INSIDE:

KEEP THE DEATH PENALTY DEAD
by Daniel N. Arshack

April 18th was the 150th birthday of Clarence Darrow. In recognition of that great defender's contributions, the NYSACDL in combination with the Jacob Burns Ethics Center at Cardozo School of Law sponsored an evening of dramatic readings excerpted from several of Darrow's most famous closings. Herald Price Fahringer hosted the evening and was responsible for setting each selection in the appropriate historic, political and legal context.

I was moved by the timelessness and sincerity of many of Darrow’s words, first delivered nearly eighty years ago. They ring true today and disappoint only in the fact that we seem to have learned so little since that time.

While trying to save the lives of two wealthy young men, Leopold and Loeb, who had brutally tortured and murdered an acquaintance of theirs for no particular purpose, Darrow said:

Do you think you can cure it by hanging these two? Do you think you can cure the hatreds and the maladjustments of the world by hanging them? You simply show your ignorance and your hate when you say it. You may here and there cure hatred with love and understanding, but you can only add fuel to the flames by cruelty and hate.

Today, pressure is being put on Albany to re-open the death penalty debate by carefully defining a particular kind of murder as worthy of the death penalty. Legislators, hungry to satisfy the calls for revenge from bereaved families and frightened law enforcement officers are again calling for blood vengeance in response to terrible crimes.

Bills are being drafted to address the infirmities identified by our Court of Appeals in our now moribund death penalty law. But such artful drafting blinks at the real horror of the death penalty and the violence it does to each of us as members of this society.

Our state breathed a collective sigh of relief when the Court of Appeals shut the door on more state sponsored killing. We recognized that, beyond the legal flaws in the application of our death penalty law, the burden of carrying the death of our fellow citizens was not ever worth the momentary blood fueled wrath which yields an eternal stain on our collective hands.

Each of us who believes that we diminish ourselves by perpetuating this atrocious punishment, which has been outlawed in many countries throughout the world, China, Iran and Iraq being notable exceptions, must accept responsibility for our system, as did Darrow, as professionals charged with protecting the powerless from the powerful. Reach out to your legislators and plead for a movement towards peace, justice and forgiveness. During this Easter season, it might well be remembered that these are the very virtues for which our religious martyrs gave up their lives.

Please take the opportunity to step up to the plate, and in Darrow’s words, tell your legislators that you are:

Pleading for the future; Pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.
FOR THE RECORD...

Condolences to the family of senior member Sandy Meltzer on his passing...

Congratulations to Larry Hochheiser on the birth of his twin granddaughters...to Ramon Pagan, Sr. on the birth of his newest grandson...and on the marriage of his son and NYSACDL member Ramon, Jr.

KUDOS TO...

Lloyd Epstein for winning a habeas petition before Judge Sprizzo in Derrick Forrest v. United States. Mr. Forrest had served 15 years of a life without parole sentence when Judge Sprizzo granted the petition and re-sentenced Mr. Forrest to time served.

James Hartmann won an acquittal on all three counts in People v. Francis J. Ricca in Otsego County Court involving a two count indictment for murder in the second degree and manslaughter in the first degree along with a charge of the lesser included offense of manslaughter in the second degree. The defense of justification by use of deadly physical force pursuant to Article 35 of the Penal Law was charge.


Editors Note: Please send us news of your victories. They are inspirational reading for all of us!

2007 BOARD MEETING SCHEDULE

Saturday, May 19.................................................Syracuse
Saturday, September 8.................................Rochester
Saturday, October 27.......................................Syracuse
Saturday - December 8.................................New York City
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS PARTICIPATES IN GIDEON DAY

On Gideon Day attorneys and public defense groups came out in force to support and call for the implementation of recommendations of Chief Judge Judith S. Kaye’s Commission on the Future of Indigent Defense which calls for a state takeover and overhaul of public defense services in New York State.


In his remarks, Arshack said that the NYSACDL supported the best public defense system for clients which would include standards and oversight for lawyers representing the indigent and adequately funding to assure equal justice for all.
Eavesdropping has been around as long as eaves, the beams that form the two long sides of an A-frame roof. Eavesdroppers supposedly climbed up on the eaves to listen in on private conversations. Nowadays, that kind of physical eavesdropping is no longer a credible threat. While it may be trespassing, the Omnibus Crime and Safe Streets Act does not prohibit it.

Technical surveillants, many of whom prefer to be addressed by the more Orwellian “Activity Monitors” appellation, have developed technical means of invading privacy. Common telephone taps are as old as the 1940s, but have grown progressively more sophisticated. The hook switch bypass was a device that circumvented the off button on the receiver of the old rotary dial telephones. In effect, the telephone microphone could be turned on remotely just as if it were off the hook, and someone miles away could listen to what was being said in a room. In the 1950s, Manny Middleman devised a way to activate a hookswitch bypass by calling a telephone that had one installed on it (which required a previous burglary to install) and blowing a certain key on a harmonica into the phone. He could then listen to conversations for as long as he liked from wherever he liked.

Taps are devices that are placed on telephone lines for purposes of covert eavesdropping. Bugs are devices placed in a room or area for the same purpose. Transmitters are physical objects that are easy to hide because of their incredibly small size, but they still require entry into the target area to plant. Hal Lipset, a San Francisco private investigator, waltzed around a cocktail party in the 1960s with a transmitter hidden in an olive in his martini. The toothpick was hollowed out for the antenna. Considering that he did it at about the time that color televisions were beginning to appear in homes in America, this was a considerable feat.

Eavesdropping devices have kept abreast of the times – advancing from ultra sophisticated electronics such as tiny frequency-hopping burst transmitters that compress and store conversations and transmit them through the air in short bursts that hop about in a preset pattern amongst multiple frequencies. To receive the messages, the eavesdropper has to know not only when they are going to be transmitted, but the exact order of frequency hops they will make during the short burst of transmission. The eavesdropper’s receiver has to hop with the transmitter to capture the electronic bursts and then demodulate them.

Eavesdropping devices can be physically installed on cell phones or computers in a matter of seconds by an intruder (a cleaning person, inspector, customer, client, sales person, acquaintance, cop, or burglar). In the alternative, the device might be sent to the “target” by e-mail or text message. When programs are installed in the latter manner, they are called Trojans, a kind of virus that is packaged as something attractive or expected.

For example, a consumer might get a text message on his cell phone saying, “Call 314-666-1234 to update your Verizon cell phone software,” or “Download free new ring tones.” When the consumer calls to get the update, he or she gets a Trojan that installs in the cell phone as a digital eavesdropping device. No burglary required. The phone will turn on so the eavesdropper can listen to room conversation or autodial the eavesdropper and give such private information as the telephone number, date and exact time of each call, and the location (within feet) of each incoming or outgoing call the cell phone owner makes or receives. It will also send any text messages or e-mail to the eavesdropper.

FlexiSpy Products’s FlexiSpy Pro spyware cell phone tap ($49.95) is one of the latest commercially available cell phone eavesdropping devices on the market, but it is not the only one. Many competitors produce similar programs. Anti-virus software companies and tech writers condemn the program as blatant spyware that can turn on a cell phone (just like Manny Middleman used to do) and allow an eavesdropper to listen in on every conversation that takes place within earshot of the cell phone while the owner of the phone thinks it is off. Now, since most of us wear our cell phones on our belts ...

FlexiSpy advertises its product as the “World’s Most Powerful Spy Software for mobile phones. FlexiSpy Pro is a mobile phone
monitoring application that secretly records all activity on a mobile phone that has FlexiSpy Pro installed. Protect your children, catch cheating spouses, the possibilities are endless.” The possibilities for abuse are endless, too.

According to the FlexiSpy Products Web site:

“You can listen in on calls and read SMS/MMS messages. What’s more, even when the phone is not in use, you can remotely activate the microphone and listen in on non-call conversations. Of course, the legality of this falls in a grey area.”

Actually, it is plainly illegal to use the tap on anyone except your minor children. FlexiSpy adds the limp caveat:

“If you are the owner of your spouse’s (or child’s) cell phone, you are merely monitoring your property, but if you use FlexiSpy Pro on an unsuspecting neighbor, that’s a different story altogether.”

FlexiSpy Products adamantly denies that FlexiSpy Pro tap is a Trojan, stating that it has to be consciously installed by a real live human. Yet the critics disagree. “This application installs itself without any kind of indication as to what it is. And when it is installed on the phone it completely hides itself from the user,” says Jarno Niemela, a researcher for F-Secure.

This is a case in which both parties may be right – at least on the surface. A person has to consciously install the program, but that person does not have to be the cell phone owner. On the other hand, if it is sent as a Trojan, the person installing it may not know that it is spyware. The missing words are “effective legal consent of the cell phone user.”

Here’s how the FlexiSpy Pro model works when it is installed:

<table>
<thead>
<tr>
<th>Target Cell Phone</th>
<th>FlexiSpy Pro Server</th>
<th>Any designated computer</th>
</tr>
</thead>
<tbody>
<tr>
<td>• SMS messages</td>
<td>Holds for relay</td>
<td>Any designated computer connected to the web may retrieve the information.</td>
</tr>
<tr>
<td>• E-mail</td>
<td>24 hours a day</td>
<td></td>
</tr>
<tr>
<td>• Telephone conversations</td>
<td>7 days a week</td>
<td></td>
</tr>
<tr>
<td>• Live voice</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Call History</td>
<td></td>
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</tbody>
</table>

F-Secure warns consumers:

“When FlexiSpy Pro is installed on the phone it will hide from Symbian’s built in process menu and it does not have any visible user interface or icon. After FlexiSpy Pro is installed on the phone, the only indication that it is installed is that the application removal menu has an additional application named “phones” in the list. This “phones” application cannot be removed with the application manager.

FlexiSpy Pro has a hidden user interface that can only be accessed using a special code known to the person who has purchased the spying application and has installed it on the phone.

When FlexiSpy Pro is active on the device, it will record details of all voice call and SMS information, and then later send those details to the FlexiSpy Pro server.”

Law enforcement has a cell phone tap that is more limited but easier to install. When law enforcement officers get your cell phone number, they go to a Web site to find out the name of the service provider. They obtain a search warrant, call the service provider, and have the provider clone the phone on which they want to eavesdrop. The provider sends them a chip via overnight mail. Thenceforth, each time the target uses the cell phone to make or receive calls or text messages, the police department receives the calls too and records them. No need to break in or burglarize someone’s home or office. No need to convince someone to use a Trojan. No chance of getting caught. This technique is an updated version of the lease-line method of tapping land lines that was popular before cell phones came along.

Digital cell phone taps may be the newest technology available to the general public, but plenty of the old gear is still around and it works well. FM radio frequency transmitters that sell for $20 in electronics stores make ideal drop bugs, i.e., disposables. Disposables are transmitter bugs that can be left somewhere to transmit until their battery runs dry, and then they can be forgotten. The eavesdropper does not have to make a second entry to recover the devices. These bugs are cheap and untraceable; nearly every law enforcement agency uses them. They are also used by private investigators, people getting divorced, partners terminating a business relationship, possessive spouses, and others.

Carrier current devices are also available at electronics stores. They are sold as baby monitor systems. Strip off the baby blue or pink plastic case and the device can be hidden anywhere in a house or building’s electrical system, inside or out. It will transmit con-

(continued on page 6)
versations from inside the house or office along the AC wiring to a receiver down the line. Room to room plug-in intercom systems do the same thing and are used by eavesdroppers for the same purposes. They are also commonly available in electronics stores. More sophisticated devices include light switches and wall plugs that really work to turn on lights or run a vacuum, but also work as transmitters when there is a conversation in the room.

**COMPROMISING COMPUTERS**

Activity monitoring software, also known as key logger spyware, has been in circulation amongst amateur and professional eavesdroppers, mainly law enforcement, for at least a decade or more. The FBI was the first agency to acknowledge using it. There are two versions of key logger eavesdropping devices. The first is a hardware device that attaches to the back of the computer. It fits in line and looks part of the cable in the back of the computer. Its disadvantage is that it requires a physical installation and has to be retrieved at some point. The other version of a key logger is software which can be sent by e-mail as a Trojan. It is the more insidious implant.

The key logger software programs sell in various stores for approximately $100-200. The software is easily concealed in e-mail or as a Trojan and it installs within seconds. Once installed, it gives erroneous file name information and changes its name and position each time the computer boots. Forensic computer analysts are needed to find, identify, and remove them, and to make a forensic copy of the hard drive for purposes of evidence and testifying in court.

Key loggers give a third-party access to every file and document on the target computer’s hard drive. Any strokes of the key will be replicated on the eavesdropper’s computer screen. What the target says in e-mails, instant messaging, documents, and spreadsheets or anything else that comes up on screen will be revealed to the eavesdropper. Equally as disturbing, the eavesdropper can learn all of the target’s passwords, account numbers, and user names including bank accounts and credit cards the target pays online.

One key logger software manufacturer advertises this way:

"WebWatcher is the most trusted name in Activity Monitoring Software, because we do what no one else can:
- Monitor in real-time from anywhere
- Block ANY Web page based on content or Web address
- Read Instant Message (IM or “Chat”) Conversations
- Read Incoming and Outgoing E-mail
- Log every keystroke
- Take screenshots
- Record online and offline activities
- Quickly sift through data using unique keyword system"

You can watch over your target from anywhere. With Webwatcher’s Web-based monitor you can check your recorded data from any computer in the world.

- Watch your target’s activities in REAL-TIME
- See what your target is doing as they are doing it!
- Using our secure servers, your data is uploaded instantly, giving you the ability to react to situations before they become problems.
- It is completely invisible

Designed to meet the exacting standards of intelligence agencies engaged in the war on terror, WebWatcher is completely invisible. Whether you are trying to monitor your computer savvy spouse or the head of your tech department, you won’t be detected. FlexiSpy Pro doesn’t appear in the Registry, the Process List, the System Tray, the Task Manager, on the Desktop, or in Add/Remove programs. There aren’t even any visible files that can be detected!

Anyone who uses computers has to heed what the advertisements say and should keep in mind that the sales of spy equipment are of a magnitude sufficient to support an industry.

**WIRELESS CONNECTIONS**

**EVEN MORE VULNERABLE**

Wireless computer systems are more vulnerable than the land line or phone line systems. A wireless computer is essentially a small broadcaster just like a commercial radio tower that broadcasts to car radios, but weaker. The user’s computer broadcasts to the receiver which then connects to the Internet.

The regular computer key logs will work on a wireless computer, but there is an easier way to capture every key stroke of the user. It is as simple as having another receiver in the area tuned to the same frequency. The broadcast frequency is easy to find with a frequency counter or other devices made for that purpose.

ISIS’s Sk-05 Wireless Key Capture surveillance system is designed to offer an eavesdropper a covert means to record keystrokes originating from a computer whose user is under surveillance. The information gathered can include typed documents, passwords, outgoing e-mails, Web sites, outgoing internet messaging, etc. The eavesdropper may be sitting in a car outside the building or in the café two floors below.
CONCLUSION

Eavesdropping is probably more common today than any time in history. The technology is sophisticated and difficult to detect without using equally sophisticated search equipment. The toys are available to law enforcement as well the public. 

We used to say, “Just because you are paranoid doesn’t mean that someone isn’t following you.” Now we can add, “…listening to every word you say and watching every word you type.”

There is no room in this article to cover the multitude of micro video cameras that fit inside the button of a shirt, a tie tack, the frame of an ordinary pair of eyeglasses, a wall clock, or baseball cap. And when it comes to following people, well, that is usually done remotely by attaching a small GPS transmitter to their cars and tracking them via satellite.

ENDNOTES
2. Electronic Surveillance Countermeasures, Jarvis International Academy.
5. FlexiSpy Products and FlexiSpy Pro are not the real names of the products being discussed. This author does not intend to advertise the products in any way.
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FEDERAL MENTORING COMMITTEE

The NYSACDL has established a mentor program for members who practice in the federal courts. The mentoring program allows members to ask experienced practitioners from all over New York State substantive, procedural or strategic questions.

We thank these members who have volunteered to serve as mentors. Their telephone numbers and email addresses are listed below. Anyone wishing to be considered as a mentor should contact Patricia Marcus via email at nysacdl@aol.com, or at (212) 532-4434.

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U.S. SUPREME COURT SHARPENS THE TEETH OF THE SPEEDY TRIAL ACT

by Joseph W. Ryan, Jr.

Joseph W. Ryan, Jr. is a criminal defense attorney in private practice in Uniondale.

The recent, significant ruling by the United States Supreme Court in United States v. Zedner, 126 S.Ct. 1976 (June 5, 2006) will have a direct and lasting impact on the day-to-day management of federal criminal cases, and provide an enhanced weapon for defense counsel seeking dismissal of an indictment for undue delay. No longer can the defendant be blamed for the Court’s failure to provide a speedy trial as required by the Speedy Trial Act of 1974 (Act). Nor can a peripheral defendant in a multi-defendant indictment be ignored, or abused by the prosecution’s power to subject a defendant to interminable delays because of its focus on the main-targeted defendants.

The Speedy Trial Act requires that the trial take place within 70-days after arraignment on the indictment, unless the Court suspends the speedy trial clock for periods of time authorized under the Act. In Zedner the Supreme Court set the landscape for enforcement of the Act. The Court held that under the Act, the defendant has been assigned the role of “spotting” violations of the speedy trial clock, and in effect becoming its “enforcer.” Where the defendant establishes a violation of the 70-day speedy trial clock, the District Court “shall” dismiss the indictment, either “with or without prejudice” to re-prosecution. There is no longer any other alternative to the Court’s granting a dismissal.

In Zedner the Second Circuit Court of Appeals had used the “waiver” doctrine to avoid dismissal. Thus, it blamed the defendant for the delay that had occurred in his being brought to trial by reason of his failure to file the speedy trial motion promptly after the violation had occurred. The Supreme Court rejected the view by holding that the only “waiver” authorized by the Act occurs when the defendant either pleads guilty or goes to trial without having moved to dismiss based on the Act.

The Supreme Court held responsibility for managing its calendar so as to comply with the Act rests squarely on the District Court. Furthermore, before the District Court grants a continuance under the catch-all “ends-of-justice” exclusion (18 U.S.C. § 3161 (h) (7)), it must first consider the public’s interest in a speedy trial by conducting a balancing test and then make on-the-record an “interest of justice” finding-of-fact before granting the continuance. The Court’s failure to make this “finding-of-fact” is fatal, and the claimed exclusion does not stop the clock.

That defense counsel will benefit from the application of the Supreme Court’s holding is shown by a brief review of the facts in Zedner, and companion case, United States v. Friemann, 136 Fed. Appx.396 (2d.Cir.2005), cert. granted, sub nom, Friemann v. United States, 126 S.Ct. 2859 (June 12, 2006), reversed, which Supreme Court held while deciding Zedner and then promptly remanded to the Second Circuit for reconsideration in light of Zedner.

In Zedner, the defendant had requested and was granted a 91-day continuance to prepare for trial. The District Court made no “findings-of-fact” because it had already extracted from the defendant, a written “waiver” form which specified that the defendant had agreed not to make a speedy trial motion “for all time.” The Supreme Court held that this “waiver” was meaningless and that the District Court’s failure to make the balancing test and place on the record the findings-of-fact required by the Act was fatal and required dismissal of the Zedner indictment.

In Friemann, the defendant had requested, and was granted, a severance from a multi-defendant trial then underway in jury selection. The District Court made no “findings-of-fact” under the Act, but did enter an order that the Friemann trial would start upon conclusion of the multi-defendant trial. Three months later the multi-defendant trial ended in a mistrial due to a hung jury. Friemann then pressed to have his trial take place before the re-trial of the main defendant, which it was anticipated would be lengthy. When the prosecution resisted his effort to secure a prompt trial, Friemann filed his speedy trial motion after more than 150-days had elapsed since the mistrial. Friemann’s motion was denied and, on appeal from his conviction on but one count of an eight count indictment, the Second Circuit affirmed the conviction. 136 Fed. Appx. 396 (2005)

The Supreme Court ordered the Second Circuit to reconsider its Friemann decision, in light of Zedner. The Second Circuit had previously held that Friemann had no right to complain since he had acquiesced in the delay as indicated by his not filing the speedy trial motion to dismiss until more than 150-days had elapsed after the mistrial. Upon remand by the Supreme Court, the Second Circuit reversed Friemann’s conviction and remanded to the District Court with instructions to vacate the conviction, and dismiss the indictment, leaving it to the District Court to decide whether the dismissal should be “with or without prejudice.” 197 Fed.Appx.37, 2006 WL 2641189. Following this remand, the prosecution entered into a non-prosecution agreement, in return for Friemann’s consent to a dismissal without prejudice, and the District Court dismissed the indictment.

The Friemann case is a good example of how defense counsel can make the prosecution regret having added a peripheral defendant to a complex, multi-defendant case where the proof of that defendant’s guilt is questionable. Friemann had initially been indicted with eight co-defendants in a highly publicized, complex, multi-count indictment that charged the defendants with conspiring to obtain lucrative health care contracts from a government entity, the County of Nassau, through the commission of bribery, fraud, money-laundering and tax fraud. Friemann was not essential to the success of the prosecution, as shown by his eventual acquittal of the
conspiracy charges at his own trial, and the guilty pleas obtained from the co-defendants.

Before his trial, Friemann rejected the prosecution’s effort to induce him to plead guilty to a tax fraud count based upon the prosecution’s promise to make a “no jail” recommendation. Rather than offering a pre-trial diversion program or moving to dismiss the indictment, the prosecution chose to spend its resources prosecuting a two-week, hard-fought trial, and thereafter defending the denial of Friemann’s speedy trial motion all the way up to the U.S. Supreme Court.

Friemann’s eventual trial resulted in his acquittal of all counts, save one, which alleged that he had falsely claimed home office deduction on a business tax return. He was acquitted on all the conspiracy and other more serious charges brought against him. Friemann was sentenced to three years probation, and a $1000 fine.

With the benefit of hindsight—and the Zedner decision—it hardly seems a wise choice of prosecutorial resources.

The Zedner and Friemann cases provide defense counsel with sound reasons why the prosecution should consider alternatives to prosecution of a peripheral target, including offering a pre-trial diversion plan or even declination, rather than be drawn off-target from the main offenders. The teaching of these cases is that the prosecution can no longer be assured that the Court will routinely deny a motion to sever the peripheral defendant.

Recently, a co-defendant won his pre-trial motion for a severance from a joint trial based upon an argument that his speedy trial right would be jeopardized by requiring him to wait almost one year while the prosecution decided whether the co-defendants should be the subject of the death penalty. On December 26, 2006, United States District Judge Jed Rakoff of the Southern District of New York granted a severance to a defendant who was joined in an indictment with four co-defendants who were under consideration for imposition of the death penalty should they be convicted after trial. See: United States v. Byrd 466 F.Supp. 2d 550.

In that case, Judge Rakoff conducted a balancing test and made “findings-of-fact.” Although the Act authorizes suspending clock to accommodate the joint prosecution (18 U.S.C. § 3161 (h) (7)), the delay must nonetheless be “reasonable.” Having rejected the “reasonableness” of the anticipated delay, the Judge also considered, but rejected, using the “ends-of-justice” exclusion because to do so would render subdivision (h) (7) of the Act meaningless. The Court set a trial date within 70-days of the ruling for the defendant Byrd, thus forcing the prosecution to conduct two trials in its multi-defendant prosecution. The Byrd decision should be considered a precursor of decisions reflecting the impact of Zedner based upon the resourcefulness of the defense bar advocating for speedy justice.

In closing, we should not let pass this opportunity to express our congratulations and appreciation to fellow defense attorney Edward S. Zas, and his associates at the Federal Defenders of New York, Inc., an affiliate of the Legal Aid Society, for their outstanding work in representing Mr. Zedner before the U.S. Supreme Court. The general public, and those defendants who seek prompt vindication, have become winners as a result of this landmark decision—and the efforts of the defense bar.

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

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

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

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

If you wish to file a complaint, contact Eric Seiff at (212) 371-4500.

For more information on the PJCC, visit our website at www.nysacdl.org.

ATTICUS REQUESTS SUBMISSION OF ARTICLES

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

Authors are requested to follow these guidelines:

1. Use footnotes rather than endnotes.
2. When a case is mentioned in the text, its citation should be in the text as well.
3. Submit articles in hard copy with disk in either WordPerfect or Word.
4. Articles longer than 3-4 pages will be edited.
CONSPIRACY: THE NECESSITY OF AN OVERT ACT

by Andrew J. Schatkin

Andrew J. Schatkin is a member of the NYSACDL who practices law in Jericho, New York. He has argued over 150 civil and criminal appeals and tried over 100 jury and non-jury trials civil and criminal, federal and state.

Article 105 of the New York State Penal Law defines the various elements and degrees of the crime of conspiracy. Conspiracy in many ways is a mental or intellectual crime, since the crime is primarily founded in an agreement to commit a crime or a plan to do so. The Conspiracy Statute enables the state to prosecute a plan to commit a crime, and thereby in a sense, functions in a preventive mode, or rather, seeks to prevent and attack nascent or imminent planned criminal conduct. Conspiracy in the sixth degree, Section 105 of the Penal Law, states that a person is guilty of Conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct. Conspiracy in the sixth degree is a class B misdemeanor.

Other statutes defining the various degrees of Conspiracy are Conspiracy in the fifth degree, PL 105.05 of Conspiracy in the fourth degree, PL 105.10; Conspiracy in the third degree, PL 105.13; conspiracy in the second degree, PL 105.15; and Conspiracy in the first degree, PL 105.17. Conspiracy in the fifth degree is a class A misdemeanor; Conspiracy in the fourth degree is a class E felony; Conspiracy in the third degree is a class D felony; Conspiracy in the second degree is a class B felony; and conspiracy in the first degree is a class A-I felony.

In addition to the planning or thinking element of Conspiracy it is also the law that it must be shown in pleading and proving the crime as an overt act. This legal requirement is codified in Section 105.20 of the Penal Law entitled Conspiracy; pleading and proof; necessity of overt act.

The leading and seminal case setting forth the elements of conspiracy is People v. Berkowitz. In that case, the Court of Appeals stated that the core of conspiracy is the eliciting agreement. Berkowitz held that the defendant must have entered into the requisite agreement with at least one other person and that once the illicit agreement is shown, the requirement of an overt act of any conspirator may be attributed to other conspirators to establish the offense of conspiracy. It is beyond the parameters of this article to exhaustively analyze the elements, thrust, and total understanding of the crime of conspiracy, on which many law review articles, books, and book chapters have been written. This essay proposes to examine, under New York law, what may be said to constitute the overt act required to complete the crime.

In general, overt act has been defined variously as functioning to manifest the fact that conspiracy is at work. The conspiracy statute does not specify any particular conduct to satisfy the requirement that there be and overt act in furtherance of the conspiracy. It is the law that the overt act must be an independent act that tends to carry out the conspiracy, but need not necessarily be the object of the crime. See People v. Arroyo. In People v. Canale, the Appellate Division Third Department stated that the overt act, once again, in furtherance of the conspiracy, need not be the object of the crime and can even include acts of concealment occurring before, during, or in some cases after the conspiratorial objective. In Robinson v. Snyder the Appellate Division First Department further refined and defined what the reach of the requirement of the "overt act" is stating that the overt act is merely an element of the crime that has as its basis the agreement and that the overt act of any conspirator may be attributed to other conspirators to establish the offense of conspiracy.

People v. Ortiz gives a more exact definition of the overt act of a conspiracy stating that the act signals the intent to move the project forward from talk to action; provides corroboration of the existence of the agreement; and indicates that the agreement has reached a point where it poses a sufficient threat to society to impose sanctions. Thus far, we have seen that the overt act requirement need not be the object of the crime; functions to show that a conspiracy is at work; can be an act of concealment; and provides evidence of the agreement and of the intent to move the project forward from the mere planning and thinking stage to the point where a threat to society is apparent. Finally we have seen that an overt act of any co-conspirator becomes the legal act of the rest.

We will now consider, more specifically, what may be said to constitute or not constitute the "overt act." It has been held that passive acts or omissions cannot constitute an overt act. Thus, in People v. Abedi it was held that alleged omissions of failing to inform an attorney over a period of five years of the means by which bank holding company stock was purchased; the failure by two defendants to inform their law partners over the same period of the means by which stock was purchased and, when informing the auditor of the loans, failing to mention their non-recourse nature, were not "overt acts" as required for a conspiracy in the prosecution arising from the investigation into the relationship between the corporation and bank holding company.

Similarly, in People ex rel. Conte v. Flood it was held that although the "overt act" must be specific, affirmative, independent and identified as done to further the conspiracy, the allegation that the conspirators threatened victims during the period of conspiracy with physical harm did not allege an overt act.

On the other hand, conversations among conspirators may constitute an overt act in furtherance of the agreement and conversations which attempt to elicit others, may also constitute such an act. In the same way, telephone conversations have been held to be "overt acts." Thus, in People v. Sorentino the Appellate Division First Department held that there was sufficient evidence of overt acts connecting the defendant to a conspiracy charge to sustain his conviction for Conspiracy in the first degree, where the timing of the defendants telephone call to an intermediary and of the intermediary's phone call to the union official informant, coupled with the intermediary's payment of $1,000 to the informant as a bribe, by a private contractor, who was using non-union employ-
ees, constituted overt acts in furtherance of the conspiracy.  

Another play on a telephone conversation constituting an "overt act" in furtherance of a conspiracy is where tape recordings are involved. In People v. Surpris the Appellate Division Second Department held that a conviction for conspiracy to sell narcotics was sufficiently supported by evidence of tape-recorded conversations between the defendant, the confidential informant, and the undercover police officer, which indicated that the defendant had entered into an agreement to sell a controlled substance and actively pursued consummation of the deal.

It is also has been held that the fact of a common scheme or plan can constitute an "overt act" in furtherance of a conspiracy. Thus, in People v. Ozarowski the trial court held that the rapid, continuous, and related sequence of events on the night of the assault and the planful character of the group action, among other things, supported the trial judge’s conclusion that there was a common plan or scheme hatched among the defendants and that overt acts in furtherance of the conspiracy took place. The law has also established that a series of meetings or meeting can constitute an overt act or acts in furtherance of a conspiracy. Thus, in People v. Sher, the the trial court held that, where it was alleged, that one defendant in Albany County communicated with a second defendant in Kings County, for the purpose of compelling a third person to pay a gambling debt; and that later the first defendant met with such person in Greene County for the purpose of arranging payment; and that thereafter a third defendant collected money from the person and upon default, assaulted him, the meeting in Greene County was an overt act in furtherance of the conspiracy to collect the gambling debt and all defendants were within the jurisdiction of the Greene County Court.

Another example of an overt act, it has been held, that fulfills that requirement for a conspiracy is a solicitation. Thus, in People v. Bonaarzone the Court of Appeals held there was sufficient circumstantial evidence upon which to infer performance of an overt act of conspiracy by defendant charged with crimes stemming from alleged conspiracy to arrange for the murder of the eyewitness to the automobile accident; the evidence included admissible statements made by defendant to others that he had spoken, and would again speak, to his mother and sister to further the conspiratorial objective by providing payment and photograph of victim; statement to undercover officer posing as hitman, that defendant would make telephone call to his mother immediately; specific instructions to the undercover officer about following up on the telephone call to the defendant's mother; and provision of his mother's phone number to undercover officer with description of instructions he intended to give her.

It should further be noted that it is also the law that money payments can constitute an overt act or acts in furtherance of a conspiracy. Thus, the Appellate Division Fourth Department held in People v. Ortiz that the payment of $50 to an undercover officer, who would not perform previously arranged conspiracy to use physical force to collect a debt until payment was made, was a "overt act" of the conspiracy and not an act to cement the conspiracy or secure the participation of the officer in the conspiracy. Similarly, in People v. Teeter the Appellate Division Fourth Department again held, as it did in People v. Ortiz, that even if the undercover officer to whom money was allegedly paid for the purpose of having certain persons killed was not a co-conspirator, the payment of money would constitute an "overt act" required for first degree conspiracy conviction.

It has also been held that drug sales and evidence as to drug sales can constitute an overt act in furtherance of a conspiracy. For example, in People v. Weaver the Appellate Division Third Department held that a co-conspirator's delivery of cocaine and his use of County airport to import cocaine were overt acts in furtherance of the conspiracy involving the defendant, even though, the cocaine handled by the co-conspirator did not come from the defendant; the co-conspirator went to Florida to get cocaine from the defendant; and turned to another supplier when he was unable to do so. On this area of drug sales Borzuko v. City of New York Police Dept. Property Clerk is instructive. In that case, the trial court held that evidence of a trip from New York to Florida with $50,000 with which the accused intended to purchase drugs was sufficient showing of an overt act to support a finding of conspiracy.

A final point should be noted. Overt acts in furtherance of a conspiracy can be admitted into evidence which took place later than during the date specified in the despite the eminence of the actual commission of the murder.

**CONCLUSION**

This brief review of what the law has held may be said to constitute an overt act in furtherance of a conspiracy reveals a number of rules. Threats cannot constitute an "overt act" in furtherance of a conspiracy, nor can passive actions or omissions. Conversations can and that includes telephone conversations and tape recordings.

Meetings and evidence of a rapid sequence of events indicating a common scheme of plan have been held to be overt acts in furtherance of a conspiracy. Solicitation, payments, and drug sales all have been held to be overt acts in furtherance of a conspiracy. It is the law as well that an overt act in furtherance of a conspiracy need not necessarily be the object of the crime and can include acts of concealment. It is also the law that once a defendant is shown to be a member of a conspiracy all overt acts performed by any of the co-conspirators becomes the legal act of every other. Finally, an act close to the consummation of the crime or even afterward, at least as to the date of the indictment, are admissible as an overt acts. It is hoped that this cursory review of the law of "overt act" in furtherance of a conspiracy will prove useful to the practitioner faced with this sort of case or issue.

**ENDNOTES**

1. A person is guilty of conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.
2. A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:
   1. A felony be performed, he agrees with one or more persons to engage in or cause the performance of

(continued on page 12)
such conduct; or
2. a crime be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

3. A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting:
   1. a class B or class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct; or
   2. a felony be performed, he or she, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct; or
   3. the felony of money laundering in the third degree as defined in section 470.10 of this chapter, be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct.

4. A person is guilty of conspiracy in the third degree when, with intent that conduct constituting a class B or a class C felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

5. A person is guilty of conspiracy in the second degree when, with intent that conduct constituting a class A felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

6. A person is guilty of conspiracy in the first degree when, with intent that conduct constituting a class A felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct.

7. A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy.

8. 50 NY 2d 333, 428 NYS 2d 927, 406 NE 2d 783 (1980)
9. 93 NY 2d 990, 695 NYS 537, 717 NE 2d 783 (1980)
10. 268 AD 2d 699, 704 NYS 151 (3rd Dept. 2000)
11. 259 AD 2d 990, 868 NYS 392 (1st Dept. 1999)
12. 100 AD 2d 6, 473 NYS 288 (4th Dept. 1984) See also on the law that all overt acts performed by any of the co-conspirators become the legal act of any other co-conspirator, People v. Adams, 2 Misc. 3d 166, 766 NYS 765 (County Court, Niagara County 2003)
13. 156 Misc. 2d 904, 595 NYS 1011 (S. Ct. NY County 1993)
14. 53 Misc. 2d 109, 277 NYS 697 (S. Ct. Nassau County 1966)
15. See also on the requirements of conspiracy People v. McGee, 49 NY 2d 48, 424 NYS 157 (1979)
17. 182 AD 2d 418, 582 NYS 152 (1st Dept. 1992)

18. On telephone conversations being "overt acts" in furtherance of a conspiracy see People v. Weaver, 157 AD 2d 983, 550 NYS 2d 477 (3rd Dept. 1990) (Held: Telephone conversations between co-conspirators were overt acts in furtherance of a conspiracy to obtain cocaine in Florida for distribution; co-conspirators sought to arrange for delivery of cocaine and the conversation led to co-conspirators flight to Florida to obtain cocaine. See also on this People v. Kellerman, 102 AD 2d 629, 479 NYS 2815 (2nd Dept. 1984) (Held: Phone calls of government informant to defendant from county to arrange delivery of cocaine constituted an overt act in furtherance of the conspiracy. See also on this People v. Menache, Id.; cf. People v. Bavisotto, 120 AD 2d 985, 502 NYS 867 (4th Dept. 1986) where the Appellate Division Fourth Department held that the evidence was insufficient to support convictions for conspiracy in the Second and Fourth Degrees, where nothing in the telephone conversations which constituted the conspiracy established a agreement to sell cocaine or marijuana.
19. 125 AD 2d 351, 509 NYS 76 (2nd Dept. 1986)
20. On this, See also People v. Kiszenik, 113 Misc. 2d 462, 449 NYS 414 (S. Ct. NY County 1982)
21. 38 NY 2d 481, 381 NYS 438, 344 NE 2d 370 (1976)
22. 68 Misc. 2d 917, 329 NYS 2 (Greene County Court 1972)
23. Compare People v. Gross, 51 AD 2d 191, 379 NYS 885 (4th Dept. 1976) (Held: not necessary that there be direct evidence of a meeting at which defendants mapped out a detailed strategy to defraud the town.)
Your Honor:

In correspondence to the Court dated __________ _, 200_, the trial attorney in the above matter indicates that while 212(h) relief is available to the applicant, the Government is apparently declining to ‘pre-termit’ this matter. This Court should administratively close this case and find that as client was improperly charged as an arriving alien seeking admission. Because he is not “seeking to make entry,” as more fully explained herein, the 30 grams or less exemption for marijuana possession (the basis for the Government’s efforts to strip him of his Permanent Residence) does in fact apply and this matter should be closed.

The Government’s correspondence predated the decision of the United States Supreme Court in Lopez v. Gonzalez, Attorney General No.05-547, decided December 5, 2006). In Lopez, Justice Souter’s language addresses the point that counsel has repeatedly drawn this court’s attention to and bears highlighting.

Consider simple possession of marijuana. Not only is it a misdemeanor under the CSA, see 21 U.S.C. Sec. 844(a), but the INA expressly excludes “a single offense involving possession for one’s own use of 30 grams or less “from the controlled substance violations that are grounds for deportation, 8 U.S.C. See 1227(a).

In their “submission” to this Court, the Government states that the applicant is being charged as being inadmissible as a result of his conviction which they call a Controlled substance violation for Criminal Possession of Marijuana in the Fifth Degree (NY Penal Law,221.10).

The Government is claiming that the INA only ignores the possession of small amounts (less than 30 grams) of marijuana in removal contexts and not in the context of an allegation of an alien’s being inadmissible.

(Name of client)’s short trip outside of the United States did not break the continuity of his residence, subjecting him to the admissibility review under which the Government claims he should be scrutinized. The interpretation sought by the Government in this matter violates fundamental notions of due process and fairness where, as here, there was not a meaningful interruption of the alien’s previous conferred Lawful Permanent Resident status. (United States Constitution, Fifth Amendment) and, where as here, the effort to proceed against (client) as an “arriving alien” dramatically affects whether immigration relief may be available. Ignoring the fact that his very short trip outside of the United States did not meaningful interrupt his permanent residence ignores reality.

The brief, casual and innocent trip abroad which in this case was clearly not meant to be “meaningfully interpretative” of Lawful Permanent Resident status does not and should not subject (client) to admissibility review. See, Rosenberg v. Fleuti, 34 U.S.449 (1963). See, Richardson v. Reno, 994 F. Supp. 1466, 1471 (S.D.Fla. 1998).

It must be noted that there is no Federal Court authority in the Second Circuit which expressly holds that Fleuti has been overruled. While counsel for (client) is aware of the Board’s opinion in In re Collado-Munoz, 211 & N Dec. 1061, Interim Decision (BIA) 3333, WL 805604 (BIA) Dec. 1, 1997), See, Mejia-Ruiz v. I.N.S. 51 F.3d 358 (2d Cir. 1995); see also Heitland v. Immigration and Naturalization Service, 551 F.;2d 495 (2d Cir. 1977). Richardson v. Reno, supra discusses the continuing viability of Fleuti and the legislative history of client’s IIRIA in this regard. As noted in Richardson v. Reno, at pp. 1471-1472.

Legislative history also demonstrates that Congress did not intend to overturn Fleuti. Congress, however, only intended to overturn “certain interpretations of Fleuti” by stating that a returning lawful permanent resident alien is seeking admission if the alien is attempting to enter or has entered the United States without inspection and authorization by an
immigration officer. See H.R. 2202 No. 104-469, Pt, at 226 (emphasis added). Here, Congress was concerned about aliens entering surreptitiously without inspection by an INS officer. Therefore, INA Sec. 101 (a)(13) expressly provides that an individual who enters at a location other than one designated by INS be treated as an alien “seeking admission.” Nowhere does Congress indicate that it intended to overrule the central holdings in Fleuti which is at issue here. It is evident from the plain meeting of the statute, the legislative history and the important policy concerns that animated the Court in 1963 that Fleuti is still good law.

The Court in Rosenberg further discusses Section 101(a)(13)(C) which “does” not provide a statutory bright line for determining which returning lawful permanent residents shall be considered to be “seeking admission. If Congress had intended that a returning lawful permanent resident shall be regarded as ‘seeking admission’ when one of the six categories applied, it certainly should have said so Instead, Congress stated six exceptions to the bright line rule that an alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission If one of the exceptions applies, the Immigration Judge should do as she always did: determine if the alien’s stay was brief, casual and innocent. (emphasis supplied.)

Simply, the trial attorneys are attempting to remove from this Court the power to make a Fleuti determination. If one of the conditions specified in the new law applies (for example, that there is a controlled substance conviction) the new statute “authorizes but does not require a finding that the alien is seeking admission. Application of those conditions is up to the Immigration Judge in removal proceedings in which time the alien an the INS can argue factors relevant under Fleuti. Rosenberg, supra, at 1471. The language of Justice Souter in Lopez, supra, he encompasses the instant situation, the exemption from immigration consequences of a simple possession of less than 30 grams of marijuana. The prior submissions establishing the appropriate amount of marijuana and all prior proceedings and papers had herein should be considered on this issue.

It is respectfully requested that this Court close the instant matter and for such other and further relief as to this Court seems just and proper.

Respectfully,

_______________
Attorney

NYSACDL LAWYERS ASSISTANCE STRIKE FORCE

PRACTICE TIP
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NYSACDL HEALTH INSURANCE PLAN

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

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

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

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

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

The NYSACDL Membership Insurance Program is administered by Specialty Financial Advisors. For more information, contact Mark A. Kovler, JD PH.D. CTP at 914 923-1160 or via email at makesq58@aol.com.
LISTSERVE ETIQUETTE

by Mark Mahoney, Esq.

Mark Mahoney is a Past-President of the NYSACDL. He is a partner in the Buffalo firm of Harrington & Mahoney.

Editors Note: This article appeared in the May/June 1999 issue of The Mouthpiece and continues to be applicable. It's certainly worth rereading.

I offer the following thoughts concerning procedure and etiquette to those people who are new to the practice using "listerves."

PROCEDURE:

- If you want send a message to everyone, or reply to a message and have everyone see it, just reply to the message so that it goes to the listserv address.

- If you want to send a message to a particular person or persons, you should use the address-book capabilities of your mail software to capture (often there is a single key you can hit that will capture the e-mail addresses in the text and allow you to add them to your address book. You can always also create groups of addressess and send a message to more than one person, in most mail software.) Otherwise you have to just copy the e-mail address of the persons you want to send a message or a reply to into the “Send to” area of your new message or reply.

- In either case you have to make sure, when you send the reply or message, that you have adjusted the “Send to” information to your liking.

- If your response to a thread of messages changes the theme or content of the message thread, then change the “subject” line accordingly, so that readers can be assisted in deciding whether to open this message or not. (In most e-mail software the user can just look at the message headers to decide whether to open a message.) Some message threads change from the frivolous to the serious, and vice verse, and it is important to let the readers know this.

ETIQUETTE:

- In making replies, consider whether it is appropriate or not to make your reply public. This requires examination of your motives in replying. There are a wide range of concerns.’ Generally it is good to let all see useful information, and to let people know if there has been a response to useful information.

- On the other hand, criticism should be done with care, and understanding of the limits of this medium to reflect nuance and tone of speech, or else be done privately.

- Because it is often difficult to convey the tone of a message, writers must be careful to make the literal terms of a message civil and assume the best about the other writers, and avoid discouraging free flow of ideas.

- Many are self-conscious or cautious about answering a message, especially if they feel their answer out to be broadcast. Fear of giving a response that seems to be too obvious, or might be “incorrect” in the judgment of others ought not have a role if the person is trying to help.

- Judge not lest you be judged.

- Sign your messages with your name and preferably with your e-mail address. It is disconcerting to try to give a private reply to a message where you do not know the author. Especially with some e-mail packages, where the message routing header is hidden from the reader, a message to a listserv may look anonymous. There are numerous problems with this. First, it is hard to give a private response if you do not know who the sender is. First, it is hard to give a private response if you do not know who the sender is. Second, it may make critical messages appear to be designed to prevent the reader from knowing who the writer is.

- Even if the message shows the writer’s e-mail address to the reader, e-mail addresses that only use initials, or some “handle,” or a spouse or co-worker’s name, may not communicate who the author is. This is a problem as listserves grow in size. Quotes: keep quotes to a minimum. Use quotes to let readers know what yo are responding to. Most email software has a facility that allows you to select segments of an original message in order to paste into a reply. Don’t quote more of a message than is needed to make your reply understandable to the reader.
NYSACDL CLE UPDATE

2007 CLE SCHEDULE

Saturday, May 5
Cross to Kill
Binghamton Club - Binghamton

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

Friday, June 8
Civil Commitment of Sex Offenders
St. Francis College - Brooklyn

Friday, June 15
Civil Commitment of Sex Offenders
Grand Hotel - Poughkeepsie

Friday, June 19
Expert Witnesses:
What You Must Know
St. Francis College - Brooklyn

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

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

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

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

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

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

The Annual Binghamton Trainer on Saturday, May 5 at the Binghamton Club coordinated by Remy Perot, will feature a segment on Civil Commitment of Sex Offenders: What the New Law Means to Your Clients. as well as lectures by Alan Rosenthal, Michael Hungerford of Mental Hygiene Legal Services and Kostas Katsavadakis Ph.D.

Other lectures include Cross of a Law Enforcement Officer, by Past-President Ray Kelly and Cross of a Blood Test, by Eric Sills.

Attorneys attending the seminar are eligible for 5 CLE credit hours in Skills.

Cross to Kill will be held on Friday, May 18 at St. Francis College in Brooklyn. Watch your mail for further details.

Friday, June 8, St. Francis College in Brooklyn will be the site of Civil Commitment of Sex Offenders: What the New Law Means to Your Clients. Among the presenters are Alan Rosenthal and Kostas Katsavadakis, Ph.D.

Attorneys attending the seminar are eligible for 3 credit hours in Skills.

Civil Commitment of Sex Offenders: What the New Law Means for Your Clients on Friday afternoon, June 15 will be presented at the Grand Hotel in Poughkeepsie.

Attorneys attending the seminar are eligible for 3 CLE credit hours in Skills.

On June 19, the NYSACDL in conjunction with the Assigned Counsel Plan Second Department 9th and 11th Judicial Districts will present Expert Witnesses: What An Effective Criminal Defense Lawyer Needs to Know. The program will feature Cross Examination of an Expert Witness, by George Goltzer, Your Right to Call Expert Witnesses, by Gregory Clarke, Esq., Preserving the Record, by Lynn Fahey, Esq., and a View From the Bench.

Attorneys attending the program are eligible for 4 CLE credit hours in Skills.

A Civil Commitment of Sex Offenders has been planned for the Buffalo area. Watch your mail for details.

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

To register or for information on our 2007 CLE Schedule, please contact Patricia Marcus at (212) 532-4434 or via email at nysacdl@aol.com or visit our website at www.nysacdl.org.
March 9, 2007...The occasion of this well-deserved award to Barry and Peter gives us an opportunity to think about the broader implications of their work.

Its most immediate product, of course, is the rectification of a wrongful conviction and the release from prison of a death sentence of an innocent person - probably the most significant service that a lawyer can accomplish. To do that once in a lifetime would justify the professional life of any ordinary lawyer; but Barry and Peter do it time and again, as recently as last Monday in the Roy Brown murder case.

More broadly, their Innocence Project has inspired emulation that has had a multiplier effect. It has served as a model for the creation of 30 other projects devoted to assisting wrongly convicted persons to establish their innocence. It has helped to sensitize judges, prosecutors, prospective jurors, and the public to the reality and the danger of convicting the innocent. It has helped to create some understanding of the causes of wrongful convictions: uncritical reliance on doubtful eyewitness identifications; police interrogation practices calculated to induce false confessions; prosecutors’ addiction to snitch testimony and junk science; resource-starved, overburdened defense attorneys working under conditions which make a sick joke of the notion that factually accurate verdicts can be obtained through an adversary system that, in theory, pits a well-prepared defense against a well-prepared prosecution.

But I want to talk about a still deeper implication of Peter’s and Barry’s work. The miscarriages of justice they have documented should confront us with two basic, frightening facts. Fact one is the endemic fallibility of the processes through which our criminal justice system sends hundreds of thousands of people to prison and thousands to death. Fact two is the ferocity with which we collectively refuse to acknowledge that fallibility - the scary state of denial that makes us unwilling to provide either adequate correctives for our mistakes or adequate safeguards against their recurrence.

Without question the American criminal justice system is now in an acute state of denial, epitomized by its fetish for finality. Over the past quarter-century, legislatures and courts have created ever more rigorous barriers against corrections of mistakes and of violations of defendants’ fundamental rights in the criminal justice system, either on appeal or in post-conviction proceedings. On the one hand, there is increasing insistence that violations of defendants’ rights before and at trial are not enough to warrant setting aside a conviction and awarding a new trial unless the appellate or habeas corpus proceedings are decided with indifference to the outcome has been shredded. Now, as a matter of law, judges are required to peer through the blindfold, survey the outcomes which their rulings would produce, and tip the scales to avoid unwelcome outcomes, most notably the releases or even the retrials of guilty-looking perps.

For example, most claims of error made to appellate courts today are rejected on the ground of harmless error, with no ruling on the merits. Suppose you get convicted at a trial at which your coerced confession is admitted into evidence or the prosecutor insinuates to the jury that your failure to testify means you’re guilty. Your constitutional right against self-incrimination has unquestionably been violated. Do you get a new trial? Not necessarily, or even ordinarily. Doctrines of “harmless error” originally created to avoid appellate reversals for trivial failures to observe procedural formalities have now evolved into a broad blanket rule upholding convictions whenever appellate judges conclude that even the most indefensible violations of core constitutional guarantees didn’t make a difference in the outcome. Theoretically, the test of harmless constitutional error is whether appellate judges conclude beyond a reasonable doubt that the error did not contribute to the guilty verdict or sentence. But in practice, it much more often boils down to whether the appellate judges think that the prosecution’s evidence of guilt was potent and the sentence well deserved.

One reason why the standard gets watered down in practice is that harmless-error analysis is seldom written up in appellate opinions in a way that forces the authoring judge, or his or her concurring colleagues, or anybody else, to examine it critically. Most harmless-error rulings on appeal are made without explanation or are explained in such cursory terms that their basis and reasoning are unintelligible. To anyone who is not intimately familiar with the record in the case - and often even to the lawyers who are - such

(continued on page 18)
rulings are completely opaque, immune to criticism, providing no guidance in subsequent cases. Rulings made under these conditions are unrestrained by precedent or methodological discipline; little wonder that they end up turning simply on the appellate judges’ sense that, on a cold record, the defendant looks damned guilty.

But harmless-error analysis is only one symptom of a more pervasive trend toward result-oriented jurisprudence in criminal cases. Increasingly, courts are developing the very substantive rules that define constitutional rights in ways that make the requirement of harmful effect a precondition to finding a constitutional violation. The Strickland rule defining ineffective assistance of counsel requires not only grossly substandard attorney performance but prejudice.

Brady violations require not only prosecutorial nondisclosure but also materiality - which is another name for prejudice. The test of improper prosecutorial argument is whether the argument was prejudicial. An indigent defendant’s right to expert witnesses and other resources under Ake v. Oklahoma depends on whether these are necessary, which always means in appellate hindsight whether their denial was prejudicial. In all of these settings, appellate judges customarily squint at the record, conclude that the defendant looks damned guilty, and deny relief.

Or consider the array of rules dealing with post-conviction remedies. After a 40-year period of expansion that paralleled the growth of modern-day constitutional criminal procedure, the Supreme Court in the early 1980’s began to cut back sharply on the availability of federal habeas corpus remedies for persons convicted at state trials in which their constitutional rights had been violated. In 1996, swept away by the tide of rage that followed the Oklahoma City bombing, Congress enacted the Antiterrorism and Effective Death Penalty Act, building on issue-preclusion and review-curbing ideas that the Court had initiated and ratcheting them up so as to make federal habeas relief for constitutional violations still more difficult to obtain. State courts and state legislatures flocked to follow the U.S. Supreme Court’s and Congress’s lead, restricting state-court post-conviction remedies for constitutional violations in a similar manner.

The rules that now govern post-conviction procedure are weirdly complicated, but a couple of points stand out. First, post-conviction remedies are restricted by standards of harmless error that allow even more violations of constitutional rights to go unredressed than the harmless error rules applied on appeal. Constitutional violations are disregarded unless they are found to have had a “substantial and injurious effect or influence” - a standard which, in practical effect, leads post-conviction judges to dismiss almost all claims of constitutional error in trial and sentencing proceedings by saying that the prosecution had a powerful case and therefore nothing else that happened at trial or on appeal matters.

Second, at the post-conviction stage, errors that were not preserved at trial and on appeal are treated as procedurally defaulted unless the post-conviction petitioner can show what is called “cause” and “prejudice.” In most cases, the only way to show “cause” is to prove a Brady violation or ineffective assistance of counsel under Strickland, so the result-oriented rules of those cases become an obstruction to getting a merits hearing on most other claims. And the “prejudice” half of the “cause-and-prejudice” requirement is, as its name implies, still another device for telling judges to decline to entertain constitutional claims unless they are convinced that a criminal conviction was undeserved because of the defendant’s likely innocence.

You’d think that, with all of this emphasis on innocence in the doctrines restricting appellate and post-conviction relief, the courts would recognize that persons with a strong claim of wrongful conviction resulting from the several common causes of factual error in criminal trials - incorrect eyewitness identifications or perjurious testimony by snitches, for example - should be entitled to have those claims heard in a post-conviction forum without also showing some additional failure of justice in their cases. But, for the most part, the courts are inhospitable to post-conviction claims of factual innocence. They resolutely enforce an array of technical limitations to deny applications for new trials on the ground of newly discovered evidence, and they either refuse to recognize that there is any Due Process right to redress for a claim of “mere” innocence or they set the standard for relief so high that it cannot be met by anything short of divine revelation manifested by the physical appearance of God in the courtroom, bearing a habeas petition for the convicted defendant in his right hand and a confession by the true perp in his left.

So we have a system that concerns itself with guilt or innocence almost exclusively as an excuse for refusing to set aside convictions marred by procedural error on the ground that the convicted defendants are very likely guilty, while at the same time it seizes on every possible procedural obstacle to refuse to hear the claims of people who present convincing evidence that their convictions were factually erroneous and that they are actually innocent. The justification for this apparent paradox is said to be the system’s interest in “finality.” The code word “finality” betrays its real function when you stop and ask “finality for whom?” My clients who have been denied post-conviction relief in the interest of finality have not thereby experienced any final end to the consequences of their convictions. After this great victory for finality was declared, many of them have been electrocuted or strapped on a gurney and poisoned to death and others have spent lifetimes in prison. “Finality” means “finality” for the courts. It means that they can close their books on a case; and often it allows them to do so with comfort only because the rules of closure are tailored to prevent inquiry into whether their judgments of prolonged incarceration or death were imposed as a result of factual error.

In saying this - and saying it sickens me - I do not ignore that our courts are badly overburdened and that, in order to do their difficult and vital job, they need to be relieved of any litigation that can properly be lifted off the judges’ backs. But we may rightly ask whether much of the work that weighs so heavily on our judges is not less important than inquiring into colorable cases of factually mistaken convictions. And in answering that question, we should keep in mind that legislatures and prosecutors every day impose on our judges the work of administering the most punitive and over-extended system of criminal punishment in the world.
In 1974, there were less than 280,000 people in prison in America. By 2004, the number was more than 2.1 million. That’s an increase from less than 300 prisoners per 100,000 population to 714 prisoners per 100,000 population - by far the highest incarceration rate in the world. And this increase appears to have little or nothing to do with the country’s crime rate. For decades, Germany, France and Finland have all had crime rates almost identical to that of the United States, and they all have incarceration rates of less that 70 prisoners per 100,000 population - one tenth of ours.

The crime rate in our country has fallen sharply since 1991, yet in that time our prison population has risen 49 percent. This is largely the result of harsher sentencing practices: mandatory-minimum-sentence laws, three-strikes laws, and so forth. In the six years between 1995 and 2001, the length of sentences rose 30 percent. Within one five-year period in the 1990’s, an astounding 45 States modified their laws governing the transfer of juvenile offenders to adult court, to provide that more young people under 18 would be subjected to the harsher punishments provided for adult criminals.

And of course, the results of this rage to punish have fallen unequally upon America’s minorities of color, particularly African-Americans. Today, almost one-third of African-American males in their twenties - 32.2% to be exact - are under criminal justice supervision: in prison or jail, on probation or parole, a tenfold increase since 1954, when Brown v. Board of Education marked the high-point of America’s profession of egalitarianism.

So I ask, in closing, whether the truth which Peter Neufeld and Barry Scheck have forced us to confront - that the mistaken conviction of innocent people is not merely a theoretical possibility but a frighteningly real fact - should not cause us to rethink some of our priorities in the allocation of resources within the administration of the criminal law. Is it sensible, is it decent, is it sane to continue the course that our country has taken over the past third of a century - forever broadening the roster of crimes and increasing the severity of criminal punishments, while at the same time cutting back the corrective processes available to convicted persons to secure redress for legally and factually questionable judgments of prolonged imprisonment or death?

Because the work that Peter and Barry have done demands that we attend to that question - as well as for the more immediate results they have obtained in correcting some of the worst errors of our fallible system of criminal justice - it gives me great pleasure to present to Peter Neufeld and Barry Scheck the New York Council of Defense Lawyers’ Norman Ostrow Award for “outstanding contributions to the defense of liberty and the preservation of individual rights.”

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**PRO BONO COUNSEL NEEDED FOR DEATH ROW PRISONERS**

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

Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The ABA Death Penalty Representation Project seeks lawyers in firms with the necessary resources to devote to his critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact Robin M. Maher, Director of the ABA Death Penalty Representation Project at 727 15 Street NW, 9th Floor, Washington, D.C. 2005. The email address is maherr@staff.abanet.org or by phone at (202) 662-1738. For more information, see the Project’s website: www.probononet/deathpenalty.

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**YOU SHOULD KNOW...**


- Bruce Bryan, an appellate lawyer in Syracuse has available for free a book he wrote about appeals and post conviction remedies in New York. It is organized and written in a way that is easy to understand for both lawyers and non-lawyers. Not only can this be a helpful resource for us all, but it can also be passed along to persons who are sentenced prisoners who are not able to retain counsel. It can be located at www.brucebryanlaw.com
THE CRIMINAL JURY CHARGE
(What Defense Counsel Never Thinks About During the Charge)

by David L. Rich

David L. Rich is a member of the NYSACDL. He is in private practice in White Plains.

It makes no difference how many times you sit through a jury charge. It never seems to get any more interesting and it can’t possibly get any more boring. Summations are done – the DA had a distinct advantage. He had the facts and the law on his side. My client is staring daggers at me and would, I’m relatively confident, put an ice pick through my skull if the circumstances so allowed. Hmmmmmmmmmm, lemmee see – Judge is going on right abut now – something about what constitutes beyond a reasonable doubt and burden of proof. We’re barely out of the gate here and jurors 4, 6 and 7 have already ‘checked out’ of this one and...

“...it is the quality of the evidence, not the quantity...

Ooops - We just lost jurors 1 and 10. This is not going as well as planned. I was hoping they would stick around until at least the Judge got up to the required elements – oh well. The People had a very strong case and summation. Mine, on the other hand won’t exactly be utilized by the law schools or found in any trial practice manuals. Wonder what it would be like to occasionally sum up a case when you actually had facts and evidence IN YOUR FAVOR! Nah. I would probably just end up getting confused by any facts that I could actually rely upon as true. Hmmmmmmmm...wonder what Derek Jeter is doing about now...Maybe in my next life - hell - I’d settle for coming back as Horace Clarke.

“...should you wish to examine any of the evidence you must first send a...

Yeah right - like ‘send in all the evidence’ won’t be the first jury note. Give you 50 to 1 – right now – that’s the first note. Any takers? A couple of weeks ago I had the first 4 numbers cold in Mega Millions – missed the 5th by 1 digit and the Mega Ball by 2 digits. Cashed in for a huge $150 windfall. If...if...if.

But IF I did hit, the prize was $20 million – chances are I wouldn’t be sitting here now listening to these riveting instructions for the umpteenth time. Hell, I’d be scooping out some beachfront property on Maui or I’d be in St. Louis tonight for Game 4.

At last the court reporter is pretty damn hot – only wish I could remember what her name was...that’s pretty pathetic considering I’ve been staring at her for about 4 weeks. Damn good thing we don’t prosecute lascivious thoughts. Hey - The judge and jury are taking a stretch – could we possibly be at the halfway point?

“...under our law the word intent has a special meaning...

Could it be possible? Are we finally heading into the home stretch?

“...the essential elements of the lesser included offenses...some of these terms also have a special meaning...

Oh man, those bad vibes and negativity are crashing down like waves smashing against the rocks. The jurors look like they’re starting to show signs of life. Dammit, they may have actually been listening. They don’t appear to be the least bit interested in the lesser included offenses, and with looks of hatred are staring at either me or my client. If you don’t take my 50 to 1, I’ll give you another chance. If I set the over/under for deliberations at 45 minutes (not including time allotted for the jury to eat lunch) - which way would you go?

“Juror #1. By virtue of the fact that you were the first juror chosen – the law requires that you be foreperson...

Damn. We’re getting pretty close to the moment of truth here. Time to start giving my client that sincere reassuring look – hum...that doesn’t seem to be working - he’s still giving me the Death Stare.

“...should you have any questions you must put it in writing and submit through your foreperson...

Yup - - - that foreperson is looking pretty darn thrilled at this point. Hew as probably hoping just to keep a low profile and glide through deliberations. No way dude. You’re gonna play a pivotal role, pal!

“I now give the case to you, the jury. Good luck with your deliberations.”

Well. That’s that. The jury is gone. The client has returned to the holding cell. The courtroom empties and the clerk takes down everyone’s cell number. Now it’s time to kill time. Lemmee see. How many words can I make using the letters CONSTITUTIONAL RIGHTS?
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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.

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

June 8...............................Civil Commitment of Sex Offenders
St. Francis College, Brooklyn

June 15...............................Civil Commitment of Sex Offenders
St. Francis College, Brooklyn

June 19...............................Expert Witnesses: What You Need to Know
St. Francis College, Brooklyn

For registration or information on our CLE schedule for 2007, contact Patricia Marcus at (212) 532-4434, e-mail us at nysacdl@aol.com

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