An event occurred on Election Day that should give us some encouragement on several levels. Matt Ryan, a senior assistant public defender in the Broome County Public Defenders Office, was elected Mayor of Binghamton. Matt overcame not just the ordinary challenges of politics, but also the kind of smear we all are too familiar with on a personal level, but which we rarely have to confront professionally as Matt did.

Ads and flyers produced by the Broome County Republican Committee attacking Matt for his work as a public defender were rather sophisticated in their production, asked, "How can we trust Matt Ryan?" Underneath that question was the following paragraph:

Matt Ryan could have been anything. He could have chosen to be an Assistant District Attorney, fighting crime to keep our neighborhoods safe. He could have gone into private practice, helping local seniors and families. Instead, Matt Ryan chose to defend the criminals who hurt our City.

The glossy two-sided flyer, which on one side displayed a negativised photo of a young girl walking by a predator-looking older man leaning against a car, also included the front page of four "pleadings" with the following stenciled over them: "Sexual Predator;" "Wife Beater;" "Rapist;" and "Drug Pusher."

The good news is that Matt bravely did not back down. And NYSACDL was there to back him up. President-Elect Ray Kelly instantly composed an inspirational Op-Ed article (reprinted in this issue at page 3). Entitled, "Why We Do What We Do," Ray's piece, which ran in the Binghamton Press & Sun Bulletin, was not only an eloquent and dispositive answer to the vituperative flyer, but it also serves as a defining tract for all of us.

While rushing to the defense of a colleague who is so viciously maligned may seem natural, and it was for Ray and NYSACDL, apparently NYSACDL was alone in coming to Matt's aid. Neither the New York State Defenders Association, or the New York State Bar Association saw fit to respond to the pernicious disparagement to which Matt, and in turn all criminal defense lawyers, and any lawyer who represents an unpopular client in any civil or criminal matter, despite Matt's requests that they lend their voice in his support.

That lack of courage is both disappointing and discouraging. Yet it is tempered by the good sense demonstrated by the voters of Binghamton, who disregarded the character assassination and elected Matt. At the very bottom, the flyer asked the ultimate question: "Is someone who chose to spend his life defending criminals fit to do the job?" Obviously, the Binghamton voters answered that question with a resounding "Yes!"

The voters not only refused to reward the purveyor of fear and intolerance, but perhaps their vote symbolizes something that we, myopic in our view of our profession, do not realize: that the public, informed about the role criminal defense lawyers occupy in the criminal justice system and the community at large, recognizes that we are valuable, and provide an essential service that only a few thick-skinned individuals have the capacity and endurance to deliver. Perhaps the votes also saw in those qualities someone who was the better candidate – someone unafraid to stand up for their principles, and those in the Constitution, and who pursues a career consistent with those values. And someone who, when subjected to vitriolic attacks, does not cower in fear, but has the strength to stand his ground and fight back. We are used to that in our daily practices, but Matt displayed
ANNUAL DINNER 2006

NYSACDL ANNUAL DINNER
AT MARRIOTT FINANCIAL CENTER HOTEL
THURSDAY, MARCH 16, 2006

The New York State Association of Criminal Defense Lawyers’ Annual Dinner will be held at the Marriott Financial Center Hotel, Thursday evening, March 16, 2006. Tickets for the dinner are $150 for members, judges and court personnel and $175 for non-members. The cocktail reception will begin at 6:00 p.m., and dinner will be served at 7:30 p.m.

ANNUAL MEMBERSHIP AND BOARD MEETING
FRIDAY, JANUARY 27, 2006

All members of the New York State Association of Criminal Defense Lawyers are invited to attend the Association’s Annual Membership and Board Meeting on Friday morning, January 27, 2006.

ANNUAL DINNER JOURNAL ADS ON SALE

Show your support of the New York State Association of Criminal Defense Lawyers by placing an ad in the 2006 Dinner Journal, and by encouraging your colleagues, clients and associates to do the same. Funds earned by the Dinner Journal enable the Association to provide members with amicus and Lawyers Assistance Strike Force as well as supporting scholarship programs. Contact Executive Director Patricia Marcus via email at nysacdl@aol.com or by phone at (212) 532-4434 for more information.
IN MY OPINION

Ed. Note: President-Elect Ray Kelly wrote this article which appeared in the Binghamton Press & Sun-Bulletin in response to a request for support by NYSACDL members in Binghamton, where a fellow criminal defense lawyer sought election as Mayor. His opponents in their campaign literature and advertisements, questioned whether the citizens of Binghamton wanted their Mayor to be “someone who represents those kind of people.”

DEFENSE LAWYERS PROTECT, PRESERVE EVERYONE’S RIGHTS

by Ray Kelly

Ray Kelly of Albany is President-Elect of the New York State Association of Criminal Defense Lawyers.

How can you defend criminals? The question comes in many forms and many voices. Sometimes with an air of arrogant intolerance, sometimes with a tinge of anger, rarely with a sense of admiration.

Why did you pick that career? How can you defend “those” people?

What would happen to America, New York and Binghamton if defenders of fellow human beings did not exist? In the absence of the criminal defense bar, who would fill the duty of constant vigilance? Who would ensure that no conviction is obtained unless supported by legally sufficient evidence acquired in a constitutionally accepted manner?

The power of the police and prosecution and the powers behind the politicians would be absolute. Americans would seldom be angered by a “not guilty” verdict because none would ever occur.

Other nations have adopted systems where prosecutorial accusation equals conviction. Other people have lived under the “protection” of such an infallible system. Those who are in power prefer such a system. The only rule of politics is once you get power, keep it at any cost. People in power hate constitutions and bills of rights because of the limits placed on their power.

Those who are governed prefer limits on power.

Patriots of our American Revolution had a healthy, justified skepticism of people in power. Our founders believed only fools or slaves gave blind obedience to power. Our founders understood that a citizen left unprotected by a defender armed with the Bill of Rights must pray that the government is righteous, virtuous, perfect -- without guilt or malice, slow to anger, tolerant of dissent, racially and ethnically blind.

Our founders understood that a citizen without rights must pray that they or their loved ones are never accused, for without the protection of an adversary system and a presumption of innocence, simple accusation equals conviction.

We are advocates because we understand that while you may be able to guarantee that you won’t commit a crime, you cannot guarantee that you won’t be charged with a crime. We are advocates because if you are charged with a crime — or if your mother, father or other loved one were charged with a crime — wouldn’t you want every protection afforded by the Constitution and the Bill of Rights? Or would you feel that you had too many rights? And if you or your loved one is wrongly accused, then who is the victim?

When we walk into the courtrooms of New York, we are not merely defending the person who stands accused. We are defending a legal system that guarantees the presumption of innocence and every citizen’s right to equal protection under the law. The only way we can be assured of our right to a fair trial is if every citizen in our land is assured of his or her rights to a fair trial. When one of us is denied justice, we are all denied justice.

What Thomas Jefferson said 200 years ago applies today -- trial by jury is the anchor of all our liberties. By giving power to the people through the jury system, our Founding Fathers created roadblocks to police and prosecutorial misconduct and prosecution-oriented judges.

Our framers understood all too clearly that control of the police, control of the prosecution, control of the government and control of power takes place in the courtrooms of this country or it does not take place at all. And they enshrined these principles by providing for the right to counsel in the Sixth Amendment.

The lawyers most critical to protecting the constitutional rights of New Yorkers are not the ones watched and adored by the media. The heroes in the trenches are devoted criminal defense lawyers who, following the commands of our founding fathers, do their work in empty courtrooms, without the press, without an audience, and, in far too many instances, without the family of the human being on trial.

On a daily basis in every county of this state, a diminishing number of lawyers for our less fortunate speak on behalf of us all by championing the rights of those wrecked desolate by poverty, circumstance, class, color or hatred.

Let’s be clear and make no mistake — while an indictment may be captioned People v. Human Being, each time that a courtroom is brought to order we are all on trial, every one of us. We all are the people, and we all are entitled to zealous representation by a committed defender of fellow human beings.

We are advocates. We have had many clients but a single cause. Justice must be served. —
The Apprendi1-Blakely2-Booker3 trio of Supreme Court decisions of course put the kibosh on mandatory sentencing Guidelines. It should come as no surprise, however, that their reach has been argued to extend beyond merely authorizing consideration of all relevant factors – not just the Guidelines – before imposing sentence, and requiring Crosby4 remands of cases pending on direct appeal when Booker was decided.5 Thus, defense counsel have argued Booker’s6 applicability to forfeitures, restitution, supervised release violation proceedings, guilty pleas, persistent felony offender statutes and other proceedings. How have they fared? You win some, you lose some. Here’s a survey of the Circuit’s post-Booker decisions.

Forfeiture and Restitution

The argument for applying Apprendi-Booker to forfeiture and restitution is pretty straightforward: These decisions require a jury determination beyond a reasonable doubt of any fact that increases the defendant’s sentence and the maximum permissible forfeiture or restitution award depends on a finding of fact, i.e. the amount of a defendant’s ill-gotten gains. Therefore, the argument goes, Apprendi-Booker applies to these forms of punishment and judges may not impose forfeiture or restitution without a corresponding charge in the indictment7 and a jury determination of the relevant facts beyond a reasonable doubt.

In United States v. Fruchter, 411 F.3d 377 (2d Cir. July 14, 2005), the court, per Chief Judge Walker and joined by co-panelists Parker and Wesley, disagreed, at least with respect to forfeitures. While acknowledging that the defendant Braun’s argument, that Booker applies to forfeitures, "has a certain surface appeal," the court found “several flaws” in this reasoning, which led it to conclude that the Supreme Court’s pre-Apprendi holding in Libretti v. United States,8 that no jury trial right exists in forfeiture proceedings, remains good law. First, said the court, the Booker decision itself reiterated that the general forfeiture provision, 18 U.S.C. §3554 (among others) remains valid.9

5. The two-step Crosby protocol applies to defendants who had not argued in the district court that the mandatory Guidelines were unconstitutional. Where such an argument in fact was made (and in the absence of an appeal waiver) a defendant is entitled to vacatur of his sentence and a remand for resentencing without having to satisfy the first step in the Crosby protocol. United States v. Fagans, 406 F.3d 138 (2d Cir.2005).
6. We use the shorthand “Apprendi-Booker” to refer to the trio of cases.
7. Blakely did not require facts increasing a defendant’s sentence under Washington State’s sentencing statute to be alleged in the indictment since the Fifth Amendment’s Grand Jury Clause has not been applied to the states. See Albright v. Oliver, 510 U.S. 266 (1994). There can be no doubt, however, that any fact that must be proved in a federal felony prosecution must be alleged in the indictment.
9. The Supreme Court said: Although, as we have explained, see Part II, supra, we believe that Congress would have preferred the total invalidation of the statute to the dissenters’ remedial approach, we nevertheless do not believe that the entire statute must be invalidated. Compare post, at 783 (Stevens, J., dissenting). Most of the statute is perfectly valid. See, e.g., 18 U.S.C.A. §3551 (main ed. and Supp.2004) (describing authorized sentences as probation, fine, or imprisonment); § 3552 (presentence reports); §3554 (forfeiture); § 3555 (notification to the victims); § 3583 (supervised release).
“[M]ore importantly,” said the Chief Judge, “and ultimately fatal to Braun’s argument, is the distinction between criminal forfeiture proceedings and determinate sentencing regimes.” 411 F.3d 382. Booker, explained the court, found a Sixth Amendment violation to occur, “when a judge increases the punishment beyond [the range justified by the jury’s verdict] based upon facts not found by a jury beyond a reasonable doubt.” Id. at 383 (footnote omitted). Criminal forfeiture, however, is “not a determinate scheme.” Id. There is “no sentencing maximum … no previously specified sentencing range. … A judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing.” Id.

Although differences certainly exist between prison sentences and forfeitures, the supposed lack of a “previously specified sentencing range” in forfeiture cases is not one of them. The extent of RICO forfeitures under 18 U.S.C. § 1963(a) are keyed directly to, inter alia, “property constituting… proceeds… obtained… from racketeering … in violation of section 1962.” The maximum of such forfeitures, therefore, are statutorily limited by the finding of a particular fact, i.e. the proceeds obtained from the RICO activity of which the defendant has been convicted. The language of the cited forfeiture statute therefore does not support the court’s conclusion that “no sentencing maximum” exists with regard to forfeitures.

A similar argument may be made that Booker applies to restitution under the Mandatory Victims Restitution Act, 18 U.S.C. §§3663A and 3664, the maximum extent of which is statutorily limited to a “finding of fact,” i.e. the amount of loss occasioned by the offense conduct. See 18 U.S.C. § 3663A(b). However, although the issue has yet to be decided in this Circuit, other Circuits have rejected the argument. Some have held, simply, that restitution is not part of a defendant’s punishment, while others have held (akin to the Second Circuit’s forfeiture analysis in Fruchter) that there is “no specific or set upper limit for the amount of restitution in contrast to criminal statutes which provide maximum terms of imprisonment and fine amounts.” United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005). The first argument, which is contrary to Second Circuit law also would appear to be contrary to the Supreme Court’s recent statement in Pasquantino v. United States, 125 S.Ct. 1766, 1768 (2005) (holding that a wire fraud prosecution in connection with a scheme to evade Canadian liquor importation taxes was not barred by the common law revenue rule), that “[t]he purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct.”

Judge Bye dissented from the Eighth Circuit’s decision in Carruth, rejecting the majority’s conclusions that restitution was not part of the defendant’s punishment and that the MVRA did not specify a maximum amount of restitution that could be exceeded only upon the finding of additional “facts.” Judge Bye said there was no getting around the conclusion, after Blakely, that, for Sixth Amendment purposes, the maximum amount of restitution is de-

(continued on page 6)
fined by “facts” that may only be found by a jury beyond a reasonable doubt.12 Whether or not facts that determine the maximum level of forfeiture or restitution need be charged in the indictment and found by the jury presents a question that should, eventually, be addressed by the Supreme Court. There are arguments to be made on both sides of this issue; the Court could agree that, as part of a defendant’s sentence, forfeiture and restitution decisions are within the Booker line of cases. Or it could find, looking to “original intent” that there simply is no Sixth Amendment right to a jury trial with respect to forfeiture or restitution. The rationales thus far put forward by the circuits to reject Booker’s application to forfeitures and restitution, however, are either contrary to now-settled law (e.g., that restitution is not part of a defendant’s punishment), or deny the obvious (e.g., that there is no statutory maximum for forfeitures and restitution that can be exceeded only upon the finding of certain facts.

Pre-Booker Sentences in the Alternative

Post-Blakely but pre-Booker, many judges imposed sentences in the alternative, attempting to cover the possibility that Blakely would eventually upend the Guidelines regime. In United States v. Fuller, 04-4995 (2d Cir. October 17, 2005), the court considered such a case. The defendant pleaded guilty to bail jumping and also was convicted after trial of being a felon in possession of a firearm. The district court initially imposed a Guidelines sentence of 151 months. The sentence was vacated by the Circuit and remanded for resentencing, for reasons not here relevant. On remand, the district court drew upon its holding, in another case, that in light of the Supreme Court’s intervening decision in Blakely, the Guidelines were unconstitutional. It then imposed two identical 151-month sentences, one calculated on the assumption the Guidelines were unconstitutional and not applicable, the other using traditional Guidelines analysis. The defendant, invoking Apprendi, argued to the district court that any fact that increased the defendant’s sentence under the Guidelines had to be submitted to the jury and proved beyond a reasonable doubt. He also argued it was unlawful for the court to impose alternative sentences.

On appeal from this post-remand sentence, the defendant asserted, among other things, that the district court’s alternative “non-Guidelines” sentence did not conform to Booker and that yet another re-sentencing therefore was required. The government responded that the district court’s alternative sentence recognized that the Guidelines were advisory, and that the court properly imposed a discretionary, non-Guidelines sentence.

The Circuit sided with the defense argument, finding that the district court’s alternative sentence did not conform to Booker’s remedial decision; Booker requires that the Guidelines, as well as all the other factors listed in 18 U.S.C. §3553(a) be considered, whereas the district court held that it had complete discretion to impose any sentence within the statutory limits:

Because the District Court imposed its alternative non-Guidelines sentence on the assumption that the Guidelines “don’t exist at all” – and thereby acted on a proverbial blank slate without explicitly considering all the factors listed in 18 U.S.C. §3553(a), including the Guidelines, see 18 U.S.C. §3553(a)(4)(A), as required by Crosby, see 397 F.3d at 111 – we hold, once again with the benefit of hindsight, that the District Court erred in formulating Fuller’s sentence.

In light of Fuller, defense counsel should not be deterred from asserting on appeal a Crosby claim, even where the district court stated it “would have imposed the same sentence” whether or not Blakely were found to apply to the Guidelines.

Guilty Plea Waivers

Crosby, of course, generally requires a remand where unpreserved Booker error has occurred, to permit the district court to determine, in the first instance, whether it may have imposed a different sentence had it known the Guidelines were not mandatory. What if, however, the defendant agreed, as part of a plea bargain, to forego appeal of any sentence at or below a certain number

12. Judge Bye reasoned:

Once we recognize restitution as being a “criminal penalty” the proverbial Apprendi dominoes begin to fall. While many in the pre-Blakely world understandably subscribed to the notion Apprendi does not apply to restitution because restitution statutes do not prescribe a maximum amount, see, e.g., United States v. Bearden, 274 F.3d 1031, 1042 (6th Cir.2001), this notion is no longer viable in the post-Blakely world which operates under a completely different understanding of the term prescribed statutory maximum. To this end, Blakely’s definition of “statutory maximum” bears repeating again, “the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdicts or admitted by the defendant.” Blakely, 124 S.Ct. at 2537 (emphasis added). Applying this definition to the present case, it dictates a conclusion that the district court’s order imposing a $26,400 restitution amount violates the Sixth Amendment’s jury guarantee because all but $8,000 of said amount was based upon facts not admitted to by Carruth or found by a jury beyond a reasonable doubt.
of months and, in fact, received such a sentence? Would he still be entitled to withdraw his plea or obtain a Crosby remand on the theory that his plea was based on the erroneous pre-Booker assumption that the Guidelines were mandatory, and therefore not "knowing and intelligent"? The Circuit addressed various permutations on this issue in United States v. Morgan, 38 F.3d 376 (2d Cir. October 7, 2004)(B.D. Parker) (“Morgan I”) and 406 F.3d 135 (2d Cir. April 27, 2005) (B.D. Parker) (“Morgan II”); United States v. Haynes, 412 F.3d 37 (2d Cir. June 13, 2005) (per curiam) and United States v. Roque, 421 F.3d 118 (2d Cir. August 26, 2005) (Straub). In each case appellant left the court disappointed.

In Morgan, the defendant (in proceedings occurring after Apprendi was decided) pleaded guilty, under 21 U.S.C. §§ 841(a) and 841(b)(1)(C) to involvement in a bicoastal marijuana conspiracy and was sentenced to 97 months, a sentence within the stipulated Guidelines range of his plea agreement, which included his agreement to not appeal a conforming sentence. He initially argued on appeal that the waiver was unenforceable because it was not clearly explained to him by the Magistrate Judge at the time of his plea and therefore was not knowing and voluntary, and because it violated Apprendi by exceeding the maximum applicable to his offense. The court rejected the first argument, finding that the terms of the plea in fact had been adequately explained to him. It declined to reach defendant’s Apprendi argument – that absent an indictment alleging quantity and a jury finding thereof, his maximum sentence was five years under 21 U.S.C. § 841(b)(1)(D) – finding it waived by the plea agreement. Emphasizing the benefits of plea bargaining, the court explained:

It has long been clear in this Circuit that “[i]n no circumstance ... may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.” United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1993). This rule recognizes that “plea agreements can have extremely valuable benefits to both sides--most notably, the defendant gains reasonable certainty as to the extent of his liability and punishment, and the Government achieves a conviction without the expense and effort of proving the charges at trial beyond a reasonable doubt.” United States v. Rosa, 123 F.3d 94, 97 (2d Cir.1997).

Though rejecting the foregoing arguments, the court held the mandate in abeyance pending decision in Booker. Thereafter, in response to the Booker decision, the defendant raised two arguments. First, he sought to withdraw his plea, asserting it was not knowing and voluntarily because he could not anticipate the Guidelines would become advisory. The court ruled that Morgan waived this argument, “[b]ecause he never previously asserted such a claim, and, on the contrary, took the position at oral argument that he did not want to withdraw his plea.” 406 F.3d at 136 n.1. Second he argued that his sentencing appeal waiver was invalid in light of Booker. The court rejected this argument, again emphasizing the benefits or plea bargaining, and finding “no indication that the parties intended for the appeal waiver not to apply to issues arising after, as well as before, the waiver.” Id. at 137. The court added:

His inability to foresee that subsequently decided cases would create new appeal issues does not supply a basis for failing to enforce an appeal waiver. On the contrary, the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.

Id. (footnotes omitted).

In Morgan the defendant, when sentenced, did not allege that the Guidelines were unconstitutional, but in United States v. Haynes, such a claim in fact was made. There, the defendant pleaded guilty to a cocaine possession charge and agreed to not appeal if he was sentenced to 108 months or less. He was sentenced to 70 months under the Guidelines, despite his lawyer’s objection that the Guidelines were unconstitutional under Blakely. He thereafter appealed his sentence, again asserting his constitutional claim, this time with the benefit of Booker. The government moved to dismiss the appeal, citing Morgan, but the defendant argued Morgan was distinguishable because the claim there had not been preserved. The court found this to be a distinction without a difference and found that the appeal waiver was enforceable, again citing both the benefits of plea bargaining and the general rule that “appeal waivers are applicable to issues arising subsequent to the plea agreement, including issues created by new judicial decisions.” 412 F.3d at 38. The fact that Haynes preserved the issue, said the court, impacts only harmless error analysis, but does not impact the issue of waiver. Id.

Whereas in Morgan and Haynes the defendants unsuccessfully sought to be released from their no-appeal agreements, in United States v. Roque, 421 F.3d 118 (2d Cir. August 26, 2005 (Straub), the

(continued on page 8)
court addressed a defendant’s efforts to actually withdraw his plea as involuntary because entered pre-Booker on the erroneous assumption that the Guidelines were mandatory. Defendant Jose Saldana pleaded guilty to an armed robbery. He agreed not to appeal any sentence within the stipulated Guidelines range of 125 to 135 months’ imprisonment, and was thereafter sentenced to 135 months. His waiver agreement notwithstanding Saldana sought to withdraw his plea on appeal, arguing that his inaccurate, pre-Booker belief that the Guidelines were mandatory rendered his plea unknowing, unintelligent and involuntary.

Drawing on its holdings in Morgan II and Haynes, the court held “that a defendant who, prior to January 12, 2005, entered an otherwise enforceable plea agreement that included a waiver of right to appeal a sentence may not seek to withdraw his plea based on alleged mistake as to the mandatory nature of the United States Sentencing Guidelines.” 421 F.3d at 121. The agreement, said the court, was “voluntarily” in that it was not coerced; it was “knowing and intelligent” because the defendant understood the consequences of the waiver. The court acknowledged that conditions had changed and that the parties may have acted differently had they known then what they knew now. Yet, said the court, defendant gave up certain rights to gain certain protections and received the benefit of his bargain; he therefore was entitled to no relief.

Guilty Pleas and Drug Quantities

Unquestionably, drug quantity is an element of a §841 offense where it increases the maximum sentence a defendant may receive upon conviction, as is the case under §§841(b)(1)(A) and (B). But what if a court sentences defendant under such an aggravated statute but the sentence actually imposed is within the twenty year maximum for a non-aggravated offense? Is Apprendi still implicated?

In United States v. Gonzalez, 420 F.3d 111 (2d Cir. August 22, 2005) (Raggi) the defendant pleaded guilty to a one-count indictment charging conspiracy to possess with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. §841(a)(1) and was sentenced under §841(a)(1)(A) to what the court believed to be the statutory minimum of 20 years given its finding, by a preponderance of the evidence, that defendant – a repeat offender – in fact conspired to distribute more than 50 grams of base. This was over defendant’s assertion that his intention was to sell mostly “beat” drugs, known as “nacona” (a Spanish contraction for “de nada con nada,” meaning “something that doesn’t contain anything”).

Gonzalez did not directly challenge his sentence on appeal, but rather asserted that his pre-sentence motion to withdraw his plea should have been granted because Apprendi and United States v. Thomas, 274 F.3d 655 (2d Cir.2001) (en banc) – both decided between his plea and sentence – rendered his plea insufficient to support the crime for which he was sentenced -- §841(b)(1)(A) -- because he had not admitted the statutory drug quantity and had been misinformed as to his right to require the jury to decide drug quantity.

The government responded that quantity is not an element of a § 841(b)(1)(A) conviction where the sentence imposed does not exceed the legally permissible sentence upon conviction of an “unquantified crime” under §841(b)(1)(C), i.e. twenty years.

The court rejected the government’s argument and clarified that “the statutory drug quantity is an element in all prosecutions of aggravated §841 offenses.” 420 F.3d at 115. It refused to determine the legality of a sentence post hoc, i.e. looking backward after sentence is imposed, to determine whether the sentence in fact exceeded the maximum sentence permissible for an “unquantified crime”: “Even if the right to trial, as recognized in Apprendi, is violated only by certain sentences,” said the court, “the law cannot reasonably defer identification of the elements of a crime until after a prosecution is concluded.” Id.

The remedy chosen by the court was to remand the case to permit Gonzalez to withdraw his guilty plea. Obviously he would have preferred that the court require that he be resentenced under §841(b)(1)(C), without a mandatory minimum, but, the court observed, the government was under no obligation to permit him to plead to a lesser offense than §841(b)(1)(A), with its mandatory minimum.

Shortly after deciding Gonzalez, the court had another opportunity to interpret Apprendi and Thomas, in United States v. Cordoba-Murgas, 422 F.3d 65 (2d Cir. September 7, 2005) (Cabranes), where the court held that a defendant who pleads guilty to an indictment charging a violation of 21 U.S.C. §841(a)(1), but which does not allege a specific quantity of drugs, must be sentenced under §841(b)(1)(C) even if he allocutes to a quantity of drugs that would otherwise support a sentence under §841(b)(1)(A) – unless he also explicitly waives his right to be indicted under one of those sections.

Defendant Louis Cordoba pleaded guilty to a count of an indictment charging him with conspiring to distribute an unspecified quantity of cocaine. In his plea agreement he acknowledged being complicit in the distribution of between 15 and 50 kilograms – a quantity that would authorize a sentence of between five and forty years under §841(b)(1)(B), and the court sentenced him to 262 months imprisonment. This was, however, 22 months longer than the maximum twenty-year sentence permissible upon conviction for distributing an unspecified quantity of drugs -- §841(b)(1)(C). He argued on appeal that under Thomas, “the type and quantity of drugs is an element of the offense that must be charged in the indictment and submitted to the jury,” 274 F.3d at 660 and that he

13. The court explained that, by “aggravated drug offenses” it meant, “crimes defined by reference to the lettered subsections of §841(b)(1) that provide for enhanced penalties for drug trafficking in specified quantities.” 420 F.3d at 115 n.2.
had not waived his right to be prosecuted by indictment. Accordingly, he said, he could not be sentenced under §841(b)(1)(B). The government responded that Cordoba’s admission that he intended to distribute between fifteen and fifty kilograms of cocaine effectively waived his right to be indicted by the grand jury for that quantity.

The Circuit rejected the government’s arguments. The failure to prosecute a defendant by indictment is a jurisdictional defect. Although a defendant may waive his right to indictment, that waiver must be knowing and intelligent: “[A]n allocution that settles the issue of drug quantity cannot serve to waive the requirement of Thomas that a defendant be charged with drug quantity in the indictment ‘if the type and quantity of drugs involved in a charged crime may be used to impose a sentence above the statutory maximum for an indeterminate quantity of drugs.’” 422 F.3d at 71, quoting Thomas, 274 F.3d at 660. The court remanded the case to the District Court with instructions to vacate Cordoba’s sentence and impose a new sentence not to exceed twenty years.

Persistent Felony Offenders

Several litigants have argued, in habeas corpus proceedings, that Apprendi requires that jurors — and not judges — determine the existence of any facts that might warrant a court’s discretionary decision to declare a defendant to be a persistent felony offender under New York Penal Law §70.10. Under this statute a defendant is designated a “persistent felony offender” if he stands convicted of a felony after having previously been convicted of two or more felonies. If so designated, the defendant’s potential sentence is increased to that applicable to an A-1 conviction if the court also is of the opinion that the defendant’s history and character, and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-term supervision will best serve the public interest.

These arguments were presented to the Second Circuit by three litigants, consolidated for decision in Brown v. Greiner, 409 F.3d 523 (2d Cir. June 3, 2005) (Leval). Each petitioner argued in the district court that Apprendi does, in fact, apply to New York’s persistent felony offender statute, and the New York Court of Appeals had erred in finding otherwise. One of the litigants had been the appellant in the New York State Court of Appeals’ decision that initially upheld the persistent felony offender statute against an Apprendi attack. People v. Rosen, 96 N.Y.2d 329, 728 N.Y.S.2d 407 (2001). The district courts had granted relief in two instances and denied relief in a third.

The Circuit, however, rejected the argument. Applying the lenient AEDPA standard – i.e. whether the state court’s proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” 28 U.S.C. §2254(d) – the Circuit found that it was not unreasonable for the New York Court of Appeals to conclude that such determinations regarding the defendant’s history, character, and offense fall into a different category from the essential statutory elements of heightened sentencing, or functional equivalents thereof, that were addressed by the Supreme Court’s Apprendi ruling. It explained:

We cannot say the New York Court of Appeals unreasonably applied Apprendi when it concluded that this second determination is something quite different from the fact-finding addressed in Apprendi and its predecessors. We recognize that determining what sentence “best serve[s] the public interest” under the statute turns on findings relating to the “history and character of the defendant and the nature and circumstances of his criminal conduct.” N.Y. Penal Law §70.10(2). The statute, however, does not enumerate any specific facts that must be found by the sentencing court before it can conclude that the extended sentence is in the public’s “best ... interest.” It was not unreasonable for the Court of Appeals to conclude that such determinations regarding the defendant’s history, character, and offense fall into a different category from the essential statutory elements of heightened sentencing, or functional equivalents thereof, that were addressed by the Supreme Court’s Apprendi ruling. We therefore conclude that the state court decisions affirming Petitioners’ sentences were not “contrary to, or ... an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

409 F.3d at 534-535.

The cited cases reflect the ingenuity of defense counsel, who seek to apply Apprendi-Booker beyond their specific holdings. Without question more possible applications of these “watershed” (okay – not in the habeas sense of the word) decisions will be suggested in the future. Eventually many of these cases will work their way to the Supreme Court for decision. At the least, defense counsel must keep current with these developments and preserve all possible Apprendi-Booker issues, even those that may appear to be on the fringe; after all, it wasn’t long ago that the arguments accepted by the Court in Apprendi and its progeny were considered fringe arguments.

14. Just days after Brown v. Greiner was decided, the New York Court of Appeals, in People v. Rivera, 5 N.Y.2d 61, 800 N.Y.S.2d 51 (June 9, 2005), reaffirmed the holding of People v. Rosen, that the persistent felony offender statute in fact does not violate Apprendi because the determination of whether someone is a persistent felony offender — thus exposing him to the higher A-1 sentence — depends entirely on a judicial finding that he has two previous felony convictions; the court’s subsequent determination regarding whether a particular defendant should be sentenced as if convicted of an A-1 offense is made only after the “previous felony offender” designation and therefore, said the Court, does not implicate the defendant’s right to a jury trial.
MULTI-DEFENDANT TRIALS: SIXTH AMENDMENT RIGHTS GET LITTLE PROTECTION

by Jay Goldberg

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Much enthusiasm followed the decision in Crawford v. Washington, 124 SCt 1354 (2004). If that were meant to convey that defendants will now receive their full panoply of rights guaranteed to them under the Sixth Amendment, the assessment of the effect of Crawford is wide of the mark. An extant principle of law serves to deny an accused his right of confrontation in the case where multiple defendants are on trial for having conspired to commit a crime. The subject has escaped critical analysis, but the principle works to prejudice at least one or more of the defendants by preferring the protections of the Fifth Amendment to those of the Sixth Amendment.

Confronting an Accuser

Crawford rests on the principle that a defendant cannot adequately present his defense without being able to confront his accuser, or at least test the credibility of an out-of-court declarant, in that case his wife, a co-conspirator. She made a full confession to law enforcement officers implicating Crawford in the crimes. The holding was not remarkable for even under pre-Crawford rulings, such a statement made to law enforcement post-conspiracy would be inadmissible.

The defense bar always sought to limit any expansion of exceptions to the hearsay rules. Nonetheless, prosecutors making use of FedREvidRules 803 (24) and 804 (b)(5), the so-called residuary provisions of the hearsay exceptions, successfully expanded the rules to permit the admission of a co-defendant's plea allocution with the limiting instruction that it was admitted only as proof of the conspiracy, not as proof of a defendant's membership therein. As Justice Robert Jackson wrote, “the naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction.”

Crawford did exert a brake on the admissibility of out-of-court testimonial proof previously admitted for the truth of the matters asserted. Henceforth, there is no balancing test that would admit out-of-court statements that are deemed testimonial. However, Crawford did not define what is “testimonial.” To the dismay of criminal practitioners, the circuit has ruled that out-of-court statements made by a co-conspirator in the course and furtherance of the conspiracy are not “testimonial” and may admitted for the truth, whether or not the co-conspirator is available.

While the bar and judiciary grapple over the question of whether proof is or is not “testimonial,” a little analyzed, but pernicious intrusion into Sixth Amendment rights continues unabated. As noted earlier, the problem arises in a joint-defendant trial where there exists a serious tension between the Fifth and Sixth Amendments.

The Problem at Issue

The following example brings into focus the problem confronting the bar and courts: An individual (“lender”) loans money at extortionate rates to a victim. In the course of lending the money he makes repeated statements that the money is not his, it is the defendant’s, and that the defendant will be angered if the money is not repaid. The lender tells the victim that he is connected with the defendant. He also tells the victim that he will see this for himself for the defendant will be picking him up at the victim’s office. The victim sees this but does not overhear any conversation.

Assume the lender is not available and the defendant is tried alone. Defendant’s counsel may argue either that the victim is not telling the truth as to what the lender said, but more than likely the defendant’s counsel will argue that the lender was not authorized to use defendant’s name for he was not involved.

4. There should be little difficulty in having the statement of the lender admitted as a co-conspirator statement. The court is given the responsibility to determine whether there was a conspiracy and the defendant a member of that conspiracy under the test of Bourjailly v. United States, 483 U.S. 171 (1987). The Court is to determine this as a matter of law, under Rule 104. The court may utilize the contents of the lender’s out-of-court statement and other indicia, which may well, be the defendant’s appearance, at the appointed time, at the victim’s place of business. The prior practice of relying on the lender’s statements alone, as sufficient proof of the conspiracy is no longer permitted with the amendment of Rule 801(d) (2) (E). The existence of a conspiracy and the defendant’s membership in it must be proved only by a preponderance of evidence for the lender’s statement to be admitted against the defendant.
It is not unusual for the defense to obtain from cross-examination of the FBI case agent that it is not uncommon for a lender to use another person’s name in connection with loaning funds. While this has the risk that the jury will be prejudiced against the defendant believing the use of the defendant’s name connotes that the defendant is a bad man, it remains for effective counsel to convince the jury that whatever they may think about the defendant, “this case” is concerned with one discreet issue limited to whether the lender was authorized to use the defendant’s name. Jurors take their role seriously and acquittals are obtained by not contesting a collateral issue. In the final analysis, the government’s case will rise or fall on the credibility, or lack there of, with respect to the lender’s out-of-court declaration.

The central argument of the defense will be that the jury must consider that there is no in-court testimony from the lender, there is silence from the witness stand, and no effective way to assess the truth of the lender’s statement. Counsel will argue that the victim having seen the lender and defendant together does not advance the government’s case. Counsel will appropriately further argue that cross-examination is the surest way to uncover falsity. A juror’s assessment of the truth or falsity of the lender’s statement regarding his claimed conspiratorial relationship with the defendant is best made by observation of the demeanor of the lender as he undergoes cross-examination.

The Out-of-Court Declarant

How, short of cross-examination, is one to determine whether the lender was merely using the name of the defendant to assure repayment of the loan? Did the defendant know or ever authorize the lender to use of his name? Is there any proof the defendant advanced any the monies to the victim through the lender? Or any proof the defendant received any proceeds from the victim? This example may oversimplify the quantum of proof offered by the government in a given case, but the principle remains, the failure of the out-of-court declarant to appear as a witness is “worth its weight in gold.”

When the Federal Rules of Evidence were promulgated, Congress, on the recommendation of the Supreme Court, enacted an extraordinarily critical rule to address the circumstance where the declarant does not testify. Rule 806. Rule 806 provides that when an out-of-court declaration is admitted, the declarant’s credibility may be attacked by any evidence that would be admissible had the declarant testified as a witness. Evidence of a statement or conduct by a declarant made at any time inconsistent with the admitted statement is not subject to any requirement that the absent declarant be given any opportunity for explanation. Rule 806 is not limited to prior inconsistent statements; every piece of admissible evidence that casts doubt on the credibility of the declarant, such as his prior criminal record, any psychiatric record, and with the court’s permission, any other misconduct bearing on his credibility may be considered by the jury.

One may argue that since it was the government that offered the out-of-court testimony on its case-in-chief, the obligations under Brady v. Maryland, should be triggered to require the government to make available any impeachment material that it has with respect to the out-of-court declarant. This Brady issue has never been addressed by any court. Practitioners in this circuit unfortunately can be assured that with the restrictive approach taken by the circuit in United States v. Coppa, 267 F3d 132 (2d Cir. 2001) the government will not be required to furnish any impeachment material. The gathering of the material will then be left to the defense.

The defense summation will weigh heavy in favor of the defendant, for so much can be made of the proof that has been gathered to impeach the lender, but more particularly his absence from the stand. The absence of the lender, the reliance by the government on the out-of-court declaration of the lender will, in most cases, convince the jury that there is a reasonable doubt of defendant’s involvement.

Amendments and Tension

The situation facing a defendant is materially different in a case where there is a joint trial of the lender and the defendant. Simply stated, the defendant cannot receive the fair trial the Sixth Amendment dictates by reason of the tension that exists between the lender’s Fifth Amendment rights and the defendant’s right of confrontation and ability to present a defense. The Fifth Amendment right of the lender will trump the defendant’s Sixth Amendment rights. That is the consequence of the defendant having the lender at the defense table. The government will offer the out-of-court statement of the lender and it will be admitted after the court makes its necessary determination.

Assume the victim is credible. But, the lender’s defense is that he did not loan monies at extortionate rates of interest. The victim has testified to the out-of-court statements of the lender. The defendant will have to sit watching the lender’s failing efforts to shake the victim’s testimony. That unsuccessful cross-examination will lead the jury to believe that the loan had been made and that the lender is protecting the defendant. The best that defense counsel can do on cross-examination is develop that the victim does not have personal knowledge as to whether the defendant was involved. This is woefully inadequate to protect the defendant’s rights.

The use of Rule 806 will be not be available to the defendant if the lender chooses not to testify. Lender’s counsel will object and argue that the reason the lender did not testify was to avoid being impeached by proof of his criminal record, his psychiatric record, and the acts of misconduct affecting his credibility. The court most likely will sustain the lender’s objection. This denies the defendant a critical tool to impeach the lender’s out-of-court declaration. The

(continued on page 12)
Inference of Truthfulness

There is no case holding otherwise, namely that the defendant can resort to any argument that the failure to be able to call the lender as a witness or the lender choosing not to testify, should be considered by the jury as creating an inference against the truthfulness of the out-of-court statement. In short, the lender’s Fifth Amendment right is sacrosanct in a contest with the defendant’s Sixth Amendment right.

The situation is no different were the defendant to testify and his lawyer in summation to point out that he is the only one to testify as to the truth or falsity of the claimed incriminatory statement. In short, the lender’s Fifth Amendment right is sacrosanct in a contest with the defendant’s Sixth Amendment right.

The defense must turn to the discretionary remedy of a severance pursuant to FedRCrimPRule 14. The highly respected Judge John Miner Wisdom first dealt with this thorny problem in DeLuna v. United States, 308 F2d 140 (5th Cir. 1962) petition for rehearing denied 324 F2d 375 (1963) holding that where there are antagonistic defenses with one defendant accusing another, there is a per se remedy of a severance. The court was divided with a concurring opinion arguing that severance was discretionary.

The Supreme Court in 1993 in the case of Zafiro v. United States, 506 US 534 (1993) held that mutually antagonistic defenses, hostility among defendants, or the attempt by one defendant to exculpate himself by incriminating another defendant does not require that defendants be tried separately. The Court did not consider how limited the rights of one defendant are when this occurs. However, in our example the defendant and the lender are not accusing one another. The lender is claiming that he never lent the money at illegal rates, or even referred to the defendant on any occasion.

Following Zafiro, the circuit became more inclined to uphold the denial of a severance. For example, it affirmed the denial of relief in a case where one defendant testified a co-defendant committed murder and attempted to murder him. Counsel generally fail to secure such a severance with courts stating, “defendants indicted together should be tried together and judicial economy too requires this.”

The last remedy available to a defendant, but so seldom granted, is a motion under United States v. Finkelstein, 526 F2d 517 (2d Cir. 1975), which would require in the example the affidavit of the lender. The affidavit would have to represent that the lender will give testimony denying that the defendant was involved or that he mentioned the defendant’s name. The affidavit must represent that he will testify at a separate trial and waive his right of self-incrimination. If, however, there is a likelihood that the testimony will be subjected to damaging impeachment, that the affiant’s offer to give exculpatory information is conditioned upon his being tried first, or that judicial economy augers against separate trials, the motion will be denied.

Conclusion

Justice simply cannot be served where the result favors a defendant’s Fifth Amendment rights over another defendant’s Sixth Amendment rights. A defendant should be able to explain why he was unable to call the lender to testify or impeach the out-of-court declaration, for after all, confrontation is the essence of Crawford. Without such a right, Crawford, rather than breathing new life into the Confrontation Clause, only delivers shallow breath in support of Sixth Amendment rights in a joint defendant trial. Our judicial system, Justice Jackson wrote, has made a unique contribution to the science of government, most assuredly not so for the reason that it achieves economy in the trial of cases; but rather, for the reason that it recognizes that justice is the main function of any criminal justice system.
After nine months, the Second Department finally issued its decision in *Bellony v. Chambers*, 800 N.Y.S.2d 733, 2005 N.Y. App. Div. LEXIS 8716 (August 22, 2005), in which NYSACDL and NACDL appeared as *amicis*. *Bellony* is a pretrial detainee who was ordered locked down without access to the outside world except through counsel. There was a claim of unspecified threats, the basis for which was not revealed to the defendant. Bellony filed an Article 78 petition to challenge the *ex parte* order. The order was issued without notice or any opportunity to contest the underlying allegations. The Second Department held that Bellony “had no right to notice and an opportunity to be heard in the first instance to challenge the People’s application.” Petitioner’s counsel filed a notice of appeal seeking appeal as of right pursuant to CPLR 5601(b)(1). NYSACDL Board member Donna Newman is prepared to file a brief in support of petitioner, but we are informed that the Court of Appeals must first decide whether to take the case “as of right” because it raises a substantial constitutional question. If the Court declines to do so, Bellony may still seek leave to appeal and our brief may then be submitted in support of that application. If the Court simply takes the case, we may apply to submit a regular *amicus* brief.

We have filed a brief in the Supreme Court of the United States on behalf of NACDL and NYSACDL in *Rivera v. New York*, 05-6081. We are supporting a petition for a writ of *certiorari* from the disappointing decision in *People v. Rivera*, 2005 N.Y. LEXIS 1214 (June 9, 2005). There, the State Court of Appeals reaffirmed that the discretionary persistent statute is constitutional notwithstanding *Apprendi*, *Ring* and *Blakely*. James Neuman authored our brief in which we argue that the New York law is plainly unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002) and that, in any event, the Supreme Court’s prior decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) should be revisited.

We had planned to file an *amicus* brief in NYSACDL member Lloyd Epstein’s case in the First Department, *People v. Christopher Fernandez* questioning the constitutionality of the deliberate indifference murder statute. Ira Feinberg and his associates at Hogan & Hartson were prepared to write a brief it developed that the issue was not preserved nor did the appellant raise the question whether counsel was ineffective for failing to raise it. Consequently, we decided not to file in this case.

Our *amicus* effort in *Muntaqin v. Coombe*, 01-7260, where we argued that New York’s felon disenfranchisement law violates the Voting Rights Act, is *sub judice*. Likewise, our arguments attacking the Federal Bureau of Prisons’ February 2005 regulations which restrict prisoners’ access to halfway houses, *Levine v. Menifee*, 05-2590-pr, await a decision from the Second Circuit.

NYSACDL members can 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

(Items not archived.)
BULLETIN BOARD

(Items not archived.)
Law Enforcement Embraces Technology

“[M]any police vehicles are equipped with laptop computers that allow electronic communications to be sent and received directly to and from the vehicle. It is now also possible to supply officers with portable and lightweight palm computers which will also allow transmissions to and from the officer.”1 That information is six years old. Today’s toys are faster, smarter, and smaller.

I own a “pocket PC”2 or “smart phone.” My device fits in my shirt pocket. It is a telephone and a personal digital assistant (PDA). Here’s what else it does: sends and receives e-mails, and the e-mails can have attached text files, photographs, video clips and audio files; takes pictures and video clips; records audio; sends and receives messages instantly; explores the Internet; and receives facsimile transmissions. A police officer armed with one of those phones can make an application for a search warrant in minutes — not hours.

A Glimpse Behind The Scenes

Law enforcement’s thirst for technology has not gone unnoticed by the courts. Let me tell you a story from behind the scenes about footnote 3 in Kyllo v. U.S.3 Unless you are a law professor, you are probably asking yourself, what was footnote 3 all about? Or maybe, what is Kyllo all about?

In Kyllo, the court held the warrantless use of a thermal imaging device on a home is a violation of the Fourth Amendment. I was privileged to be co-counsel in the trial with Portland, Oregon NACDL stalwart Ken Lerner. I urged Ken to include in his Supreme Court briefing papers an argument that this case would have implications for all sorts of technological issues that would be confronting the court in years to come.

In typical conservative Oregon fashion, Ken resisted my suggestions to make this a big, overarching issue that would affect search and seizure cases for years to come. After Ken argued the case, imagine the whoop and holler I let fly after reading footnote 3. OK, I’ll stop the suspense. This is what Justice Scalia wrote:

The ability to ‘see’ through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a ‘Radar-Based Through-the-Wall Surveillance System,’ ‘Handheld Ultrasound Through the Wall Surveillance,’ and a ‘Radar Flashlight’ that “will enable law enforcement officers to detect individuals through interior building walls.”

www.nlectc.org/techproj/ (visited May 3, 2001). Some devices may emit low levels of radiation that travel ‘through-the-wall,’ but others, such as more sophisticated thermal-imaging devices, are entirely passive, or ‘off-the-wall’ as the dissent puts it.

Kyllo v. U.S., 533 U.S. at 37, n.3.

If you want to learn about the latest law enforcement technology, go to where Justice Scalia has gone: www.nlectc.org/techproj.

2. For an overview of what is “out there” go to http://www.pocketpcmag.com/.
**Information Is Gold**

We are a world of “information hunter-gatherers.” The person (or business, or investor, or corporation, or nation, etc.) who has access to accurate information quicker than anyone else wins ______. You fill in the blank.

Law enforcement is keenly aware of the power of this technology. It uses it to catch criminals. And we often do not even know that the technology has been used against our clients.

Have you ever wondered if the military’s spy satellites are used to track “motherships” smuggling contraband? Have you ever wondered if NSA “passes off” this covert intelligence to the DEA? If spy satellites are used to observe private places in the land mass of the U.S.A., is that a search? Has a prosecutor ever informed you that spy satellite technology has been used in a drug case you were defending? If your interest is at all piqued by these questions, get the article noted below and enjoy yourself reading it.

**Oregon Announces A Call To (Electronic) Arms**

While law enforcement eagerly uses the latest technology to catch criminals, it rarely uses that technology to comply with the command of the Constitution requiring search warrants. Almost 20 years ago, Oregon Supreme Court Justice Robert E. Jones picked up his pen (well, you’re right, he probably sat before his computer and typed) and made this prediction:

In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception. All that would be needed in this state would be a central facility with magistrates on duty and available 24 hours a day. All police in the state could call in by telephone or other electronic device to the central facility where the facts, given under oath, constituting the purported probable cause for search and seizure would be recorded. The magistrates would evaluate those facts and, if deemed sufficient to justify a search and seizure, the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed. The warrant could either be retained in the central facility or electronically recorded in any city or county in the state. Thus, the desired goal of having a neutral magistrate could be achieved within minutes without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches.

Despite that prediction, law enforcement has not been “slow to respond” — it has been virtually “non-responsive.” Criminal defense lawyers need to bring law enforcement officers kicking and screaming into the technology-laden 21st Century so that the warrant clause of the Fourth Amendment can be resuscitated.

**The Federal Procedure**

If you have a warrantless search case in federal court, you can challenge the failure of the agents to seek a warrant by “telephone or other appropriate means.” Fed. R. Crim. P. 41(d)(3)(A) provides:

A magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means, including facsimile transmission.

The magistrate judge is required to make a “verbatim record” of the conversation with “a suitable recording device.” The applicant is required to prepare a “duplicate original warrant,” the magistrate signs the original warrant, and directs the applicant to sign the magistrate’s name on the “duplicate original warrant.” The procedure for obtaining federal telephonic search warrants has been around, in one form or another, since 1977. The federal courts have concluded that this telephonic search warrant procedure was intended to encourage agents to use this procedure, particularly where the existence of exigent circumstances was a close call. And, the United States Supreme Court recognized this procedure can be easily utilized if a magistrate is not nearby when it declared:

In routine search cases such as this, the short time required to obtain a search warrant from a magistrate will seldom hinder efforts to apprehend a felon. Finally, if a magistrate is not nearby, a telephonic search warrant can usually be obtained. See Fed.Rule Crim.Proc. 41(c)(1), (2).

**State Court Procedures**

Oral search warrant procedures are authorized in several states, including Alabama, Alaska, Arizona, California, Idaho, Kansas, Louisiana, Michigan, Minnesota, Michigan, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Utah, and Washington. The National Advisory Commission on Criminal Justice Standards and Goals strongly recommends that “every State legislature enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers.” Even where no court rule or statute exists author-

(continued on page 18)
rizing telephonic warrants, courts have upheld such warrants. In California, an “early adopter of electronic warrant procedures, has been the most progressive state in expanding the methods by which an officer may apply for a search warrant.” In 1973, the San Diego District Attorney’s Office” estimated that 95 percent of its request for telephonic warrants were processed in less than forty-five minutes.” Nevertheless, almost 30 years later an empirical study came up with a “surprising finding[]” — that there was an “apparent underutilization of existing statutory procedures for telephonic and electronic search warrants.”

Federal agents have fared no better. Consider the following from the Ninth Circuit:

To date, [Rule 41(c)(2)] apparently remains a largely ignored provision, at least according to representations of the U.S. Attorney at oral argument in this case. Counsel could not answer our questions concerning the government’s experience with telephone warrants apparently because the procedure outlined in Rule 41(c)(2) is simply not used in the Central District of California.

Add this from the Eleventh Circuit:

In the age of telephonic warrants, we doubt that it would have been impossible (or even difficult) to obtain a warrant by telephone on that Wednesday afternoon. If we were to condone the warrantless entry of Ramirez and Santa’s apartment under the circumstances presented here, we would effectively allow officers to create exigencies by failing to procure a warrant while there was time to do so. Every situation would become an eventual emergency; the practice of obtaining a warrant would soon fall by the wayside, and the exception would swallow the rule.

A third example comes from the Seventh Circuit:

Inexplicably, during that thirty-minute period he did not attempt to arrange for a telephonic search warrant despite the provision for such warrants in Federal Rule of Criminal Procedure 41(c)(2). Five years earlier the Supreme Court recognized in Steagald that the availability of telephonic search warrants minimized the burdens of Steagald’s requirement of a search warrant to enter a third person’s house to seize a fugitive. 451 U.S. at 222, 101 S.Ct. at 1652. A telephonic search warrant should have been sought during the thirty-minute period the agent waited the other officers.

Suppression Will Bring About Resurrection

If defense lawyers begin moving to suppress evidence because the police have not utilized existing technology to seek to obtain electronic search warrants, courts will begin suppressing evidence. The police will respond to this depressing state of affairs (for them, not for the defendants and their lawyers) and begin utilizing electronic search warrant procedures. This will result in more search warrants being issued, thus protecting citizens from the potential harm from unwarranted intrusions into private places by police officers “engaged in the often competitive enterprise of ferreting out crime.” New life will be breathed into the Fourth Amendment (and state constitutions’ parallel provisions).

Application In A Concrete Situation

By now, you are probably thinking about firing up a motion to suppress guns, or drugs, or bloodstained clothing. That is all well and good, but come with me down the highway and let’s see if we can create a federal constitutional earthquake — California style — that will cause a classic constitutional case to crumble and fall. Yes, the time is ripe to disassemble Schmerber v. California.

Time Out!

The method and manner of using technology — and science — to overrule Schmerber will have to be addressed in the next issue of the Champion. Stay tuned.

13. State v. Lindsey, 473 N.W.2d 857 (Minn. 1991); State v. Valencia, 93 N.J. 126, 459 A.2d 1149 (1982); but see White v. State, 842
19. U.S. v. Patino, 830 F.2d 1413, 1416 (7 Cir. 1987)
Two men emerge from an alley and fire several shots, striking and killing a 16-year-old boy sitting on the steps of a nearby house. The men quickly run back down the alley, disappearing from sight. Witnesses immediately call the police but the only description they can provide is that the men were black and one wore a gray shirt. The police broadcast a description of the men and minutes later a patrol officer detains a man coming out of a carryout store wearing a gray shirt. Although the witnesses cannot identify this suspect in a show up, the police take him to headquarters for questioning. While there, gunshot residue swabs are taken from his hands. Laboratory tests on the swab from one hand comes back positive; the lab report states that “unique gunshot residue (GSR)” was detected.

Imagine representing a client who finds himself in this situation. Assume your client claims he had nothing to do with the crime and never fired a gun. Could he possibly be telling the truth? What can you, the defense lawyer, do?

The first step is to realize that GSR evidence may have serious limitations. Recent litigation in Baltimore, spearheaded by the Office of the Public Defender’s Innocence Project and Forensics Division, illustrates just how serious those limitations can be and points the way to effective GSR challenges in other jurisdictions. The Baltimore experience revealed some startling facts about GSR analysis that every defense lawyer should understand before dealing with this evidence.

What is GSR?

When a gun is fired, particles of the expended gunpowder often blow back onto the shooter’s hands and body. These particles can be collected with adhesive lifts and then analyzed using a technique known as SEM-EDS (Scanning Electron Microscope with associated Energy Dispersive X-Ray Spectrometry). The analysis reveals the elemental composition of tiny particles found on the lifts. Based on the composition (and sometimes the number) of particles detected, the analyst makes a judgment about whether gunshot residue (GSR) is present.

A key problem with GSR analysis, as currently practiced, is that there are no definitive standards for distinguishing gunshot residue from other substances. Forensic laboratories have applied a variety of standards for “identifying” GSR and these standards have shifted over time. Before the year 2000, most laboratories reported that GSR had been detected upon finding particles of barium and antimony in a sample. But a growing body of evidence showed that barium and antimony are also found in a number of other substances in the environment that are not associated with firearms. Beginning in 2000, most analysts identified a substance as “unique GSR” only if they found a combination of barium, antimony and lead fused together in a single particle. But even that standard was cast in doubt by a 2002 article reporting particles of barium, antimony and lead fused together in a single particle. But even that standard was cast in doubt by a 2002 article reporting particles of barium, antimony and lead fused together in a single particle. But even that standard was cast in doubt by a 2002 article reporting particles of barium, antimony and lead fused together in a single particle. But even that standard was cast in doubt by a 2002 article reporting particles of barium, antimony and lead fused together in a single particle.

1. Barium and antimony are components of the primers used in most cartridges.
GSR Everywhere?

Even assuming that particles recovered from your client’s hand are “unique GSR,” the question remains how those particles got deposited on his hand. There have been published reports since at least 1995 documenting secondary transfer of GSR from police officers or their equipment to suspects.4 But there is little agreement among GSR analysts about how to take account of the potential for secondary transfer when interpreting GSR test results. Recognizing the possibility of background GSR contamination, some laboratory protocols such as that of the Maryland State Police, require detection of more than one particle for a positive result. The protocols state that if only one “unique GSR particle” is detected then the possibility of secondary transfer cannot be eliminated and the result should be reported as inconclusive. Other labs such as the Illinois State Police and the Federal Bureau of Investigation require a finding of at least three particles before an association can be made with firing or handling a weapon, while still other labs require the presence of five particles or more.

As far as we can tell, there is no validation data to support any of these protocols. None of these laboratories has studied the levels of background contamination in the relevant environments sufficiently to be able to determine how frequently one, three, five or more particles will appear on the hands of suspects who had no recent contact with a discharging firearm. The problem is compounded by the willingness of some laboratories to make strong statements linking a suspect to a crime based on data other laboratories would consider inconclusive. For example, the Baltimore City Police Department issues a standard form report when only one “unique GSR particle” is detected stating:

There is a possibility that these residues were transferred from the surface of a firearm or from an object which lay immediately adjacent to a firearm during its discharge. Most probably, however, the subject’s hands were immediately adjacent to a discharging firearm or were themselves used to fire the firearm within a few hours of the time of sampling.

Conclusions of this nature are neither scientifically valid nor generally accepted; such statements should not be allowed to pass without challenge.

Inadequate Scientific Controls

The problem of background GSR contamination is compounded by the fact that most forensic analysts never bother to take control samples that could detect it. Control samples are an easy and obvious step for an analyst concerned with scientific rigor. A “GSR particle” on the defendant’s hand may seem like convincing evidence taken in isolation. But what if there are also GSR particles on the handcuffs that were placed on him by the arresting officer, who also had GSR on his or her clothing and gun belt? What if there is also GSR in the back seat of the patrol car in which he was transported to the police station for testing and on the furniture and in the ambient air of the police station in which he was tested? What if the walls and floor of the police station were also covered with GSR? If GSR can be detected all over the environment that a suspect has been exposed to, then it would be foolish to claim that finding GSR on the suspect is a sure sign that he fired a gun. A careful analyst who cared about good science would take lots of control samples from places other than the suspect’s hand looking for background contamination. Most forensic analysts never bother.

Baltimore Experience

In 2001, The Baltimore Sun reported that an internal study by the Baltimore City Police Department (BCPD) had revealed background GSR contamination, at high levels, in areas of police stations where suspects and witnesses were processed for GSR collection. On June 6, 2001, the police collected a few samples from the furniture and ambient air in the processing area at four stations. These stations were chosen for examination because all of them housed active police firing ranges. “Unique GSR particles” and many more “associated GSR particles” were found in the air or on surfaces at virtually every police station that was sampled over the course of the summer of 2001. At that time BCPD officials directed police officers to stop collecting samples from suspects at one station that had particularly high levels of contamination. BCPD crime lab officials claimed that they were unaware of the close proximity of police firing range to the areas where GSR samples were collected from suspects.


5. Unique is defined by the BCPD in this context as those particles containing a fusion of lead, barium and antimony.

6. “Associated GSR particles” are defined by BCPD as particles containing lead, lead and antimony, lead and barium, or antimony and sulfur.
What prompted the police department to undertake its initial internal study of GSR contamination? Internal documents, obtained after protracted discovery battles, suggest the primary motivation was not the integrity of the evidence collection process. An OSHA report on the high levels of lead in at least one district station may have raised concerns about officers’ health. We suspect another factor may have been that false positives were occurring when government witnesses were tested for the express purpose of showing that they had not fired a gun.

Internal BCPD documents that were recently and reluctantly turned over by the prosecution show that personnel in the crime lab realized the significance of the contamination problem. An analyst was reported to be “very concerned about convictions based solely on GSR evidence” and recommendations were made to the head of the crime lab that samples should be obtained from police officers and various types of police equipment such as handcuffs and vehicles in order to evaluate the scope of the problem. None of these recommendations was followed. Instead, the sum and substance of the crime lab’s response to this problem was to direct officers in the field to bag the hands of suspects prior to obtaining GSR swabs and to set up a dedicated GSR collection room (called the “clean room”) in the vehicle processing bay at police headquarters. The directive to bag hands has not and is not being followed consistently and of course it does not address the problem of secondary transfer that occurs in the officer-citizen interaction that occurs prior to the bagging.

The “clean room” had its own problems. It was set up in an area of the police station that was the subject of lead abatement efforts. According to the internal documents, at various times the door to this room could not be closed and so contaminants in the vehicle-processing bay were allowed to waft right into the so called “clean room”. In the spring of 2004, while preparing for an attempt to seek accreditation from the American Society of Crime Laboratory Directors’ Laboratory Accreditation Board, the crime lab took test samples from the “clean room.” There was no effort to monitor the “clean room” over time — all samples were collected at one time on a single day. But the results were hardly reassuring.

Internal police documents reported that “unique and associated GSR particles” were found on a cleaning bucket, on the floor and most critically on the holster and gun belt of the officer overseeing the collection process. The number of particles found on the officer confirmed the worst suspicions of those crime lab personnel who had suggested three years earlier that a large source of contamination was probably to be found in police personnel and equipment. More than five “unique” particles and more than 41 “consistent particles” were recovered from the officer’s gun belt, more than five “unique” and more than 37 “consistent” particles were on the holster and 1 “unique” and more than 25 “consistent” particles were on his handcuffs. These are disturbing findings when one considers that the BCPD crime lab continues to report that a person “most probably” fired a weapon or was in the immediate proximity of a fired weapon if they have even one “unique GSR” particle on either hand.

While BCPD’s internal investigations were showing serious potential problems with GSR contamination, the department’s sole GSR analyst was giving deceptive and misleading testimony in criminal trials. In the Spring of 2004, the analyst was questioned closely about his standards for identifying “unique GSR.” He testified that he had attended a conference in 2000 where he learned about studies showing that barium and antimony are found in substances other than gunshot residue and where he also learned that among GSR examiners the consensus had shifted against identifying GSR based solely on finding barium and antimony. He testified that he no longer reported such a finding as positive for GSR. However, a review of his cases showed otherwise. Within days of returning from the conference the analyst reported out barium and antimony as positive for GSR and he continued to do so at least 93 times between 2000 and 2004.

This analyst’s duplicity has finally caught up with him. In a recent case, a Baltimore City Circuit Court trial judge excluded from evidence his finding that the presence of a barium and antimony particle constituted a positive indication of GSR. The exclusion was based at least in part on the analyst’s inability to reconcile this finding with his sworn testimony in other cases.

(continued on page 22)

7. The exact number of particles on each item is unknown because the analyst stopped counting upon finding the numbers reported. The presence of “consistent” particles in the “clean room” turned out to be significant because BCPD reports a positive for GSR on finding a single fused particle of barium and antimony if at least six “consistent” particles are also found. “Consistent” particles include particles of barium and lead, antimony and lead, antimony and sulfur, or lead. Lead by itself is, of course, very common—particularly in areas targeted for lead abatement.
Only In Baltimore?

The problems with the Baltimore City GSR testing regimen are severe due to a combination of factors: uncontrolled background contamination, lenient standards for identifying GSR, inconsistent applications of those standards, and analysts’ willingness to state conclusions that simply are not supported by data. However, we doubt that Baltimore is the only place where such problems occur. Some or all of these problems may beset virtually every police department that tests for GSR.

The underlying problems with GSR analysis are beginning to garner national attention. The FBI is reportedly inviting GSR examiners from law enforcement agencies across the nation to convene this summer in Quantico, Virginia to discuss the ongoing problems surrounding GSR testing. In a recent editorial The Baltimore Sun called upon the National Institute of Justice to conduct a study on the issue. In the view of the authors a more appropriate entity to conduct this review would be the National Academy of Sciences so that the views of the larger scientific community could be brought to bear without being subject to any partisan influences. Time will tell whether GSR testing can be saved by better validation and clearer standards or whether it becomes another discredited forensic science, joining handwriting analysis, microscopic hair analysis, and bullet lead analysis as an example of the questionable evidence that can pass for science in the criminal courts.

In the meantime, criminal defense attorneys must carefully scrutinize and actively challenge GSR evidence. Defense lawyers can no longer simply accept at face value a conclusory expert report that says a client’s hands or clothing was “positive” for GSR. The defense lawyer must obtain the underlying laboratory notes and data, examine the relevant laboratory protocols and validation studies, and carefully considering alternative explanation for the findings. History shows that the best way to assure that forensic science is carefully validated is for defense lawyers to successfully challenge its admissibility as evidence. Thus, effective challenges to bad forensic science not only serve our clients’ interests, they serve our shared interest as citizens in the quality and integrity of the justice system. Model discovery requests and related information can be found on the Forensics websites of NACDL and NLADA.

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8. See www.nacdl.org or www.nlada.org/Defender/forensics
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SYRACUSE CRIMINAL LAW UPDATE

NYSACDL OFFERS SCHOLARSHIP TO NATIONAL CRIMINAL DEFENSE COLLEGE TRIAL PRACTICE INSTITUTE 2006

The deadline for applications to the National Criminal Defense College’s Trial Practice Institute 2006 held at Mercer Law School in Macon, Georgia is April 1.

NYSACDL members in good standing who wish to be considered for the scholarship must first be accepted by the NCDC and submit a letter to the NYSACDL describing their practice, financial situation and qualifications. The scholarship is funded by money raised by the NYSACDL’s production of Twelve Angry Men.

For further information regarding the scholarship, contact Executive Director Patricia Marcus via e-mail at nysacdl@ol.com or by phone at (212) 532-4434. To receive an application for the Trial Practice Institute, contact the NCDC at (478) 746-4151 or visit their website at www.ncdc.net
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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