and the jury, what the agent has been permitted to do as an expert, he never would have gotten away with as a fact witness using precisely the same information; that is, he never could have testified, ÔI interviewed Larry, Moe and Curley after they agreed to cooperate and they told me the following about the XYZ enterprise.Ô Yet, he is permitted to tell the jury, using the same interviews as his source. Based on my years of training and experience I can tell you the following about the XYZ enterprise.

The Second Circuit’s past willingness to permit expert structure testimony that amounts to little more than a delivery mechanism for rank hearsay began innocently enough, when it approved limited expert testimony regarding coded language, with careful limiting instructions. But the government saw these early cases as a foot in the door and, pretty soon, opened it wide enough to push through a dizzying array of structure evidence that effectively established substantial portions of their organized crime prosecutions in virtually unassailable form.

Richard Ware Levitt is a criminal defense lawyer in private practice in Manhattan.

1. See, e.g., United States v. Ardito, 782 F.2d 358 (2d Cir. 1986), citing United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), where the court said:
   Appellants also assert that the court erred in admitting the expert testimony of an FBI agent who described such terms as Ôcaptain,Ó Ôcapo,Ó Ôregime,Ó and Ôcrew.Ó That testimony aided the jury in its understanding of the recorded conversations, helped establish the relationship between appellants and the Cucios as well as appellants’ interest in disrupting the Curcio trial. Moreover, Judge Daly specifically cautioned the jury as to the limited purpose of the agents’ testimony and that the indictment did not charge conduct relating to organized crime activities. We hold that there was no abuse of discretion in the court’s determination that the probative value of the agents’ testimony outweighed any potential prejudice.

2. See, e.g., United States v. Locascio, 6 F.3d 24 (2d Cir. 1993) (affirming wide-ranging structure testimony in organized crime case and noting such testimony had previously been approved, citing United States v. Daly, 842 F.2d 1380, 1387-88 (2d Cir. 1988) (where the expert identified the five organized crime families that operate in the New York area; he described their requirements for membership, their rules of conduct and code of silence, and the meaning of certain jargon, such as the distinction between Ôa friend of oursÓ (i.e., a member of organized crime) and Ôa friend of mineÓ (i.e., only a personal acquaintance and not an organized crime member before whom ÔfamilyÓ matters could be discussed); and he described how, in general, organized crime has infiltrated labor unions).

(continued on page 4)
The court’s tolerance of such questionable expert testimony is to be contrasted with its more critical appraisal of other, questionable uses of expert testimony. Thus the court has condemned the use of experts offered, essentially, to bolster the credibility of a government fact witness by suggesting how “typical” drug dealers behave, has found error where an agent testifies to the meaning of certain language in a drug case without testimony that the language in fact is specialized drug jargon, and has disapproved testimony by case agents that blurs the line between fact witness and expert.

The time has come for the Second Circuit to entertain a sweeping reevaluation of structure testimony. This reevaluation should include consideration of (1) whether testimony that essentially summarizes the hearsay statements of others should be admitted as expert testimony; and (2) whether, in light of Crawford v. Washington, an expert’s reliance on testimonial hearsay violates a defendant’s confrontation rights. The application of Crawford to Rules 702 and 703 has already begun elsewhere, in the Eleventh Circuit, and related arguments have shown some traction in the Second Circuit’s recent decision in Howard v. Walker. This trend should continue.

The introduction of expert testimony is addressed in Rules 702

3. United States v. Cruz, 981 F.2d 659 (2d Cir. 1992) (We reaffirm here the principle that the credibility of a fact-witness may not be bolstered by arguing that the witness’s version of events is consistent with an expert’s description of patterns of criminal conduct, at least where the witness’s version is not attacked as improbable or ambiguous evidence of such conduct. United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991).

4. See, e.g., United States v. Cruz, 363 F.3d 187 (2d Cir. 2004) (expert wrongly permitted to explain meaning of defendant’s statement that he was told to watch Medina’s back while he did business, as such words not shown to fall within the ambit of drug jargon). See also United States v. Hermanek, 289 F.3d 1076, 1094 (9th Cir. 2002) (error for trial court to rely on witness’s general qualifications without requiring the government to explain the method witness used to interpret words he had never before encountered; under Rule 702 court must assure reliable methodology). Note that the argument has been made, but rejected, that expert testimony regarding the meaning of defendant’s coded language violates Fed. R. Evid. 704(b) which states, “No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto.” See United States v. Dukagjini, 326 F.3d 45, 52-53 (2d Cir. 2003) (such testimony did not run afoul of Rule 704(b) because it left to the jury the task of determining whether the decoded terms demonstrated the necessary criminal intent).  

5. United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003) (finding error, though not plain error, in case agent’s testimony that blurred the line between expert and fact witness, opined on the meaning of entire sentences rather than only drug code, and interpreted, language that in fact was not drug jargon). For cases disapproving testimony admitted at trial as lay opinion evidence under Rule 701 see Bank of China v. NBM LLC, 359 F.3d 171 (2d Cir. 2004); United States v. Grinage, 30 F.3d 746 (2d Cir. 2004)


8. 406 F.3d 114 (2d Cir. 2005).
and 703 of the Federal Rules of Evidence. Additionally, Rule 104(a) imposes on the trial courts a gatekeeping function to assess the admissibility of particular types of expert testimony, and Rule 403 provides a final check against the introduction of technically admissible but unfairly prejudicial testimony. Rules 702 and 703, as originally enacted in 1975, were bare-boned, but were amended in 2000 after the Supreme Court’s decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. The text of each, with the language added by amendments in 2000 italicized, follows:

Rule 702: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703: The facts or data in the particular case upon which an expert bases an opinion or inference maybe those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

As originally enacted, Rule 702 contemplated liberal use of experts as both fact and opinion witnesses where their testimony would assist the trier of fact. Additionally, the Advisory Note provided that “The fields of knowledge which may be drawn upon are not limited merely to the scientific and technical, but extend to all specialized knowledge.” Within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called skilled witnesses, such as bankers or landowners testifying to land values.

As Rule 702 broadly addresses when expert testimony may be introduced and who may qualify as an expert, Rule 703 circumscribes the facts upon which an expert may rely. The Advisory Committee’s note accompanying the text of Rule 703 as originally enacted observes, “Of facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources, (1) firsthand observation; (2) trial evidence (as through the use of hypothetical questions); and (3) Apresentation of data to the expert outside the court and other than by his own perception. Expert structure witnesses in RICO cases rely heavily on this third category of source information, gleaned much of their information from cooperating individuals, plea allocution, previous trial testimony, etc. Such extra-record facts, we are told by Rule 703, may, indeed, include facts or data not admissible as evidence if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

The 2000 amendments to Rules 702 and 703 were catalyzed by the Supreme Court’s 1993 decision in Daubert and its 1999 decision in Kumho Tire Co., Ltd. v. Carmichael. In Daubert, a case involving birth defects allegedly caused by the mother’s use of the anti-nausea drug Bendectin, the complaint had been dismissed after the district court rejected expert testimony proffered by plaintiff that the court said did not satisfy the general acceptance standard of Frye v. United States. The Court in Daubert held that the Federal Rules had superseded Frye and that general acceptance was no longer a necessary precondition to admitting expert testimony; rather, the test was one of relevance and reliability, as determined by the trial court in its role as gatekeeper under Fed. R. Evid. 104(a).

In this gatekeeping role, the trial court must determine whether the witness is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand the evidence or to determine a fact in issue. To make this determination the court must assess whether (1) the reasoning or methodology underlying the witness’s testimony is scientifically valid, and (2) the reasoning or methodology can properly be applied to the evidence or fact in issue."

(continued on page 6)
Of course none of this applies to non-scientific evidence (such as an expert organized crime structure witness), but the court subsequently held, in Kumho Tire Co., that the district court’s gatekeeping function extends to all expert testimony, not just expert testimony based on scientific knowledge.

Reacting to Daubert and Kumho Tire Co., Rules 702 and 703 were amended in 2000. Rule 703 was amended to reflect that qualified experts may testify in the form of opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Rule 703 was amended to clarify that otherwise inadmissible facts or data used by the expert to formulate his opinion may not be admitted by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.13

An FBI Structure Witness is not an Expert Under Rules 702

No doubt Rules 702 and 703 contemplate substantial flexibility in designating who is an expert, but this liberal approach is not entirely standardless. The text of Rule 702, as amended, establishes that a witness may testify as an expert only if she possesses relevant specialized knowledge and if three additional conditions are met: the testimony must be based on sufficient facts or data; it must be the product of reliable principles and methods; and the witness must apply the principles and methods reliably to the facts of the case. A typical FBI structure witness does not satisfy these requirements when the witness merely summarizes information obtained from numerous hearsay sources, to testify regarding the structure, rules, continuity, and common criminal conduct of the charged enterprise. The witness may be possessed of information to which the jury is not otherwise privy before the trial, but presumably all witnesses, expert or not, have such knowledge. There is a vast difference between the accumulated knowledge of a scientist and that of an FBI agent: the scientist has spent years learning broad principles which he can use to process the underlying facts of a particular case and arrive at conclusions, whereas an FBI agent simply collects and synthesizes facts from numerous sources and repeats them to the jury. Even, say a banker or a real estate appraiser, who testifies regarding land value, must apply a base of learned principles to a set of facts to render an opinion; an FBI structure witness does no such thing.

It is true that some expert witnesses are called not to render opinions but simply to explain to a jury otherwise difficult concepts. A doctor may be called to explain to a jury medical concepts or an economist to explain macroeconomic theory to help lay jurors understand and draw inferences from the facts and data presented by lay witnesses. But such expert fact witnesses are assisting jurors to understand difficult concepts that lay fact witnesses may not be able to communicate effectively.16

It simply is not true that lay jurors cannot understand a non-hearsay cooperating witness who explains the structure of the organization in which he was a member. Certainly the government prefers to impart such information through an FBI agent who speaks with authority and can summarize numerous hearsay sources, but expedience alone is not a sufficient reason to qualify a witness as expert.

Furthermore, witnesses who properly testify as experts within Rule 702 to explain facts and concepts to the jury rather than offering opinions, do not typically testify to facts establishing an element of an offense, as do FBI structure witnesses who establish the existence of a charged RICO enterprise. Such FBI witnesses merely act as a conduit for information between hearsay sources and the jury and add little to the trial mix other than the convenience of synthesis and the authority of their position, and the avoidance of calling non-hearsay witnesses who the government fears will be subject to effective cross-examination.

The Second Circuit, in United States v. Locascio, was not impressed with the defendant’s argument that the organized crime structure expert was not an expert at all, but rather merely a conduit for the hearsay declarants who fed him the information upon which his testimony was based. There, appellants challenged the structure testimony of FBI Agent Shiliro, arguing he served merely as a conduit for hearsay information. The court reiterated it had often permitted such testimony as helpful to jurors who might not otherwise understand the workings of an organized crime family, and that he was qualified to testify as an expert. It then turned to the sources of his information, nameless informants and countless tapes not in evidence. The court cited Rule 703’s proviso that experts may rely on facts that would not be admissible so long as of a type reasonably relied upon by experts in the particular field. 6 F.3d at 938 (emphasis added by court). Unquestionably, said the court, agents routinely rely on such sources to determine the structure and operating rules of organized crime families, and the fact that they rely on such hearsay is therefore less an issue of admissibility for the

15. Note that the question whether the expert may testify regarding her sources is to be distinguished from the more preliminary question whether the witness may give expert testimony at all based on otherwise inadmissible sources.

16. See States v. Lundy, 809 F.2d 392, 395 (7th Cir.1987) (Courts agree that it is improper to permit an expert to testify regarding facts that people of common understanding can easily comprehend).
court than an issue of credibility for the jury. The court agreed that a district court need not accept expert testimony based on questionable sources simply because experts use such data in the field, and that the district court has broad discretion to decide the admissibility of expert testimony based on inadmissible evidence, but that the district court consistently and continually performed a trustworthiness analysis sub silentio of all evidence introduced at trial.

Although it approved the use of the expert structure witness the court concluded with a mild admonition:

We remind the district courts, however, that they are not required to admit such testimony, and when they do the testimony should be carefully circumscribed to ensure that the expert does not usurp either the role of the judge in instructing on the law, or the role of the jury in applying the law to the facts before it. Cf. United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir.), cert. denied, 502 U.S. 813 (1991).

Although the Locascio court noted defendant’s argument that the so-called expert was used merely as a conduit for hearsay information obtained from informants and tape recordings it did not satisfactorily address this claim, apparently believing it to be subsumed within the general permission granted by Rule 703 for experts to rely on hearsay of a type used by others in the field. The conduit argument, however, goes beyond the hearsay character of the witness’s sources; it is that the witness is not testifying as an expert at all if all he is doing is regurgitating things others have told him. The court in Locascio said that such testimony is admissible because it would assist the trier of fact to understand the evidence or to determine a fact in issue. But the fact that such testimony may assist the trier of fact is a necessary prerequisite to admitting such testimony but it surely is not sufficient to secure its admission.

Other courts, particularly the Seventh Circuit, have looked askance at so-called expert testimony that simply repeats otherwise inadmissible hearsay, as Aan expert witness may not simply summarize the out-of-court statements of others as his testimony. Like-wise, the Seventh Circuit has upheld the refusal to admit opinion testimony that simply parrots the opinion of another. This seems correct: Rule 702 was not meant to be a device by which Expert A essentially repeats to the jury what Informant B told him; in such instances he is not providing the jury the benefit of his expert analysis, he is simply a glorified recording device, conveniently playing back to the jury what someone else told him.

In United States v. Dukakjini, the Second Circuit recognized that, under Rule 702 as amended, ÓWhen an expert is no longer applying his extensive experience and a reliable methodology, Daubert teaches that the testimony should be excluded.Ó 326 F.3d at 54, and it criticized those portions of the expert’s testimony that Òappear to have been drawn largely from his knowledge of the case file and upon his conversations with co-conspirators, rather than upon his extensive general experience with the drug industry.Ó id. at 55. Structure testimony in fact applies no real methodology and is largely based on statements of cooperators. Such testimony no more falls within Rule 702 than does the testimony disapproved in Dukakjini.

Expert “Fact” Testimony based on Testimonial Hearsay Violates the Confrontation Clause

Even if such conduit testimony can be considered expert testimony under Rules 702 and 703 (and otherwise passes muster under Rules 104(a) and 403 there remains a confrontation clause issue that cannot be ignored.

In the 1972 Advisory Notes to proposed Rule 703 we are told the rationale for permitting an expert to testify based on information or data obtained from hearsay sources. It is noted that a doctor, in his own practice, would routinely rely on information obtained by others, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records and X rays. Since doctors would rely on such sources to make life-and-death decisions, it is reasonable, said the Committee Report, to permit the rendering of an in-court opinion based on such hearsay sources, as the witness’s validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

This rationale does not address, one way or another, the Confrontation Clause implications of relying on such hearsay sources, anymore than do other Rules of Evidence address such issues. The Advisory Note’s confidence in a doctor’s hearsay sources, however, do not at all suggest a similar confidence in hearsay used to inform expert testimony in criminal cases based largely on inadmissible hearsay sources, which might consist largely of out-of-court statements of criminals obtained solely for the purpose of investigation and trial, rather than to make the life-and-death decisions often made by doctors based on hearsay.

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17. United States v. Smith, 869 F.2d 348, 355 & n.13 (7th Cir. 1989) (rejecting argument that witness merely summarized findings of another, since Nakasone based his testimony at trial on his own analysis of the spectrograms prepared by Smrkovski); United States v. Lawson, 653 F.2d 299, 302 & n.8 (7th Cir. 1981) (same general point)

18. United States v. Tomasian, 784 F.2d 782, 786 (7th Cir. 1986)
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Pre-Crawford decisions rejecting claims that experts should not be permitted to base their testimony on otherwise inadmissible hearsay consistent with the Confrontation Clause (or, for that matter, on evidence inadmissible under other theories such as lack of authentication or the best evidence rule) have employed various rationales. Some have held that experts presumably know when evidence, including hearsay, is sufficiently probative and trustworthy to merit reliance. Others find that such witnesses state opinions rather than facts and their testimony therefore is not admitted for its truth. And still others hold that Rule 703 reflects a firmly rooted hearsay exception that presumptively satisfies Confrontation concerns.

Other courts, by contrast, have long recognized that expert opinion based on hearsay can violate the Confrontation Clause. As one court explained:

An expert's testimony that was based entirely on hearsay reports, while it might satisfy Rule 703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses. The Government could not, for example, simply produce a witness who did nothing but summarize out-of-court statements made by others [footnote omitted]. A criminal defendant is guaranteed the right to an effective cross-examination. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.

Whatever the previous state of the law, after Crawford which forbids the introduction of all unconfronted testimonial hearsay, firmly rooted or otherwise, cannot trump the Confrontation Clause.

In one of the few reported cases to address the application of Rules 702 and 703 in light of Crawford, the Eleventh Circuit held that the district court committed error (albeit harmless) when it permitted and agent in a heroin case to testify regarding the value of heroin. The district court committed error (albeit harmless) when it permitted and agent in a heroin case to testify regarding the value of heroin. The court found that the testimony met the requirements of Rules 702 and 703, but that it nonetheless violated Crawford because the agent's testimony was based on information obtained from an unidentified individual in Washington, D.C., and as such was testimonial in nature. Because it was not shown that the source was unavailable and that the defendant had an opportunity to cross-examine him, its admission violated the defendant's confrontation rights as explained in Crawford.

The Eleventh Circuit's decision in Buonsignore, while holding that testimony in which an agent simply regurgitates information obtained from another can be expert testimony under Rule 702, nonetheless properly recognizes that a defendant's confrontation rights in fact are implicated by an expert's reliance on testimonial hearsay.

The Second Circuit has yet to reevaluate Rules 702 and 703 in light of Crawford, but in a case that did not implicate Crawford (because Crawford is not retroactive) raised (but did not decide) whether an expert opinion can be based on a codefendant's post-arrest statement that would be excluded against the defendant under Bruton. In Howard v. Walker, 406 F.3d 114 (2d Cir. 2005), the defendant was on trial for burglary and murder stemming from a home invasion during which the 87 year old homeowner suffered a fatal heart attack. The prosecutor offered the testimony of medical examiner Jacqueline Martin, that the heart attack was induced by the stress of the burglary. The defendant argued to the trial judge that the testimony should be excluded because it was based in part on the post-arrest statements of Howard's coconspirators, which were otherwise inadmissible under Bruton. The trial court rejected the argument and ruled, further, that if defense counsel challenged on cross-examination Martin's basis-of-knowledge for her expert opinion, the State could offer all the evidence Martin considered, including the damning post-arrest Bruton statement of codefendant Eric Williams.


21. United States v. Brown, 299 F.3d 1252, 1258 (11th Cir. 2002). This argument is strained in the context of structure testimony, which unquestionably is offered for its truth.

22. The court's footnote 8, inserted at this point in the text, states:

See, e.g., Weinstein's Evidence, P 703(03) at p. 703-18 (1980) (ÔIn a criminal case, even though Rule 703 warrants the use of hearsay as a basis for an opinion, the constitutional right of confrontation may require that the defendant have the opportunity to cross-examine the persons who prepared the underlying data on which the expert relies.Ô)
Ultimately the Second Circuit reversed the denial of habeas relief, finding that Howard’s confrontation rights were violated, *inter alia*, by the Hobson’s choice the court presented to him: forego meaningful cross-examination of the expert or suffer the admission of the *Bruton* statements. Before reaching this conclusion, however, the court raised though it did not answer the question whether Howard’s rights under the Sixth Amendment were violated by the trial court’s ruling which allowed the State’s expert witness to testify to an opinion based in relevant part on the otherwise inadmissible hearsay statement of Eric Williams. The court observed that numerous safeguards are in place to ensure that an expert’s reliance on hearsay furthers, rather than hinders, the truthfinding process. These include the trial court’s exercise of authority to ensure that an expert’s testimony rests upon reliable bases and foundation; the presumed ability of the expert to evaluate the hearsay; and cross-examination. *Bruton* statements, however, are presumptively unreliable, said the court, and it was not satisfied that Dr. Martin’s assurance that her methodology conformed with that of forensic pathologists generally was sufficient to procure the admissibility of her opinion, where that opinion was based on a *Bruton*-infected statement.

If in fact the circuit court were to recognize that expert testimony cannot be merely a summary of, say, post-arrest statements of a codefendant implicating the defendant, the direct admission of which would be forbidden as inherently unreliable, it is not a large leap for it to recognize as well that expert structure testimony should not be permitted if based on direct admission of which would violate a defendant’s confrontation rights. The Supreme Court in *Crawford* disapproved the introduction of testimonial hearsay because it has not been subject to the truth-finding process of cross-examination; the same objectionable result obtains when an expert is presented principally to impart facts rather than opinion and those facts are based on unconfronted testimonial hearsay.

We undoubtedly are presented with a difficult task when we attempt to undo years of case law approving the use of structure witnesses whose testimony reflects little more than the testimonial hearsay of persons never subjected to cross-examination. *Crawford* provides an opportunity to reevaluate such testimony, and cases such as *Buonsignore* and *Howard* suggest there may be a willingness to do so. In all appropriate cases we should challenge the government’s proffer of such testimony, lest we risk the application of plain error analysis on appeal.

23. The court analyzed the confrontation issue as the relevant law existed pre-*Crawford*.

24. The court also agreed that Howard’s right to compulsory process was violated when the trial court ruled these same statements would be admitted if he called his own expert to testify that the precipitating cause of the heart attack could not reasonably be ascertained.

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**FEDERAL MENTORING COMMITTEE**

The NYSACDL has established a mentor program for those members who practice in federal courts.

Experienced federal practitioners from all over New York State have volunteered to serve as mentors. This program allows members to ask experienced practitioners substantive, procedural or strategic questions.

The NYSACDL thanks the members who have volunteered to be mentors. Their telephone numbers and e-mail addresses are listed below. If anyone wishes to be considered as a mentor please contact Patricia Marcus via e-mail at nysacdl@aol.com or at (212) 532-4434.

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Over the past few years I have spent a great deal of time representing aliens who wish to undo convictions which are causing immigration problems. As a result of this experience, I have some observations which I hope will help criminal defense lawyers protect the rights of their immigrant clients.

Be Careful About Waivers

Too many attorneys fall over themselves to place on the record a litany of waivers associated with pleas, such as a waiver of prosecution by information. Although I certainly understand when it is advisable to waive prosecution by information to obtain a favorable disposition, it is not a defense attorney’s job to initiate the waiver on the record. That is the responsibility of the court and the prosecutor. The failure to waive prosecution by information in many circumstances can be a jurisdictional defect on appeal or it may offer an avenue of collateral attack. There is no reason that a defense lawyer should take affirmative action to protect the prosecutor from those results. Negotiate the plea bargain vigorously but wait for the court and the prosecutor to request all waivers on the record.

This also applies to waiving the reading of the rights and charges at arraignment. I actually won a 440 motion to vacate an arraignment plea because the clerk forgot to say ÔDo you waive the reading of the rights and charges but not the rights thereunder?Ô See generally, People v. Connor, 63 N.Y.2d 11 (1984).

File Notices of Appeal

Lawyers need to be more vigilant about filing notices of appeal on convictions involving aliens. Deportation proceedings and, consequently, immigration custody cannot begin on convictions for which there is a notice of appeal pending. It does not matter if the client does not want to appeal, has no issue for appeal, or faces a risk if he appeals. The notice of appeal only begins the process, which may be aborted. However, the notice of appeal entirely stalls the immigration consequences of the conviction. This gives the client a chance to raise money for litigation or to put his affairs in order. It also gives the practitioner a chance to procure the record to look for previously unnoticed issues and to investigate whether a collateral attack on the conviction is appropriate. If a 440 motion to vacate the conviction is made and denied, a defendant has a better chance of obtaining leave to appeal the 440 denial if the direct appeal is still pending. When there is any doubt about the immigration consequences of a conviction, file a notice of appeal.

“Illegal” Aliens and Aliens with Prior Records

Attorneys often mistakenly assume that because a client has no legal status in the country, the conviction will have no consequences because the client will be deported anyway. This is a false assumption. Many ÔillegalÔ aliens have the right to seek adjustments of status which could make them legal residents. However, certain convictions, especially narcotics convictions, can bar these adjustments. Therefore, the client’s illegal status is not always dispositive.

A similar problem arises for legal aliens with criminal records. Some lawyers mistakenly assume that the new conviction has no additional immigration consequence because the client will be deported for the older conviction(s) anyway. Again, the alien may be eligible for some form of adjustment that only the new conviction bars. A full analysis of the client’s situation by an immigration lawyer is almost always necessary to protect the client’s rights.

2. See, INA ¶236(c).

3. Numerous factors will influence whether a particular disposition makes sense from an immigration law perspective: whether the defendant has a green card, the date on which he obtained it, whether he has married a citizen or resident alien, what other family members are here, what country he would be deported to, what type of disposition is contemplated, etc. Moreover, immigration law is complicated, confusing, and often counter-intuitive. Also, the Board of Immigration Appeals will interpret the effect of a disposition by applying the law of the particular federal circuit in which the court sits.
New York Misdemeanors Which Are Aggravated Felonies

Attorneys need to be particularly careful about certain misdemeanor charges under New York law which are aggravated felonies under immigration law. Aggravated felonies are the worst convictions for a potential deportee because they almost always foreclose the remedies for avoiding deportation, such as cancellation of removal or waiver of deportation. Aggravated felonies as defined in the U.S. Code are defined by the presence of certain elements. 8 U.S.C. ±1101 (a) (43). Therefore, misdemeanors are not exempt from being Ôaggravated felonies.Ô

Sale and attempted sale of marijuana (P.L. ±221.40) are considered by the Department of Homeland Security to be aggravated felonies because they involve trafficking in controlled substances as that is defined under federal law. See 8 U.S.C. ±1101 (a) (43) (B); 18 U.S.C. ±924; see, United States v. Simpson, 319 F.3d 81, 85-86 (2d Cir.2002). If disorderly conduct pleas are unavailable, always attempt to dispose of such cases with pleas to possession only.

Second degree sex abuse and attempted second degree sex abuse are aggravated felonies under subdivision two, which prohibits sexual contact with a minor.¹ PS ±130.69(2). DHS considers any Òsex abuse of a minorÔ to be an aggravated felony under immigration law whether or not it is a misdemeanor under New York Law. 8 U.S.C. ±1101(a)(43)(A). When disposing of these cases, if a violation is unavailable, try pleading to endangering the welfare of a minor.

Considering the serious immigration consequences for these sex abuse of a minor cases, we need to challenge the People’s reduction of these charges to attempted crimes to deny the defendants the right to a jury.

Considering the serious immigration consequences for these sex abuse of a minor cases, we need to challenge the People’s reduction of these charges to attempted crimes to deny the defendants the right to a jury trial.

We should argue that the seriousness of these newly enacted collateral consequences requires that defendants charged with these crimes, even at the attempt level, receive a jury trial. A judge might be influenced by concern for the political consequences of acquitting a suspected pedophile and a defendant may be better served by having a more independent jury decide whether there is reasonable doubt.

Additionally, alien defendants who are offered disorderly conduct pleas before such class ÔBÓ misdemeanor trials must be told that if they lose the trial they will be convicted of an aggravated felony which requires deportation without remedy. The risks of going to trial are far worse than 90 days in jail, one year of probation or sexual predator registration. Because of the immigration consequences, aliens need to seriously consider disorderly conduct pleas in child sex misdemeanor cases.

Finally, practitioners should know that DHS is making a special effort to find and deport all individuals convicted of such sexual offenses. The agency is presently reviewing all sex offender registries, so hoping that no-jail or no-supervision sentences will avoid coming to the attention of DHS is no longer a prudent strategy.

Petit larceny, criminal possession of stolen property, or illegal use of a vehicle convictions with a one-year sentence are aggravated felonies because they are ÔtheftÔ offenses where the sentence imposed is at least a year. 8 U.S.C. ±1101(a)(43)(G). Misdemeanor intentional assault convictions where the sentence was a year of more are also aggravated felonies except if the person is being deported by a judge in an area covered by the Second Circuit. This is because they are arguably crimes of violence with sentences of at least a year. 8 U.S.C. ±1101(a)(43)(F).²

In this section, I have only included what I consider to be the most common examples of New York misdemeanors which are aggravated felonies. There are many more. Each practitioner must obtain a copy of Manny Vargas’s ÔQuick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses published by the New York State Defenders Association.

4. Aggravated felonies can also affect the availability of naturalization, asylum, and withholding of removal. There are certain situations where deportation can be avoided even after an aggravated felony conviction. That is why consultation with an experienced immigration attorney is extremely helpful.

5. The Second Circuit in Simpson stated in a footnote that its holding only applied to the definition of Ôaggravated felonyÔ for purposes of the United States Sentencing Guideline for illegal re-entry after deportation. 319 F.3d at 86 n.7. Although this footnote creates some doubt in this area, it is my expectation that DHS will consider ±21.40 convictions to be Ôaggravated feloniesÔ under immigration law and that many circuit courts will agree.

6. A foritiori sexual intercourse with minors is an aggravated felony. See e.g. PL ±130.25 (2); 130.30(1); 130.35(3)&(4). Felonious sex abuse also qualifies. See PL ±130.65(3).

7. It is the sentence that counts, not the time actually served.
Loss of $10,000 Dollars or More

Theft convictions which carry restitution amounts of $10,000 dollars or more, or where the count pleaded to indicates a loss of $10,000 or more, are aggravated felonies because they are offenses involving "fraud or deceit" where the loss was $10,000 dollars or more. 8 U.S.C. SS1101(a)(43)(M)(i). The practitioner should, if possible, break the amount into two counts, with face amounts or restitution amounts less than $10,000 dollars each. This gives the immigration lawyer a basis for arguing that the crimes are not aggravated felonies. Where the restitution or loss amount in the probation report is $10,000 or more for any one count, it is advisable to review whether there is any way to contest the prosecution's ability to prove that the fraud caused the loss. In federal cases, one can request a finding by the court that the loss amount reflects "intended loss" or a "risk of loss" rather than actual loss from the fraud.

Cooperation and Drug Treatment

In some New York State cases, prosecutors have asked defendants to plead guilty to offenses which are later vacated when cooperation or drug treatment is complete. This may do nothing for the immigrant defendant because DHS will still consider the defendant to have been convicted of the higher offense if it is vacated for some reason other than that it was illegally obtained.8 The definition of conviction under immigration law involves a judicial admission of guilt and punishment. Certainly a plea with a mandatory drug program is an admission and punishment. It is unclear whether a plea and cooperation would be considered punishment. It is a better practice to delay the plea until after the cooperation is complete.

The complexity of New York and federal law and the onerous nature of new immigration statutes and policies make our continued vigilance in this area more important than ever. Each of us must keep our guard up and constantly re-evaluate the effect immigration law has on each of our clients.

8. For the time being, in the Fifth Circuit, even illegally obtained convictions later vacated can be used. We expect this holding to be reversed. It should be noted, however, that Fifth Circuit decisions often control deportation issues because many New York deportees are housed in FCI-Oakdale in Louisiana.

9. ACDs do not fit this definition because there is no admission of guilt. However, other jurisdictions have deferred dismissal provisions where a plea is actually entered and then dismissed after a period of good behavior. These would be convictions for immigration purposes. There is probably a slight risk that deferred prosecutions in federal court could be convictions for immigration purposes if the client admits the crime and is put on Pretrial Services supervision until the case is dismissed. To date, I have never seen this argued by DHS. It is still probably a good practice to avoid documentation of a judicial admission by your client in such situations.
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.

Recently we received a telephone call from the State Court of Appeals seeking our amicus input in the case of Jason Williams who had prevailed in the Fourth Department on a suppression issue but whose case was going to be heard by the Court of Appeals in about two weeks. Under enormous time pressure, we obtained the assistance of NYSACDL Past-President Mark J. Mahoney to prepare the brief in which The Legal Aid Bureau of Buffalo Inc. and the New York State Defenders Association joined. Mr. Mahoney's work was truly outstanding. Timothy Murphy from Buffalo Legal Aid orally argued the case. The defendant prevailed and the Court held that a police officer who is acting under color law but outside his agency's jurisdiction cannot affect a citizen's arrest. Mr. Williams had retained counsel in the Appellate Division but could not afford counsel in the Court of Appeals and was unaware he could seek appointed counsel. Apparently, the Court has no procedure to assure that defendant-appellees are represented or even to assure they know they may apply for appointed counsel. The NYSACDL Board has appointed President-Elect Ray Kelly, Donald G. Rehkopf and Richard D. Willstatter to address this issue with the courts.

We filed an amicus brief in Syracuse Article 78 proceedings against City Court Judges Kate Rosenthal and Langston McKinney. The District Attorney sought to force the judges to "consider" ex parte affidavits in support of felony complaints. Former NYSACDL Vice-President Scott Greenfield, with assistance from NYSACDL Past-President Dick Barbuto, authored an amicus brief in support of the proposition that New York law does not permit ex parte affidavits or other submissions in support of the sufficiency of a felony complaint or bail (except perhaps in a Darden situation). Onondaga County Supreme Court Justice Donald A. Greenwood dismissed the petition against Judge McKinney as moot but granted the petition against Judge Rosenthal. Her counsel, the Attorney General, is appealing to the Fourth Department.

Also in the Fourth Department, NYSACDL member Don Thompson and Vanessa Potkin of the Innocence Project at the Benjamin N. Cardozo School of Law are representing two appellants who were each denied DNA testing on 440 motions. NYSACDL's brief will focus on the standard by which a court decides whether to order post-conviction DNA testing and will challenge the order of one judge to force the defendant to pay for the testing regardless of his indigent status. NYSACDL member Gary Schoer will prepare our amicus brief.

Our amicus efforts questioning the constitutionality of the deliberate indifference murder statute are once again percolating, with Ira Feinberg and his associates at Hogan & Hartson set to write a brief in NYSACDL member Lloyd Epstein's case in the First Department, People v. Christopher Fernandez.

We submitted two amicus briefs challenging New York's discretionary persistent violent statute. On June 3, 2005, the Second Circuit rejected our arguments and those of habeas petitioners. The Second Circuit, in Brown v. Greiner, 2005 U.S. App. LEXIS 10191, 2005 WL 1314429 (2d Cir. June 3, 2005), held that the New York Court of Appeals' rejection of petitioners' Apprendi claims was a reasonable interpretation of federal constitutional law at least before Ring v. Arizona, 536 US 584 (2002). Then, in a 5 to 2 decision, People v. Rivera, 2005 N.Y. LEXIS 1214 (June 9, 2005), the State Court of Appeals reaffirmed that the discretionary persistent statute is constitutional notwithstanding Apprendi, Ring and Blakely. We expect a petition for a writ of certiorari to be filed and may join in that effort.

The Center for Appellate Litigation and its Attorney-in-Charge, NYSACDL member Robert S. Dean, sought our assistance in the matter of People v. Felix Gomez, 11 A.D.3d 333 (1st Dept. 2004). The State Court of Appeals has granted leave to Gomez on the issue of whether a driver's general consent to search a car is sufficient for an officer to tear the car apart with a knife and a crowbar. NYSACDL member David Clifford Holland of the Law Office of Michael Kennedy has written a brief amici curiae on behalf of NYSACDL and NACDL.

No decision has been rendered in our several open amicus cases: the Bellony Article 78 petition challenging the people's right to obtain ex parte "look-down" orders; Joshua Dratel's brief in the Quattrone case challenging Judge Owen's bias; our Voting Rights Act challenge to the disenfranchisement of felons; and our opposition to cameras in the courtroom in the Court TV case.

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.
BULLETIN BOARD

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NYSACDL CLE UPDATE

2005
CLE SCHEDULE

October 15
Sex Abuse & Domestic Violence
Rochester

October 21
Cross to Kill
Nyack

October 28
Weapons for the Firefight
St. Francis College - Brooklyn

November 5
Criminal Trial Skills Update
Syracuse Law School - Syracuse

November 18
Annual Mid-Hudson Trainer
Grand Hotel - Poughkeepsie

President-Elect Ray Kelly and Sandy Meltzer at the Annual Syracuse Trainer.

Avrom Robin, Co-Chair Stephanie Zaro and Howard Weiner at the May 13 Cross to Kill seminar at St. Francis College.

The NYSACDL is an accredited New York State Continuing Legal Education provider.

To register or for information on our 2005 CLE Schedule, contact Patricia Marcus at (212) 532-4434 or via email at nysacdl@aol.com
ALL THE WORLD’S A STAGE

by Cathy R. Silak

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In this era of sound bites, remote controls, and short attention spans, holding the focus of a group of appellate judges for the duration of oral argument requires careful planning and execution. An advocate desires to inform and persuade the judges of the justice of the cause at the bar while at the same time creating an impression in their minds of the lawyer’s own credibility, passion, and honest belief in the client’s position.

Creating this impression requires all the attention to detail that the producer, director, actor, and set designer bring to a successful theatrical production. During many hours on the bench listening to oral argument, I customarily would take notes on certain attributes of the arguments. Many of those observations are included here.

Imagine actors setting foot on a stage they have never seen before, unsure of who the audience is, what type of lighting cues to expect, and whether they will be interrupted by catcalls or applause. This will give you some idea of what it is like to present appellate argument without adequate preparation. Advocates usually discuss preparing for oral argument simply as the review of the points of law and any factual issues drawn from the briefing and record in the case. It is a given of appellate lawyers’ skill sets that they will carefully hone the argument to be delivered. But preparation also includes becomingly thoroughly familiar with all the details of the courtroom.

My judicial colleagues and I would often wonder who the various people in the courtroom were at oral argument. The litigants usually were present, sitting on opposite sides of the aisle

aisle behind counsel table, and various citizen observers, including students, often would view the proceedings. Frequently, however, solemn individuals dressed in business attire would take notes and observe attentively. These were lawyers who would show up at the lectern in a day or so. They were stationed in the court- room during someone else’s argument to become familiar with the layout; the practices of the judges, clerks, and bailiffs; and details such as the height of the lectern and the sound and time-keeping systems.

Each courtroom is different. Attorneys who have never appeared in a particular courtroom would do well to attempt to acquaint themselves with it. For example, recently I presented oral argument before a trial judge, and there was no podium or lectern D the lawyers simply placed their documents on top of the narrow court railing. By contrast, many courtrooms have

advanced technology for the demonstration of exhibits. Appellate advocates encountering such a courtroom would be wise to practice using the technology before the argument.

In a good stage production, the sets work for the actors and not against them. The same should be true for appellate lawyers. One issue to be addressed well in advance is whether demonstrative exhibits, such as charts or maps, will be used in the courtroom. During several oral arguments, the attorneys struggled to balance large, poster-sized exhibits on a relatively small easel, causing both delay and distraction for the judges. Once, the visual display completely blocked an attorney’s client and co-counsel from the sight of the podium and bench, an effect that was unintended but distracting to the judges. Attorneys always should check with court staff to find out whether the appellate judges will want copies of the demonstrative exhibits available to them during argument. Similarly, some attorneys keep for notes for oral argument on computers and therefore set up a laptop on the podium. It’s best to check to see whether the court allows this use, and whether the physical setup of the podium is conducive to such an arrangement.

Lighting and sound can become issues in some courtrooms. With high ceilings, not enough light may reach the lectern if the lawyer is relying on notes, or copies of quotes to be read during argument, check whether there is enough light to read by. Similar considerations apply to the sound system. If possible, check out the sound system and make sure you know how it works. Also, be aware that many courts tape arguments rather than have them transcribed by a court reporter. Some advocates like to step away from the podium for dramatic effect—but the sound system might not be able to record that portion of the argument. Occasionally during oral argument, one side or the other will make a concession or even withdraw an issue, and the tape of the oral argument thus becomes an even more significant part of the record. Checking in advance whether the sound system pick up words not spoken directly into the microphone will avoid potential difficulties with the record.

Television cameras are now allowed in some appellate court-rooms—indeed, in Idaho they are permitted in all levels of the court system at the discretion of the presiding judge. The presence of television cameras is usually designed to be unobtrusive, but the advocate planning a televised appearance should know exactly what to expect in terms of camera placement, extra microphones and lighting, and other details.

Of all the physical attributes of an appellate courtroom, the timekeeping system is, in my experience, the one that trips up even the most seasoned members of the appellate bar. Many times during arguments, lawyers would ask the chief justice, “How much more time do I have?” During my service, the timekeeping system in the Idaho Supreme Court consisted of green and red lights that

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signaled the attorney how much time remained. Even attorneys who were regulars would often get confused by this. One of the most embarrassing incidents occurred when an attorney persisted in arguing well after the red light had become illuminated. The associate justices looked toward the chief justice to see whether the attorney would be cut off, and the opposing attorneys started making facial expressions indicating exasperation. They wisely, however, did not stand up and object, because it really is the court that ultimately controls the allotment of time. When in doubt, ask-in advance - many questions about how time is indicated, whether the time devoted to questions from the bench is deducted, and how time is allocated among co-counsel. Be sure that all key points can be made within the time allowed.

Many attorneys engage in multijurisdictional practice and may travel to a court far from their office location. In these instances, it may be impractical for the attorney personally to view the courtroom before the argument. Feeling in command of the stage for oral argument is nevertheless just as (if not more) important for the non-local attorney. In such a case, even a description of the courtroom setup from local counsel or court personnel would help.

Preparing the argument is like writing the script of a play. And, like an actor, the appellate advocate who desires to give a stirring and compelling presentation will not read from the script but will memorize key points after writing them down. Unlike the stage actor, however, the appellate advocate typically will have notes available during argument but will make sparing use of them.

Appellate practitioners hardly need to be reminded that they should review the record on appeal, their briefs and those of opposing counsel, and the authorities relied upon in the briefing. In addition, the rules of the particular appellate court, especially those relating to oral argument, should be reviewed. Once this is done, attorneys should employ whatever method they feel most comfortable with, preparing a detailed outline of argument or writing out the argument verbatim. Some attorneys will write out the argument, practice delivering it verbatim, but then take only the detailed outline to the lectern in order to avoid reading the argument. Reading the brief, except perhaps for a key passage or two, usually is not a good idea-it is embarrassing for attorneys when judges interrupt oral arguments to advise counsel, ÒWeÓve read your brief, now letÓs move on, your time is limited.Ó

To have a thorough knowledge of the record is really to win half the battle of oral argument. Appellate judges are impressed (I know I was) when an advocate makes direct reference to the exact page in the record where a key piece of evidence can be found. Some advocates are capable of memorizing the exact page reference and can pull it up from memory even in the stress of the performance. Most, though, will have in their notes page references to which they can easily refer without breaking the flow of their argument.

Having the chance to hear and answer questions from the appellate panel is one of the main reasons that attorneys seek and take advantage of oral argument. This is the one and only time the advocate will be able to do this. Brief writers generally try to answer all potential questions in the brief, but the specific issues a court will want to address are not always apparent in advance of argument. To prepare for oral argument, the advocate should develop concise answers to questions. Typically, the questions will address the weakest points in the case, but they may be hypothetical, designed to elicit an analysis of how application of a principle in this case might affect future ones. Some advocates become so flustered during this process that they actually object to the form of the question, as if in a trial court with a jury. To prepare, anticipate the worst scenario possible, for that is likely what will develop. Hypotheticals seem to give practitioners the most difficulty, so you might ask a colleague to develop challenging hypotheticals, and then practice answering them in preparation.

Even better, if time and budget permit, is staging an actual oral argument before a panel of practice judges. This is the gold standard of preparation-the dress rehearsal, the opportunity to make sure that timing is right, to answer questions, and to perform final adjustments to make the argument all the more convincing. It is apparent which lawyers have practiced, because they use the time for argument more efficiently and are more self-assured. Recently, one of my former law partners and I served as a practice appellate panel, and we attempted to make the conditions as realistic as possible, complete with difficult hypothetical questions and demands for references to the record. The attorneys later said that the moot court made a positive difference in their actual presentation and they did go on to win the appeal.

The appellant argues first and thus has the opportunity to set a tone and to make a good impression on the appellate panel. During my ten years on the bench, only once did an appellant counsel forgo the opportunity to give the appellate argument first. To the surprise of everyone, counsel stated that he would reserve his time for the rebuttal argument, and thus ceded the first statement of the case to the respondent counsel. The respondent counsel in that instance was able to occupy the high ground and assist the court by laying out the case from his clientÔs vantage point. The appellant counsel Ôs choice was not a good strategy, and this attorney ended up failing on appeal for his client.

**Courtesy and Propriety**

Upon taking the podium, lawyers should first state their name to the court, even if they frequently have been before the appellate panel. It is a courtesy, and spectators or media in the courtroom may wish to know the counselÔs name. As for other courtesies, the advocate should address all the justices on the appellate panel, not appear to direct the argument to just one judge. Several times I noted lawyers who would address the appellate panel collectively as ÔYour Honor,Ó although the panel actually consisted of five judges. Instead, use a collective address like ÔMembers of the Court,Ó ÔJustices,Ó or ÔJudges.Ó In addition, it is important to make eye contact, a somewhat tricky business when dealing with numerous appellate judges on the panel. Take care not to look at only one of the judges shift your attention from time to time so that all judges are included.
Questions from the bench seem to be a perennial difficulty in any discussion of appellate argument. A simple rule is to answer the question when the judge asks it. Many times during argument my colleagues and I would receive a response that basically boiled down to ÔI’ll get to your question later.Ô The problem with this approach is that the judge asking the question has the issue in mind at that very moment, and, if it is not addressed at that time, the judge may be less persuadable later. Moreover, the judge is giving the advocate a strong cue that an important issue has not yet been addressed. The best thing to do is answer the question but then return to the argument, using a transitional phrase to signal to the court that you are doing so.

It is also not a good idea to comment on the quality of the questions. Complimenting one of the judges for having asked a really great question-unless the lawyer intends to make the same comment about every question-Nessentially tells the other judges their questions are second rate.

Properly addressing the appellate panel is a point that appears elementary, but I have experienced some humorous incidents. It was my privilege to serve as the first woman appellate judge in Idaho’s history after I was appointed in 1990 to the Idaho Court of Appeals by then Governor Cecil D. Andrus. At that time, there were not many women judges on the state court bench at any level. In my early days on the bench, I was occasionally addressed as ÔSir,Ô which caused some mirth and teasing among my male colleagues. After a while, the practitioners settled into referring to me as ÔYour Honor,Ô ÔJudge,Ô ÔJustice,Ô ÔMa’am,Ô and ÔMadame Vice Chief JusticeÔ—the latter usually employed by those given to more flowery rhetorical flourishes.

Refer to an appellate judge generally as ÔJudgeÔ or ÔJustice,Ô depending upon the particular court system’s designation. One of my colleagues on the court of appeals, Judge (later Idaho Supreme Court Justice) Jesse R. Walters, Jr., would quip, ÔThere is no justice on the court of appeals—referring to the fact that the jurists there are appropriately referred to as ÔJudge.Ô When in doubt, ÔYour HonorÔ is always appropriate.

Another trap for the unprepared is the pronunciations of the jurists’ names. Even a seemingly straightforward name might be pronounced with less-common emphasis. If the practitioner doesn’t know the judges’ names from prior experience or inquiry, it is best to stick to the safer, impersonal appellations. I once heard a lawyer refer to one of my colleagues by his first name, but this really was too informal, even though they were longtime friends.

Interacting with the appellate panel can often prove difficult. Sometimes counsel are tempted to comment on the judges’ questions, personal appearances, moods, and the like. One seminar for judges emphasized that in order to maintain the appearance (and the underlying reality) of impartiality, a judge should maintain a neutral demeanor, including facial expressions, at all times while on the bench. I thus endeavored to keep my face as nonexpressive as possible during oral argument, so I was taken aback when one lawyer commented that I had raised my eyebrows and looked as though I had a question.

Counsel should be familiar with the pronunciations of the names of key players and place names in the case, as well as the names (and correct pronunciation) of opposing counsel. This is especially true for counsel retained to handle an appeal without having been trial counsel and for out-of-state counsel. Idaho is filled with tricky place names-try pronouncing Kooskia, Picabo, and Weippe without assistance from an Idahoan. It is a sign of respect and careful preparation for counsel to become familiar with the locally preferred pronunciation of names involved in the appeal.

Body language and facial expressions comprise important components of the presentation, for either positive or negative impact. Attorneys should approach the podium with an air of confidence and pride in their ability to present the case on behalf of the client. It is important to maintain this confidence, which is bolstered by careful preparation, even in the face of tough questioning from the bench. The questions are not designed to sandbag or trap the attorney but to assist the jurist in making a decision. Many times, however, counsel appear to spar with the judges during questioning and then seem deflated if they cannot score points in their answers. Remember, the judges are not adversaries but neutral decision makers for the parties.

Often after each argument my colleagues and I would privately select the best nonverbal argument by the person in the courtroom who showed the most visible reaction to the hearing. This often took the form of vigorous head nodding or shaking, smiling, grimacing, shoulder shrugging, and many other body communications. Often the winners were in the audience, litigants or their families and friends. On occasion, though, one or more of the advocates would engage in such conduct while opposing counsel gave argument, or during questions from the bench. Activity like this detracts from the professional demeanor and respect that attorneys should display at all times while in the courtroom.

The lawyer’s body language while addressing the court has great impact upon the image he or she projects. I have seen attorneys pound the lectern or slam a book down, both of which convey anger at and disrespect for the institution of the court. Excessive hand gestures while the argument is being made can be distracting to judges. If an attorney has certain nervous habits, such as tapping the podium with a pencil or gazing at the ceiling while trying to make a point, it would be wise to practice the argument with a view to eliminating them. Positive body language, such as looking at the judges while addressing them, standing straight, and avoiding excessive gestures, helps to keep the court focused on the argument.

An actor’s voice is an instrument, and so it is with the advocate. Deliver the oral argument in a voice that modulates and is loud enough to be heard but does not shout or strain. Speak at an unhurried pace, but not too slowly. Use language that is not abrasive or demeaning to anyone in the courtroom. In addition, never interrupt a judge’s comment or question.

Humor poses a unique set of problems, and it is usually better to avoid telling a joke or story. People often take offense at jokes, especially if they relate to gender, being blond, or race or ethnicity.

(continued on page 26)
MEMBERSHIP APPLICATION

To promote study and research in the field of criminal defense law and the related arts. To disseminate and advance by lectures, seminars, and publications the knowledge of the law relating to criminal defense practice. To promote the proper administration of criminal justice. To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases. To foster periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby To protect individual rights and improve the criminal law, its practices and procedures.

(Please print or type.)

Name:__________________________________________________________________________

❑ 18-B COUNSEL ❑ PRIVATE PRACTICE
❑ CJA COUNSEL ❑ PUBLIC DEFENDER
❑ FEDERAL PRACTICE ❑ STATE PRACTICE
❑ LEGAL AID

(check all that apply)

Firm Name:____________________________________________________________________

Address:_______________________________________________________________________

City/State/ZIP ________________________County__________________________________

Phone: (         )_________________________  Fax: (          )_____________________________

Admission to Bar:  State: _______________________________Year Admitted:__________

E-Mail Address: ________________________________________________________________

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

Enclosed is my payment for membership in NYSACDL:

__________________________________________

Signature of applicant

Membership dues can be paid by check, or charged to the American Express card.

Please make your check payable to NYSACDL and send to:
NYSACDL, 245 Fifth Avenue - 19th Floor, New York, NY 10016

Please charge my American Express account #__________________________ Expiration Date___________

Signature of Applicant________________________________________________________Date________________

We need your participation. Tell us on which of the following Committees you will serve:

❑ CAPITAL DEFENSE ❑ CONTINUING LEGAL EDUCATION ❑ INDIGENT DEFENSE ❑ LEGISLATIVE

What issues and activities would you like to see NYSACDL concern itself with?
___________________________________________________________________
__________________________________________________________________
The following is a brief legal and forensic update on the legal basis and parameters of mitigation. Mitigation is the preparation by a forensic social worker of those life issues and background problems that may inform the court about the defendant and permit a reduced sentence.

While psychologists and psychiatrists can provide expert testimony about mental illness, the social worker is called upon to provide expert assistance both in this area and also to inform the court about a wide range of issues that may serve to mitigate a defendant’s case. Social workers are uniquely qualified for this work given the disciplines’ focus on the individual’s biopsychosocial background. Indeed, there are defendants who present with psychopathology, but the main mitigation issues concern non-psychopathological issues. And, there are defendants who present without psychopathology, yet have strong mitigation issues given their biopsychosocial history that the expert forensic social worker must present to the court.

**WIGGINS V. SMITH**

**Proposition I:** The absence of mitigation by a forensic social worker in capital cases at the penalty phase is a Sixth Amendment violation due to ineffective counsel.

**Proposition II:** The absence of psychiatric diagnoses does not preclude counsel’s requirement to present any and all mitigating issues to the court.

In *Wiggins v. Smith*, 539 U.S. 510 (2003) the U.S. Supreme Court held that defense counsel provided ineffective assistance, a Sixth Amendment violation, by failing to investigate further during the death penalty phase of a murder trial the defendant’s abuse as a child and his limited intellectual abilities despite preliminary information that such information could have had a substantial mitigating effect. (See, *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995)). The decision by counsel not to proffer such evidence did not fall within the realm of counsel’s tactics that are generally given extensive deference by the courts.

Justice O’Connor, writing for the majority in *Wiggins* and drawing heavily from its seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984), ruled that counsel’s decision not to pursue further the mitigation defense met the two prongs for an ineffective assistance of counsel claim as outlined in *Strickland*: that (1) counsel’s presentation was deficient and (2) the deficiency prejudiced the defense. The Court found that counsel failed to meet the professional standards of attorneys in Maryland at the time of the trial or the standards promulgated by the American Bar Association for capital defense work. The Court further found that the Fourth Circuit misapplied *Strickland* and instead stated that the relevant question on appeal was not simply whether the quantum of evidence known to counsel is sufficient to make a tactical decision, but whether the knowledge of that evidence would lead a reasonable attorney to investigate further.

However, the court also decided, in an effort to move away from the generalized language in *Strickland*, to adopt an additional ABA Guideline 11.8.6 to further suggest what the detailed content of counsel’s investigative efforts should contain, including biographical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

This ruling is of fundamental and seminal importance because the *Wiggins* Court stands for the additional proposition that even in the absence of a psychiatric diagnosis any and all mitigating issues must be brought to the court’s attention at the penalty phase of the trial by a forensic social worker. (See also, *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997) and *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001), where the courts found that prevailing professional norms required full investigation of mitigating evidence.)

**BIGBY V. COCKRELL**

**Proposition:** Nullification of a jury instruction that precluded mitigating issues is reversible error where psychiatric defense was circumvented beyond what is constitutionally permissible.

In *Bigby v. Cockrell*, 340 F.3d 259 (5th Cir.2003), the Fifth Circuit Court of Appeals held that the defendant was entitled to federal habeas corpus review and that the state trial court committed reversible error when it provided the jury with a nullification instruction that prevented consideration of the defendant’s mitigating evidence that he suffered from paranoid schizophrenia. The trial court sought to limit the defendant’s mental illness as a mitigating factor in the sentencing phase by providing rigid and complex jury instructions that required the jury to render a death penalty sentence if they answered in the affirmative for three special instructions. The first instruction dealt with the specific intent of the crime, the second inquired as to the potential future dangerousness of the defendant, and the third asked the affirmative defense of provocation. The instructions effectively eliminated from consideration the defendant’s mental illness as a mitigating factor during the sentencing phase.

The *Bigby* Court relied heavily on the U.S. Supreme Court decision in *Penry v. Lynaugh*, 532 U.S. 782 (2001), where the court held that the trial court errs when it gives a nullification jury order where such an order would preclude a defendant from proffering mental illness as a mitigating factor in violation of the Eighth and Fourteenth Amendments. (See also *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir.2003)).
BRYAN V. MULLIN

Proposition: The absence of mental health issues during mitigation at penalty phase is not ineffective counsel if the defendant requested that a psychiatric defense not be used at trial.

In Bryan v. Mullin, 335 F.3d 1207 (10th Cir.2003), the Tenth Circuit Court of Appeals found that defense counsel had provided effective assistance despite the defendant's psychiatric history that could have provided strong mitigating factors in the defendants's favor. The defendant repeatedly demanded that his mental health not be placed at issue during trial and had been deemed competent to stand trial by a jury.

The Court employed the Strickland two-pronged test and found that no Sixth Amendment violation occurred because the defendant was deemed competent, the defendant made repeated requests to counsel not to use a psychiatric defense, and consultation with mental-health experts revealed that the defendant did not have a viable psychiatric defense. These factors satisfied the constitutional requirement that an attorney investigate the feasibility of a psychiatric defense. The court extended this finding to the attorney's decision not to introduce the defendant's mental health as a mitigating factor at the penalty phase.

In contrast, in Ake v. Oklahoma, 470 U.S. 68 (1985), the Court held that when an indigent defendant demonstrates that the issue of sanity may be a significant factor, the state, at a minimum, must assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assistant in the evaluation, preparation, and presentation of the defense.

It should be noted that in Bryan counsel investigated and pursued the relevant mental health questions prior to making a decision to act in accordance with the wishes of the defendant and his family. What criteria constitute an adequate investigation is pivotal in helping the court to determine if the decision to forego presenting mental health and other issues during mitigation is a tactical defense decision made at the behest of the defendant and the defense team or an ineffective counsel Sixth Amendment Violation.

However, the dissent, calling counsel 'the most ineffective defense I have ever seen', noted that the defendant's overt psychosis and frontal lobe deterioration as evidenced through SPECT scanning suggests that the defense lawyer may have lacked a fundamental understanding regarding the defendant's mental capacity rather than forming a thoughtful trial strategy by counsel.

CONCLUSION

Mitigation encompasses biopsychosocial historical facts from the defendant's life garnered by a forensic social worker, which go significantly beyond psychiatric issues alone and which may include those matters that even the defendant wants limited as a defense during trial.

It may thus be wise to start mitigation considerations at the outset of litigation rather than a few moments after the verdict is rendered to reflect not just successful and missed trial strategies, but a more informed and clinically richer picture of the defendant based on his or her particular biopsychosocial history.

HAMBLIN V. MITCHELL

Proposition: Counsel has the duty to unearth all relevant facts for mitigation purposes not to guess at the value of their possible relevance even where the defendant may pose the request to abandon such efforts.

In Hamblin v. Mitchell, 335 F.3d 482 (6th Cir.2003), the Sixth Circuit Court of Appeals reversed the decision of the U.S. District Court for the Northern District of Ohio at Youngstown to deny the defendants' petition for a writ of habeas corpus, finding that counsel's performance at the death penalty phase fell below the standards required for effective counsel. The Court cited counsel's failure to investigate the defendant's background, to obtain pertinent records, to seek expert advice, and to prepare the defendant for his statement in the penalty phase as falling short of prevailing standards of effective assistance of counsel. Attorney Fred Jurek later stated that he did not investigate the case or pursue expert consultation under the assumption that the case could not go to trial. Jurek further stated that he did nothing in preparation for the penalty phase at trial until after the guilty verdict was rendered.

The appellate court made the following two novel points regarding mitigation. (1) The appellate court rejected the proposition that the failure to investigate mitigating issues was a strategic ploy, that is, that counsel had anticipated that such an investigation would be negative for psychological problems and organic brain injuries and would thereby preclude an argument for mitigation based on those circumstances. The court ruled that the counsel's fundamental duty is to unearth facts, not to guess or assume their relevance or value to the defense at the mitigation phase.

(2) The appellate court ruled that counsel's failure to investigate mitigating issues was not justified simply because the defendant had allegedly asked him not to present mitigating evidence. The court suggested that even if the defendant made such a request, neither counsel nor defendant is capable of making informed decisions regarding appropriate courses of action without first conducting an exhaustive investigation. Moreover, it is impossible for counsel to establish with confidence the competence of his client to make a decision regarding mitigation efforts without first having the facts on which such a decision would be made.
APPEALS - STATE

Defendant personally entitled to redacted probation report for appeal

A defendant whose assigned appellate attorney already had a copy of the presentence report applied to the court for a copy. Queens Supreme Court Judge Seymour Rotker directed appellate counsel to send the report to the defendant after redacting confidential information such as names, addresses and telephone numbers. People v. Robert Boehm, NYLJ, 4/14/05, p. 19 (Sup. Ct. Queens Co. 2005).

ATTORNEYS

Attorney partnership not protected by New York’s self-incrimination clause

A partnership of attorneys may be subpoenaed for records of its cases, including retainer statements, financial records and records of payments to medical providers, and for lists of present and former partners and associates. Matter of Grand Jury Subpoena Duces Tecum Dated June 24, 2003, NYLJ, 5/4/05, p. 18 (NY Court of Appeals, dec. 5/3/05). In rejecting a partnerOs self-incrimination claim, the Court relied on the Supreme CourtOs interpretation of the Fifth Amendment in Bellis v. United States, 417 US 85 (1974), and declined to adopt a more expansive reading of the stateOs self-incrimination provision. The Court said it was reluctant to interpret the stateOs constitutional provision clause differently when its language was virtually identical with that of the equivalent federal constitutional provision.

Attorney keeps retainer even though no retainer agreement

An attorney who violated court rules by not providing a written letter of engagement or entering into a signed retainer agreement is not entitled to unpaid fees but need not disgorge retainer already received where services had already been rendered. Natalie Lewin v. Law Offices of Godfrey C. Brown, NYLJ, 5/17/05, p. 1 (Civ. Ct. Kings Co. 2005), NYLJ, 5/20/05, p. 19.

CRIMES - ELEMENTS AND PROOF

Defendant may be convicted of driving while impaired without lab report

A defendant who denies drug use and refused to consent to chemical test may be convicted of driving while impaired based on the testimony of a police officer trained as a drug recognition expert. People v. Patricia Rose, NYLJ, 5/3/05, p. 20 (Dist. Ct. Nassau Co. 2005). Otherwise, said Judge Kenneth L. Gartner, a defendant could frustrate a prosecution.

Attempted endangerment is a crime

A defendantOs motion to dismiss a charge of attempted endangering the welfare of a child was on the grounds that it is an impossible crime was denied by Bronx Criminal Court Judge Dominic R. Massaro. People v. Janet Levy, NYLJ, 5/10/05, p. 1, NYLJ, 5/13/05, p. 20 (Crim Ct. Bronx Co. 2005). The charge had been reduced by the prosecutor (perhaps to avoid a jury trial??). Judge Massaro relied on People v. Vega, 185 Misc 2d 73 (Crim. Ct. Bronx Co. 2004). After trial, Judge Massaro acquitted the defendant.

Correction officer liable for simple gun possession as an accomplice

Although a corrections officer could not be guilty of unlawful possession of a gun as a principle, he could be convicted as an accomplice to the possession of a gun by others in the car which he was driving. People v. Mark Carney, NYLJ, 5/12/05, p. 26 (1st Dept. 2005). The officer made false statements in an attempt to mislead investigators, leading to the Òinescapable conclusionÓ that he knew of the guns and intended to help his codefendants by transporting the guns and helping them evade arrest. Note: the First Department avoided a Crawford issue by ruling that the right to confrontation did not apply since the tape of a 911 call was introduced not for its truth but as background information.

No conflict of interest where attorney for client on pending indictment is himself under indictment

At the same time he represented a defendant on a Queens indictment for murder, an attorney was under indictment in the Eastern District. He alerted his client to the situation and his client agreed he should go ahead. After the client was convicted, he moved to vacate the conviction on grounds his client had a conflict of interest. Queens Supreme Court Justice Timothy J. Flaherty denied the motion ruling that since the attorney was indicted by a different jurisdiction and for a matter unrelated to the charges against his client, his situation was no more than a serious personal situation that was a potential distraction but not a conflict. People v. Jason Faulkner, NYLJ, 5/19/05, p. 19 (Sup. Ct. Queens Co. 2005).
Trespass not shown by defendant’s not knowing tenant’s full name

Two men seen leaving an apartment were unable to give the tenant’s full name. There was no allegation that they entered the apartment illegally or that any tenant of the apartment denied permission for them to enter. Judge Anthony J. Ferrara dismissed the complaint and the charges. People v. Mervyn Spann and William Freeman, NYLJ, 4/26/05, p. 18 (Crim. Ct. N.Y.Co. 2005).

DISCOVERY

Federal court orders “early” discovery of impeachment material

In a 20-defendant heroin distribution case the government offered to provide impeachment information at 5 p.m. on the Friday preceding the Monday start of trial. Because defense counsel could not be expected to thoroughly review and investigate the material over the weekend, the SDNY Judge Robert Sweet ordered the Giglio material provided by the close of business on Wednesday. US v. Robert Underwood, NYLJ, 5/2/05, p. 23 (SDNY 2005).

HABEAS CORPUS - FEDERAL

Citation to federal authority not always required for exhaustion

A federal due process claim is fairly presented in the state courts when the federal and standard standards for adjudicating the claim are the same and the appellate court’s inquiry would have been the same had federal authority been cited. Jackson v. Edwards, NYLJ, 5/5/05, p. 18, 2005 USApp LEXIS 6163 (2d Cir., dec. 4/14/05). In this case, defendant argued in the state courts that under state law, the trial court should have instructed the jury on the justification defense.

PAROLE

In Matter of Weinstein v. Dennison, NYLJ, 4/19/05, p. 18 (Sup. Ct. N.Y.Co. 2005), New York Supreme Court Judge Shirley Kornreich ordered a new parole hearing in the case of an inmate with an excellent prison record and no criminal history other than the manslaughter conviction for which he was serving time. The inmate had served 12 years on a 7- to 21-year sentence and had been denied parole two previous times. Kornreich found the Parole Board did not follow its own guidelines, improperly focused only on the crime of conviction, and violated Correction Law § 850 and 9 NYCRR § 8002.3(c), which creates a presumption for parole for an inmate serving an indeterminate sentence with a minimum less than 8 years who has been granted an Earned Eligibility Certificate.

90-day period starts from date new revocation hearing ordered

Where a determination revoking parole has been vacated and a new revocation hearing ordered, the Parole Board must commence the new hearing within 90 days of the date the new hearing is ordered, pursuant to Executive Law § 259-i. People ex rel. Cicero Murphy v. Warden, ARDC, NYLJ, 4/25/05, p. 26, col. 4 (1st Dept. 2005). The requirement of timely parole revocation hearings must be strictly construed. People ex rel. Johnson v. New York State Bd. of Parole, 71 AD2d 595 [1st Dept. 1979]).

POST-CONVICTION PROCEEDINGS - STATE

440.10 not available for not responsible plea

A defendant’s motion to vacate a plea of not responsible by reason of mental disease and defect was rejected, New York Criminal Court Judge Martin Stolz holding that CPL 440.10 did not apply to such a plea, which does not result in a judgment. People v. Francis S., NYLJ, 5/6/05, p. 24 (Crim. Ct. N.Y.Co. 2005).

SEARCH AND SEIZURE

Peace officer acting as such cannot rely on “citizen’s arrest” concept to justify arrest

The Court of Appeals held that a housing authority police officer in Buffalo had no authority to make a traffic stop outside the project. Further, the arrest could not be justified as a citizen’s arrest, since the right to make a citizen’s arrest arises only if the arresting person is not acting as a police or peace officer. Although not expressing a blanket prohibition on a peace officer making a citizen’s arrest, the Court noted that in this case the officer was not acting under color of law and with all the accouterments of official authority. People v. Jason Williams, NYLJ, 11/5/05, p. 19 (dec. 5/10/05).

Where car stop involved first-level DeBour inquiry, passenger free to leave

A police officer stopped a car when he saw it park in an empty space and then back up in front of a fire hydrant. When he approached the car a juvenile passenger left, pushing the officer out of the way. He was arrested. Family Court Judge Paula Hepner suppressed a firearm later found in the car during an inventory search, finding that the officer had justification for only a request for information and no right to stop the passenger from leaving or arrest him when he pushed the officer in exercising his right to leave. Matter of Londell S., NYLJ, 5/12/05, p. 19 (Fam. Ct. Kings Co. 2005).
Unreasonable stop does not require suppression of evidence where subsequent events provide reasonable suspicion

Defendant was followed by police after he entered and exited a known drug house under the mistaken belief that he was a man whom the police suspected of supplying drugs to the drug house. When he was ordered to pull over, he kept driving and violated traffic laws (crossing a double lane divider, driving the wrong way on a one-way street). He was seen to reach into the visor and throw a plastic bag out of the car. He stopped the car and ran; the police arrested him. ÖConstrained by recent Supreme Court decisions,Ó the Second Circuit affirmed his conviction. The court saw no Öprincipled basisÓ for distinguishing between an illegal stop, which cannot be made legal by incriminating behavior after the defendant is stopped and an unreasonable order to stop followed by incriminating behavior. However, it said, the Supreme Court had drawn just such a distinction in California v. Hodari D., 499 US 621 (1991), at least by implication. US v. Swazine Swindle, NYLJ, 5/19/05, p. 18 (2d Cir., dec. 5/11/05).

PRIVILEGE AGAINST SELF-INCrimINATION

Attorney partnership not protected by New York’s self-incrimination clause

A partnership of attorneys may be subpoenaed for records of its cases, including retainer statements, financial records and records of payments to medical providers, and for lists of present and former partners and associates. Matter of Grand Jury Subpoena Duces Tecum Dated June 24, 2003, NYLJ, 5/4/05, p. 18. In rejecting a partner’s self-incrimination claim, the Court relied on the Supreme Court’s interpretation of the Fifth Amendment in Bellis v. United States, 417 US 85 (1974), and declined to adopt a more expansive reading of the state’s self-incrimination provision. ThBellis court held that an artificial entity does not have a privilege and an individual cannot invoke the privilege to avoid producing records in his representative capacity even though they may incriminate him personally. The Court of Appeals said it was reluctant to interpret the state’s constitutional provision clause differently when its language was virtually identical with that of the equivalent federal constitutional provision. The Court suggested an exception for a family partnership or association.

SENTENCE - FEDERAL

Defendant loses concurrency of state sentence with federal sentence due to timing

A defendant arrested by New York was transferred to federal custody on unrelated federal charges before he was convicted under the state charges. In federal court he received a 30-year sentence which did not specify whether it was concurrent with or consecutive to the potential state sentence. He was immediately returned to state custody, convicted, sentenced to 17 years concurrent with the federal sentence. He began service of his state sentence because he had been arrested first by the state authorities and the state had Öprimary jurisdiction.Ó In order to effectuate the concurrency, defendant asked the BOP to designate the state prison as the place for service of his federal sentence, but BOP declined as a matter of discretion. When his state sentence was served, he was transferred to federal custody to begin serving 30 years. Defendant filed a 2241 arguing that BOP erred in denying his designation request. He lost and the Second Circuit affirmed. Hassan Abdul-Malik v. Hank-Sawyer, 2d Cir., dec. 4/5/05. While reluctantly affirming, Judge Dennis Jacobs directed that a copy of the opinion be sent to the Congressional Judiciary Committees to consider statutory changes.

OTHER

Defendant not entitled to have People’s pretrial psychiatric exam taped

Westchester Supreme Court Judge Lester B. Adler denied a defendant’s request to have an audio- and videotape made of the pretrial psychiatric exam of him to be conducted by the prosecution’s doctor. People v. Neilasan Chung, NYLJ, d 4/18/05, p. 20 (Sup. Ct. West. Co. 2005). The judge found that by giving the defendant the right to have his attorney present and take notes, New York provided more protections than other jurisdictions, and the taping was not required absent special circumstances.

Subject of unfounded abuse allegations entitled to see reports

Although Social Service Law ¶ 422 forbids disclosure of an unfounded report of child abuse, the report must be made available to the alleged abuser, held Westchester family Court Judge Sandra B. Edlitz, in denying a motion to quash a subpoena. Matter of J.H. v. K.H., NYLJ, 4/29/05, p. 24 (Fam. Ct. West. Co. 2005). Judge Edlitz noted that the statute was intended to protect the subject of the report from its use against him or her by unauthorized persons.

(continued on page 26)
Judge’s order setting aside verdict under Judiciary Law §2-b(3) cannot be appealed by prosecutor

A Supreme Court judge set aside a verdict sua sponte because defendant’s attorney had been ineffective, relying on Judiciary Law §§2-b(3) (a court may devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it) for his power to do so. The Court of Appeals affirmed the Appellate Division’s dismissal of the prosecutor’s appeal from the order since an appeal from an order under the Judiciary Law is not one of those orders made appealable under the Criminal Procedure Law. People v. Faye Dunn, NYLJ, 4/29/05, p. 19 (dec. 4/28/05). The prosecutor’s remedy is via Article 78.

Gun licensing statutes do not violate Second Amendment or Privileges and Immunities Clause

The Second Circuit rejected a constitutional challenge to New York’s gun licensing scheme, under which an out-of-state resident was denied a license. David D. Bach v. Pataki, NYLJ, 5/10/05, p. 1, NYLJ, 5/12/05, p. 23 (2d Cir. 2005). The Second Circuit declined to rule whether the Second Amendment creates a right of an individual or of the state, but instead held that the Second Amendment is a limit only on the federal government, relying on Presser v. Illinois, 16 US 2252 (1886). As to the Privileges and Immunities Clause, the Second Circuit ruled that New York had a substantial interest in monitoring gun licenses and the restriction at issue is sufficiently related to this interest.

Bank in jeopardy of eviction under RPAPL § 715 because broker accused of “late trading”

Civil Court Justice Joan Kenney has ruled that RPAPL §715, usually used to oust drug dealers and prostitutes from apartments, is applicable to white collar crimes. Solow Building Co. v. BAS, NYLJ, 5/17/05, p. 1, NYLJ, 5/18/05, p. 19 (Civ. Ct. N.Y.Civ. 2005). Refusing to dismiss a landlord’s suit asking for the eviction of a subsidiary of Bank of America from its midtown headquarters because it is alleged to have acquiesced in the illegal trading of one of its brokers, Judge Kenney commented that the landlord’s theory is “an audacious proposition” but justified under the law. She said it would be up to a trial to decide whether the use of of RPAPL § 715 under these circumstances is proper.

Eviction by Housing Authority for drug trade is governed by statute of limitations

Bronx Civil Court Judge xx Alpert dismissed the New York Housing Authority’s attempt to evict a tenant who had allegedly used the apartment for drug transactions two years before. The judge ruled that CPLR 215(4), which provides a one-year statute of limitations on actions “to enforce a penalty or forfeiture created by statute and given wholly or partially to any person who will prosecute,” applied. NYCHA v. Pretto, NYLJ, 5/18/05, p. 19 (Civ. Ct. Bronx Co. 2005).

WORLD’S A STAGE
continued from page 19

Age-related comments are frequently made, as when an attorney professes that he is becoming slow due to aging. This would cause those of us on the bench who were close to his age to wonder what he thought of our mental capabilities. A witticism that seems appropriate when inserted into the argument is always welcome, but it is important to judge the type of case being argued—levity in criminal cases is almost always out of place.

The ending of the argument should be a powerful restatement of the relief sought, after which the advocate should thank the court. Some attorneys ask whether the court has any additional questions, but it is unnecessary because the judges will ask them if they wish to do so. Finally, some courts such as those in Idaho will leave the bench to shake hands with the advocates at the end of the argument, so be prepared to convey another brief word of thanks.

In developing an image as an appellate advocate, the wise attorney will keep in mind the adage “to thine own self be true.” It is my hope that the advice presented here will allow the advocate to take the stage of the appellate courtroom as a carefully prepared, polished practitioner, one who allows his or her own personality to shine through. A successful performance at the appellate stage, whether measured by victory or simply the satisfaction of a well-delivered argument, surely will follow.
NEW MEMBERS

Mary J. Barnes............................................Fairport
Michael Benvie........................................Poughkeepsie
Steven LoSquadro.................................Rocky Point
Thomas McGarrity.................................White Plains
Laura Nagel...........................................Manhattan
Brendan O'Donnell.................................Interlaken
Paul Prestia...........................................Manhattan
Jarrod Smith........................................Oswego
Joseph Sorrentino..............................Staten Island
Carl Spector.................................Fair Lawn, N.J.
Pat Stiso................................................Harrison
Joseph Villanueva..............................Rye
Paul Villanueva.................................Rye
John B. Webster............................East Providence, R.I.
NYSACDL FALL CLE CALENDAR

October 15.......................................Sex Abuse and Domestic Violence  
                                          Rochester

October 21.....................................Cross to Kill  
                                          Nyack

October 28.....................................Weapons for the Firefight  
                                          St. Francis College - Brooklyn

November 5.....................................Criminal Trial Skills Update  
                                          Syracuse Law School - Syracuse

November 18...................................Annual Mid-Hudson Trainer  
                                          The Grand - Poughkeepsie

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