When I began practicing law almost 25 years ago, summers were less hectic. Judges went on vacation, juries were unavailable, and there opportunities for vacation and relaxation existed. Today, however, with cell phones, Blackberries and Treos, escape is more difficult. In my own experience, as well as those of other lawyers with whom I have spoken, summers no longer offer respite for criminal defense counsel whose lives are now just as hectic in the summer as they are during the other three seasons.

Of course, the continued full-speed operation of the criminal justice system year-round requires NYSACDL to be as active and as vigilant throughout the year as well. This summer, the Board has continued to work on formulating a comprehensive position on indigent defense in New York State. NYSACDL has also continued its work educating lawyers about the intricacies of Rockefeller Drug Law Reform. Board members (in alphabetical order) Neil Checkman, Greg Clarke, President-Elect Ray Kelly, Greg Lubow, Dennis Murphy, Arlene Popkin, Alan Rosenthal, Tom Saitta, Past-President Marvin E. Schechter and Lisa Schreibersdorf have been particularly active in that regard.

In addition, during this summer NYSACDL Continuing Legal Education Committee has been busy planning an impressive curriculum of programs for the upcoming year. One such program will involve not just education, but also inspiration: it will identify several issues in federal practice that criminal defense lawyers should be addressing in every possible case, and with the solidarity that is necessary to effect positive change on those issues. The article by Jay Goldberg, reprinted on page 19 in this issue of Atticus, regarding jury instructions, identifies one of these issues. Jay will also have an article in the next issue regarding the need to preserve the Sixth Amendment right to confrontation. Jay has also written previously on another issue the program will address: how cooperation agreements, and the latitude afforded the government in re-direct examination, provides the jury a completely distorted and prejudicial picture of a cooperating witness’s motives and expectations with respect to testimony and sentencing. Please stay tuned to Atticus, the listserv, and website for more information on this important program and other CLE seminars.

All of this activity notwithstanding, I do hope that members have had the chance to find time for leisure. This Fall promises to have important implications for the future of criminal justice: the hearings, and potential confirmation, of a new U.S. Supreme Court Justice (and perhaps the opening of another vacancy on that court); the continued efforts to keep New York State death penalty-free, to enact further Rockefeller Drug Law reforms, and to accomplish a coordinated and effective statewide approach to indigent defense; continued evolution of federal sentencing in the "advisory Guidelines" era, including monitoring Congressional action; and ensuring that the fundamental and essential right to habeas corpus relief remains protected from legislative proposals that would eviscerate the Great Writ. So please be sufficiently well-rested to participate in NYSACDL’s efforts in these areas vital to achieving justice for our clients.
NYSACDL MEMBERS AMONG TOP LAWYERS IN NEW YORK STATE

More than 30 members of the New York State Association of Criminal Defense Lawyers were listed in the upcoming 2006 edition of The Best Lawyers in America, the preeminent referral guide to the legal profession in the United States. The book lists those attorneys who have been chosen through an exhaustive survey in which thousands of the nation’s top lawyers confidentially evaluate their professional peers.

As reported in the July 21 edition of New York Magazine, here are the names of our colleagues, listed by category and by alphabetical order.

Non-White Collar Criminal Law
Past-Presidents:
Martin Adelman
Paul Cambria
Lawrence S. Goldman
James Harrington
Jack Litman
Mark Mahoney
Members:
Lawrence Andolina
Paul Bergman
Ben Brafman
Terence Connors
Joel Daniels
Herald Price Fahringer
Lawrence Hochheiser
Jack Hoffinger
E. Stewart Jones
Joseph LaTona
Gerald Lefcourt
Brian J. Neary
Barry Scheck
Eric Seiff
Gerald Shargel
John Speranza.

White Collar Criminal Law
Past-Presidents
Paul Cambria
James Harrington
Mark Mahoney
Members:
Lawrence Andolina
Paul Bergman
Austin Campriello
Terence Connors,
Joel Daniels
Peter Fleming
Jay Goldberg
Frederick Hafetz
Jack Hoffinger,
E. Stewart Jones
Joseph LaTona,
Gerald Lefcourt
Gary Naftalis
Brian J. Neary,
Andrew Rubin
John Siffert
John Speranza

Immigration Law
Jonathan Avirom
Since our last update in the January/February 2005 issue of The Magazine Formerly Known As The Mouthpiece, the Circuit has rendered several decisions of note. Most significantly, it

- Held, in a pre-Crawford case, that a court violated a defendant’s confrontation rights by threatening to permit the prosecutor to elicit from a medical examiner that her expert opinion was based in part on an alleged coconspirator’s post-arrest statement otherwise inadmissible under Bruton.  


- Found that a habeas petitioner was denied effective assistance of counsel when his attorney, in a one-witness case, mistakenly put on an alibi defense for the wrong day.

- Kept hope alive for John Gotti’s codefendant Frank LoCascio, remanding for further proceedings upon his claim that his lawyer altered his trial strategy in response to Gotti’s orders that the lawyer focus largely on Gotti’s defense rather than his client’s.

- Dismissed as procedurally defaulted a habeas petitioner’s claim that admission of a 911 tape deprived him of his confrontation right when at trial his counsel objected to admission of the tapes solely on evidentiary grounds.

- Held that Apprendi does not apply to criminal forfeitures (as opposed to sentencing proceedings) and that New York State courts reasonably found that Apprendi does not apply to New York’s persistent felony statute.

- Held that Booker is not a “watershed” rule and therefore is not retroactive to cases on collateral review.

- Provided clarification for the application of Booker where plain error analysis applies, and where a defendant waives his right to appeal a sentence if within a certain range.

- Held that neither Crawford nor Booker forbids consideration of hearsay at sentencing proceedings.

- Provided substantial analysis of Guidelines departures based on “good deeds,” “family circumstances,” and childhood abuse.

(continued on page 4)

3. Henry v. Poole, 409 F.3d 48 (2d Cir. May 24, 2005) (Kearse).
8. Guzman v. United States, 404 F.3d 139 (2d Cir. April 8, 2005) (Jacobs).
• Held that harmless error analysis applies to violations of the Speedy Trial Act.15

• Held that IRS summons have no force or effect and therefore need not be obeyed until the Service seeks to enforce them through a proceeding under 26 U.S.C. § 7604.16

• Rejected a government argument that the “separate sovereigns” rule permits admission in federal court of a post-arrest statement taken by state police in violation of a defendant’s Sixth Amendment right to counsel.17

• Disapproved a district judge’s practice of holding plea and sentencing proceedings in the robing room.18

Here’s an outline of these and other of the most significant decisions this year:

CONSPIRACY – OVERT ACTS

The overt act element of a conspiracy charge may be satisfied by an overt act that is not specified in the indictment, at least so long as there is no prejudice to the defendant. United States v. Milstein, 401 F.3d 53 (2d Cir. March 10, 2005) (p.c.).

CONFRONTATION

Reversing denial of habeas in state burglary/murder case, court holds that defendant’s right to confrontation and compulsory process were violated when trial court ruled (1) that if defense counsel cross-examined the state’s medical examiner regarding the basis for her opinion that the burglary caused the homeowner’s heart attack, then the prosecutor could introduce the Bruton statements of defendant’s coconspirators upon which the expert relied; and (2) the prosecutor could introduce these same statements if defense counsel called his own expert to testify that the precipitating cause of the heart attack could not be determined. Drawing on cases such as Simmons v. United States, 390 U.S. 377 (1968), court says a defendant should not be required to sacrifice one right to safeguard another. The errors violated clearly established constitutional rights and were not harmless. Howard v. Walker, 406 F.3d 114 (2d Cir. April 26, 2005) (Hall).

RIGHT TO BEAR ARMS

Per Presser v. Illinois, 116 U.S. 252 (1886), the Second Amendment does not require New York State to offer handgun licenses to visitors, since the Second Amendment does not apply to the states (the court declining to decide whether the Second Amendment defines individual rights) and the Privileges and Immunities Clause of Article IV cannot preclude New York’s residency requirement in light of the State’s substantial interest in monitoring handgun licensees — an interest that will not adequately be satisfied if New York is dependent on other states’ willingness to undertake such monitoring of visitors on New York’s behalf. Bach v. Pataki, 408 F.3d 75 (2d Cir. May 6, 2005) (Wesley).

CRIME VICTIMS’ RIGHTS ACT OF 2004

Court upholds government’s settlement with numerous defendants and non-defendants in case involving the Rigases and their company, Adelphia, as against the claims of several plaintiffs who asserted that the settlement terms violate their rights under the Crime Victims’ Rights Act of 2004, 18 U.S.C. § 3771. In so holding, court determines to apply an “abuse of discretion” standard reviewing, on mandamus, claims that the district court erred, and it states that settlement terms, which require those receiving compensation from the agreed-upon restitution pool to forego other actions against the Rigases, did not violate numerous of the plaintiffs’ rights under the VRCA and the MVRA, since the victims were too numerous to identify individually and efforts to do so would unreasonably delay defendants’ sentencing. In re W.R. Huff Asset Management Co., LLC, 409 F.3d 555 (2d Cir. June 3, 2005) (Hall).

DISCOVERY – PRETRIAL SERVICES REPORT

Trial court erred when it refused to permit defendant to access his pretrial services report in aid of securing testimony from the pretrial officer who interviewed him. Under 18 U.S.C. § 3153(c)(1) the report is available to the attorney for the accused and the attorney for the Government. The error, however, was harmless. United States v. Lewter, 402 F.3d 319 (2d Cir. March 24, 2005) (Jacobs).

EFFECTIVE ASSISTANCE OF COUNSEL

Court reverses district court’s denial of habeas petition, finding that defense counsel was ineffective, to defendant’s prejudice when, in a one-witness case, he mistakenly put on alibi defense for the wrong day, and nonetheless argued its importance to the jury.

In so holding, court also notes the apparent discrepancy between New York State’s ineffectiveness standard and the *Strickland* standard and suggests that the circuit court should revisit its previous holding that the two standards are equivalent. In any event, the state court’s rejection of petitioner’s ineffective-assistance claim was at least an objectively unreasonable application of *Strickland*. Sack concurs. *Henry v. Poole*, 409 F.3d 48 (2d Cir. May 24, 2005) (Kearse).

Reversing grant of habeas, court finds that state court’s rejection of defendant’s ineffectiveness/conflict claim was not a clear misapplication of federal law. The joint representation, at a plea and trial, respectively, of petitioner’s father and petitioner in this child molestation case did not create an actual conflict because there was no plausible defense strategy foregone as a consequence of the joint representation conflict. The father would not have exonerated petitioner and, in any event there was no indication that counsel failed to pursue this strategy because of the joint representation. Further there was no possibility that petitioner could have cooperated against his father, as there was no evidence he had any evidence to offer against him or that the prosecutor had any reason to bargain with petitioner for such evidence. *Eisemann v. Herbert*, 401 F.3d 102 (2d Cir. March 11, 2005) (Newman).

Case is remanded for determination, pursuant to defendant’s habeas petition, whether defense counsel altered his strategy to defendant’s detriment after being threatened by codefendant Gotti to focus largely on his defense rather than his client’s. To obtain relief defendant must show an actual lapse in representation that resulted from the conflict, *i.e.* (2) the existence of some plausible alternative defense strategy not taken up by counsel which (2) was not undertaken due to the conflict. *LoCascio v. United States*, 395 F.3d 51 (2d Cir. January 12, 2005) (Winter).

**DNA ACT**

District Court did not err when it dismissed government’s petition to violate defendant’s probation for his refusal to give a DNA sample under the DNA Act, 42 U.S.C. § 14135a, as bank larceny was not a qualifying offense under the DNA Act prior to the 2004 amendment, which required samples from those convicted of, inter alia, “robbery or burglary.” *United States v. Peterson*, 394 F.3d 98 (2d Cir. January 10, 2005) (Eisemann).

**EVIDENCE**

**Experts**

District Court did not manifestly err when it permitted N.Y.P.D. Detective to testify in drug cases regarding the relationship between crack and powder cocaine, and the different methods employed by drug dealers operating at various levels of the distribution chain. The testimony in question did not impermissibly blur the lines between fact testimony and expert testimony, as her fact testimony was brief and sufficiently separate and distinct from her brief expert testimony – which related only to a few general practices of street-level dealers – to raise no concern that the line between the two was “hard to discern.” *United States v. Barrow*, 400 F.3d 109 (2d Cir. March 2, 2005) (Raggi).

**Hearsay – Coconspirator Statements**


**Proffered Statements**

Defense counsel’s broad defense that he was not the person involved in certain drug sales and that he had been misidentified, triggered provision of proffer agreement permitting the government to introduce proffer statements of defendant, in which he generally admitted selling drugs routinely at the location in question. Agreement permitted the government to use defendant’s proffer statements as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of defendant at any stage of the criminal prosecution. Defendant conditionally waived his protections against the use of proffered statements under Fed. R. Evid. 410. Factual assertions made by a defendant’s counsel in an opening argument or on cross-examination fall within the broad language of the waiver; defense counsel’s factual assertions triggered the waiver; proper rebuttal is not limited to direct contradiction; and the district court acted within its discretion in admitting portions of the proffer eliciting what defendant actually said and questions eliciting what he did not say. Court adds that the introduction of such statements, however, is not mandatory, as a waiver agreement does not divest a district court of its considerable discretion to exclude relevant evidence that may inject unfair prejudice or confusion into the jury’s resolution of the issues in dispute, per Fed. R. Evid. 403. *United States v. Barrow*, 400 F.3d 109 (2d Cir. March 2, 2005) (Raggi).

**FORFEITURE**

**Acquitted Conduct**

Criminal forfeiture under RICO can be based – as here – on acquitted conduct, since the defendant is not being punished for committing the substantive acts found to be not proven, but is being punished for conducting the affairs of an enterprise through a pattern of racketeering activity. So long as the court finds – as the sentencing court found here – by a preponderance of the evidence that the criminal conduct through which the proceeds were made was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment. *United States v. Fruchter*, 411 F.3d 377 (2d Cir. June 14, 2005) (Walker).

**licenses**


(continued on page 6)
GUILTY PLEAS
Plea Agreements, Breach of

Government did not breach its plea agreement with defendant when it adopted the findings of the revised PSR, which recommended adjustments the government had agreed not to urge, since after defendant objected, the government filed an amended statement expressly declining to advocate for sophisticated means and aggravating role enhancements, and repeated that position several times thereafter. Likewise, the government’s lengthy response to defendant’s objections to the PSR did not violate the agreement as the government had reserved their right to respond to any statements made by the defendant that were inconsistent with information and evidence available to the defendant. Additionally, the government’s discussion of the law governing sophisticated means and aggravating role enhancements did not violate the plea agreement as the government emphasized it was not advocating for these enhancements, and the discussion constituted an appropriate response to defendant’s provocative arguments. Court also comments on the general rule that a defendant generally need not show a tangible harm resulting from a breach to be entitled to relief, and the exception that applies where the violation “does not cause the defendant to suffer any meaningful detriment” because the defendant’s “reasonable expectations were fulfilled. United States v. Amico, 03-1435 (2d Cir. July 26, 2005) (Leval).

Government breached plea agreement entered into with defendant who pleaded guilty to robbing an informant, when it promised to take no position regarding where within Guidelines range defendant should be sentenced, yet then made gratuitous statements suggesting – though not specifically requesting – sentence at the high end of the range. Remedy in this case, however, was not to permit defendant to withdraw his plea but to order resentencing before a different judge. Court reiterates that plea agreements are construed strictly against the government. United States v. Vaval, 404 F.3d 144 (2d Cir. April 12, 2005) (Winter).

Sufficiency of

Plaintiff’s securities fraud plea was sufficient where he said he participated in trading designed to inflate the price of the subject stock and sold a portion of the stock he received at no cost at an inflated price. The record of defendant’s allocation reflected that defendant knew all of the elements of the offense, knew of the securities fraud conspiracy, intended to participate in it, and engaged in manipulative trading knowingly, intentionally, and with intent to defraud. United States v. Rosen, 409 F.3d 535 (2d Cir. June 6, 2005) (Kearse).

Withdrawal of

District Court did not abuse its discretion under Fed.R.Crim.P. 11(d) when it denied defendant’s motion to withdraw his guilty plea prior to sentence, when he asserted that he was denied effective assistance of counsel because his attorney substantially miscalculated his Guidelines by failing to consider that defendant was a career offender. To satisfy the prejudice prong of Strickland in this context a defendant must show there is a reasonable probability that but for counsel’s errors he would have proceeded to trial. The issue is whether defendant was aware of the actual sentencing possibilities, and if not, whether accurate information would have made a difference in his decision to enter a plea. Here, defendant failed to make a sufficient showing that accurate information would have made a difference in his decision to enter a plea. He pleaded guilty knowing that the estimated sentence range could be incorrect; he benefited by receiving a three level reduction for acceptance of responsibility; his codefendants pled guilty and there was no reason to doubt the strength of the case against him; and, absent a plea agreement defendant could have been prosecuted for any open counts against him possibly resulting in an even longer sentence than the statutory maximum for the offense to which he pleaded guilty. Viewing the record as a whole, district court did not err in ruling that defendant’s affidavit in support of the motion was not sufficient to show he would have gone to trial but for counsel’s error. United States v. Arteca, 411 F.3d 315 (2d Cir. June 16, 2005) (Feinberg).

HABEAS CORPUS

Jury Instructions – Justification Defense

Affirming grant of habeas, court agrees that petitioner was entitled under state law to justification instruction in case where petitioner claimed victim was about to rob him or apartment. Failure to give the instruction was “catastrophic” to petitioner’s defense to murder and required habeas relief because it “so infected the entire trial that the resulting conviction violates due process.” Cupp v. Naughten, 414 U.S. 141, 147 (1973). Additionally, although petitioner was not entitled to the defense with respect to charge of possessing a firearm with the intent to commit a felony, the failure to give the instruction on the murder charge also prejudiced defendant with respect to the firearms charge. Jackson v. Edwards, 404 F.3d 612 (2d Cir. April 14, 2005) (Parker).

Procedural Default

Court affirms denial of habeas petition in state murder case because defendant defaulted upon issue whether testimony of his aunt and a 911 tape were wrongly excluded from evidence. Defendant’s leave letter did not mention the exclusion of his aunt’s testimony, and the 911 issue was not argued in state court on constitutional grounds, but rather solely on evidentiary grounds. Smith v. Duncan, 411 F.3d 340 (2d Cir. June 21, 2005) (Wesley).

Standing

Court denies motion to vacate stay of execution and dismisses appeal from denial of habeas brought by supposed “next friend” of condemned capital defendant, as petitioner. Court finds that district court must establish that petitioner Smyth was properly acting as Ross’s next friend, and that it does not have a basis adequately to
review, and therefore disagree with, the district court’s conclusion that there was “meaningful evidence [before it] that [Ross] was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision.”. Such evidence is a basis for deciding that Ross is in fact not competent to forgo his right to bring habeas corpus proceedings, and it was premature for the district court to determine “next friend” standing in the absence of the proceedings it has now ordered. Whenever a capital defendant desires to terminate further proceedings, a hearing on mental competency will obviously bear on whether the defendant is able to proceed on his own behalf.  *Ross ex rel. Smyth v. Lantz*, 396 F.3d 512 (2d Cir. January 25, 2005, as amended, January 26, 2005) (p.c.).

**Superseding Indictment**

The district court’s construction of the mail fraud statute, and the policy that penal statutes ought to be construed with leniency applicable to criminal statute, and the policy that penal statutes ought to be construed in accordance with their plain meaning, so that the least sophisticated citizen may read the statute and regulate his or her conduct consistently therewith. Court finds, however, it is “to late in history to repudiate the settled doctrine of *Porcelli*.” Congress, which has amended the mail fraud statute four times during the 16 years since that decision is deemed to have relied on the court’s construction. Furthermore, court recently reaffirmed that uncollected sales taxes in the hands of a seller are “property” within the meaning of the mail fraud statute, and that prosecutions for tax fraud are permissible under the mail fraud statute. *Porcelli v. United States*, 404 F.3d 157 (2d Cir. April 12, 2005) (Briem).  

**MAIL AND WIRE FRAUD — ELEMENTS**

Court affirms denial of *coram nobis* relief, finding that the Supreme Court’s construction of the Hobbs Act extortion statute in *Scheidler v. NOW, Inc.*, 537 U.S. 393 (2003), requiring not only the deprivation but also the acquisition of property, does not carry over to the mail and wire fraud statutes, neither of which requires that a defendant “obtain” property before violating the statute. The mail fraud statute criminalizes any scheme or artifice for obtaining money or property. The fact that the Hobbs Act and the mail fraud statutes contain the word “obtain” does not necessitate imposing *Scheidler*’s construction of a wholly separate statute onto the court’s pre-existing construction of the mail fraud statute. Court also rejects argument that defendant – who failed to collect retail sales taxes on gasoline – never “obtained” anything by fraud. Court agrees that defendant’s argument is supported by the rule of leniency applicable to criminal statute, and the policy that penal statutes ought to be construed in accordance with their plain meaning, so that the least sophisticated citizen may read the statute and regulate his or her conduct consistently therewith. Court finds, however, it is “too late in history to repudiate the settled doctrine of *Porcelli*.” Congress, which has amended the mail fraud statute four times during the 16 years since that decision is deemed to have relied on the court’s construction. Furthermore, court recently reaffirmed that uncollected sales taxes in the hands of a seller are “property” within the meaning of the mail fraud statute, and that prosecutions for tax fraud are permissible under the mail fraud statute. *Porcelli v. United States*, 404 F.3d 157 (2d Cir. April 12, 2005) (Briem).  

**RETROACTIVITY — BOOKER**

*Booker* held not to be a watershed rule (i.e. one without which the likelihood of an accurate conviction is seriously diminished) and therefore not to be retroactive, and therefore not to apply to cases on collateral review where the defendant’s conviction was final as of January 12, 2005, the date that *Booker* issued. *Guzman v. United States*, 404 F.3d 139 (2d Cir. April 8, 2005) (Jacobs).  

**RIGHT TO COUNSEL**

State Court decisions rejecting defendant’s claims that he was denied his Sixth Amendment right to counsel when he was forbidden to speak with his counsel during two recesses – one during direct and the other during cross – were not contrary to Supreme Court precedent and did not involve and unreasonable application of that precedent. Interpreting *Perry v. Leekne*, 488 U.S. 272 (1989) and *Geders v. United States*, 425 U.S. 80 (1976), court notes that defense counsel’s behavior had been so poor he was held in contempt and incarcerated. The first recess was of very short duration and the second one, lasting ninety minutes during lunch, was imposed only after the trial court indicated to counsel he was willing to limit the ban to discussions of ongoing testimony if counsel gave sufficient assurance that he was willing to comply with such an order, but defense counsel was coy. *Serrano v. Fischer*, 412 F.3d 292 (2d Cir. June 20, 2005) (Sotomayor).

(continued on page 8)
SEARCH AND SEIZURE

Border Searches

Stopping of Lincoln Town Car and questioning of occupants followed by agents near the Canadian Border was not a “border search” because the roads were not generally used solely by persons entering the country, but nonetheless was lawful as supported by articulable suspicion, including the car’s proximity to the border, its flashing brake lights, its suspicious comings and goings and a report that a sensor near the border was tripped, all suggesting the driver might have picked up illegal immigrations. United States v. Singh, 04-3324 (2d Cir. July 19, 2005) (Cardamone).

Standing

Counsel’s affidavit in support of suppression motion did not come close to showing defendant owned the premises or that he occupied them and had dominion and control over them by leave of the owner, nor did he show that he had a legitimate expectation of privacy in the searched residence by averring that the address was listed in the “Former Addresses” section of his United States Marshals Service booking form. He therefore was not entitled to a hearing upon his motion. United States v. Watson, 404 F.3d 163 (2d Cir. April 12, 2005) (Cabranes).

SENTENCING

Adjustments and Departures

Childhood Abuse

The extreme childhood abuse to which defendant was subjected would have been sufficiently “extraordinary” to justify the district court’s downward departure on behalf of defendant convicted of a conspiracy to commit bank fraud, even though Guidelines § 5H1.2 disfavors departures based upon mental and emotional conditions. Court nonetheless remanded for further proceedings because the evidence did not demonstrate the necessary causative link between the abuse and defendant’s criminal conduct. Court notes, however, that post-Booker the probationary sentence given defendant may nonetheless be “reasonable” as a non-Guidelines sentence, even if the Guidelines departure were not sustainable. United States v. Brady, 04-0729 (2d Cir. July 22, 2005) (Cardamone).

Diminished Capacity

Court vacates and remands for resentencing because district court seemed to conclude it could not grant a downward departure for diminished capacity in light of the jury verdict finding beyond a reasonable doubt that defendant intended to defraud the various financial institutions he approached with his counterfeit bonds. United States v. Zedner, 401 F.3d 36 (2d Cir. March 8, 2005) (Leval).

Family Circumstances

Court remands case for further fact-finding regarding district court’s grant of downward departure for family circumstances. United States v. Selioutsky, 409 F.3d 114 (2d Cir. May 27, 2005) (Newman).

Good Deeds

Defendant’s military service, work as a volunteer fireman and heroics justified district court’s downward departure in light of defendant’s extraordinary good deeds and community service, which is a discouraged but not forbidden ground for departure under Guidelines §5H1.11. United States v. Canova, 412 F.3d 331 (2d Cir. June 21, 2005) (Raggi).

Perjury

Court rejects government’s argument that district court erred when it refused to impose perjury enhancement under Guidelines §3C1.1. Contrary to government’s argument the court did not apply the wrong standard when it found that the enhancement required the court to find that the defendant not only perjured himself but that he did so with specific intent to obstruct justice. The willfulness contemplated by §3C1.1 is distinct from the intent required to prove perjury and the district court was in the best position to determine defendant’s obstructive intent. United States v. Canova, 412 F.3d 331 (2d Cir. June 21, 2005) (Raggi).

Seriousness of Offense, Overstating

Trial court seemed not to understand that it could grant downward departure under Guidelines §2F1.1, Comment 10, on the ground that the loss determined under section (b)(1) overstated the seriousness of the offense, because the defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. Fact that jury convicted defendant and rejected defendant’s argument that he lacked a criminal state of mind on account of his delusional belief that the bonds were genuine was not incompatible a conclusion that the severity of the offense was diminished by the obviously spurious nature of the bonds. United States v. Zedner, 401 F.3d 36 (2d Cir. March 8, 2005) (Leval).

Apprendi-Blakely-Booker Issues

Court holds that the Sixth Amendment does not entitle a defendant to a jury determination, upon proof beyond a reasonable doubt, of facts required to impose RICO forfeiture under 18 U.S.C. §1963, because (1) the Supreme Court has so held in Libretti v. United States, 516 U.S. 29 (1995); and (2) forfeitures are not like the determinative sentencing schemes held subject to the Sixth Amendment in Apprendi, Booker, and Blakely because there is no
inherent statutory maximum that can be exceeded only upon the finding of certain facts. *United States v. Frucher*, 411 F.3d 377 (2d Cir. June 14, 2005) (Walker).

Reversing grants of habeas in two instances and affirming denial of habeas in another, court holds that state courts did not unreasonably apply then-existing Supreme Court law when they held that New York’s persistent felony offender rule, P.L. §70.10 — which increases a defendant’s potential sentence to that applicable to an A-1 conviction, if defendant has two previous felonies and the court also is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest – does not violate *Apprendi*. 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. At n. 3, Court addresses the “inconsistent guidance” given by the court on the precise time to which a federal court should look to assess what was “clearly established Federal law,” as determined by the Supreme Court. *Brown v. Greiner*, 409 F.3d 523 (2d Cir. June 3, 2005) (Leval).

Court outlines procedure for addressing *Booker* issues where plain error analysis applies. Court will remand to district court for determination (upon submission of papers but not necessarily with the presence of defendant) whether court would have imposed a different sentence had it been aware of the Supreme Court’s decision in *Booker*. If the answer is “yes” then it should vacate sentence and hold a new sentencing proceeding. The new sentence will be subject to appeal under the reasonableness standard addressed in *Booker*. *United States v. Williams*, 399 F.3d 450 (2d Cir. February 23, 2005) (Newman).

*Booker-Fanfan* error was harmless where defendant received the mandatory minimum sentence. Court observes that government could have sought a remand but did not, and leaves open whether government might be entitled to a remand if it did not appeal or cross-appeal. Court also does not resolve whether defendant’s waiver of appellate rights as part of his plea would preclude any consideration of sentencing issues arising under *Blakely or Booker*. *United States v. Sharpley*, 399 F.3d 123 (2d Cir. February 16, 2005) (Pooler).


Court dismisses defendant’s sentencing appeal because even though defendant objected to the mandatory application of the Guidelines (pre-*Booker*) he also agreed to not appeal if his sentence was 108 months or less. Although ignorance of then-existing rights can invalidate a plea agreement in some cases, ignorance of future rights is unavoidable and not a basis for avoiding a plea agreement. Although there was a constitutional error (a la *Booker*), it was not an error of reliance on a constitutionally impermissible factor within the meaning of *United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 1996). *United States v. Haynes*, 412 F.3d 37 (2d Cir. June 13, 2005) (p.c.).

An error in determining the applicable Guideline range or the availability of departure authority (here a downward departure for family circumstances) would be the type of procedural error that could render a sentence unreasonable under *Booker*. Court observes it might apply harmless error analysis in a case where the district court would reasonably have imposed the same sentence even had the adjustment or departure not applied. *United States v. Selioutsky*, 409 F.3d 114 (2d Cir. May 27, 2005) (Newman).

Where sentencing court’s error may have resulted in erroneous five-point enhancement, court will remand to the district court with instructions to vacate the sentence and to conduct resentencing under *Booker* rather than remand without vacating. *United States v. Savarese*, 404 F.3d 651 (2d Cir. April 14, 2004) (Jacobs).

At n. 1, court observes that not every panel of the court confronted with post-*Booker* sentencing issues must first decide the district court’s Guidelines determination prior to remanding for resentencing consistent with *Booker* and *Crosby*. Cardamone concur. *United States v. Rubenstein*, 403 F.3d 93 (2d Cir. March 31, 2005) (Jacobs).

Establishing a protocol for reconsidering sentences in light of *Booker/Fanfan*, court holds that it will first remand to the district court for a determination by the district court, after submission of papers, whether it would have sentenced defendant differently had it known the Guidelines were advisory and not mandatory and, if the answer is “yes”, then district court is to vacate the sentence and, in defendant’s presence, resentence defendant. Either party can thereafter appeal the new sentence for “reasonableness.” *United States v. Crosby*, 397 F.3d 103 (2d Cir. February 2, 2005) (Newman).

**Firearms**

Court vacates sentence and remands where sentencing court applied the wrong standard to determining whether to apply five-point enhancement to robbery guideline for brandishing or possessing a firearm pursuant to Guidelines §2B3.1(b)(2)(C). Since no firearm in fact was possessed court should not have held defendant liable on the theory that it was “reasonably foreseeable” that a gun would be brandished or possessed, when in fact the proper standard was whether the use of the firearm was a specifically intended element of the conspiracy. *United States v. Savarese*, 404 F.3d 651 (2d Cir. April 14, 2004) (Jacobs).

**Appeals**

Court explains standards of review for sentencing issues. Court will review issues of law *de novo*, issues of fact under the clearly erroneous standard, mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual, and exercises of discretion for abuse of discretion. *United States v. Selioutsky*, 409 F.3d 114 (2d Cir. May 27, 2005) (Newman).

(continued on page 10)
Career Criminals

Vacating sentence, court finds that defendant’s two previous drug convictions should in fact be considered as such rather than as a single conviction because they were not part of a single criminal episode, and defendant therefore should have been sentenced to life imprisonment under 21 U.S.C. § 841(b)(1)(A). Two prior felony drug convictions should be treated as one if and only if the conduct underlying both convictions was part of a “single criminal episode.” Here the offenses were committed seven months apart in cities separated by almost 250 miles. Court expresses sympathy for plight of defendant, who is of borderline to low intelligence and whose previous convictions occurred years earlier when he was a minor, but says it is Congress’s prerogative to set mandatory minimums. United States v. Powell, 404 F.3d 678 (2d Cir. April 13, 2005) (Meskill).

Concurrent and Consecutive Sentences

Per Guidelines §5G1.3, district court did not err when it ran defendant’s contempt sentence consecutively with its previously-imposed sentence for bankruptcy fraud, because the district court did not consider all of the conduct underlying defendant’s bankruptcy fraud conviction – the grounds for the earlier sentence – in sentencing for the criminal contempt offense. Additionally, even though the New Jersey court mentioned defendant’s contemptuous conduct when it sentenced him, court concludes that he would have received the same sentence in the New Jersey court for the bankruptcy fraud had the $1.5 million transfer that formed the basis for the contempt not occurred and that, had he been sentenced simultaneously by the court for violation of the Freeze Order, a higher sentence would have been imposed. Under these facts, running the sentences fully consecutively was not an abuse of discretion per Guidelines §5G1.3, district court did not err when it ran defendant’s sentence. United States v. Brennan, 395 F.3d 59 (2d Cir. January 12, 2005) (Winter).

Factual Disputes


Loss

Disapproving district court’s determination that government suffered no “loss” when defendant’s company did not perform tests to Medicare’s specification, court holds that a party who contracts to have goods produced or services performed according to certain specifications, and who pays for those goods or services in reliance on a fraudulent representation that they conform to the specifications, has sustained a measure of pecuniary loss for purposes of calculating the fraud guideline, and a defendant cannot avoid a loss enhancement by offering evidence that no one other than the victim places any value on the demanded specification. Court further holds that defendant’s fraudulent scheme to prevent Medicare from recovering payments made to his company pursuant to the testing fraud itself caused a calculable “intended loss.” United States v. Canova, 412 F.3d 331 (2d Cir. June 21, 2005) (Raggi).

In health care fraud case where defendant charged for face-to-face doctor-patient meetings in fact conducted by nurses, a preponderance of the evidence supported the district court’s conclusion that the loss encompassed all the nursing visits fraudulently billed as if there were face-to-face contact between physician and patient. Court remands, however, to provide defendant an opportunity to show, if he can, that the total amount he expected to receive from the insurers was less than the amounts he actually billed. United States v. Singh, 390 F.3d 168 (2d Cir. November 23, 2004) (Miner).

Where defendant was convicted of distributing mislabeled/non-sterile drugs, district court did not err when it refused to give defendant credit for the value of the products consumers received when calculating loss under the then-applicable Guidelines (and as they were later reformulated per Guidelines §2B1.1). United States v. Milstein, 401 F.3d 53 (2d Cir. March 10, 2005) (p.c.).

Prior Convictions

Defendant may not collaterally attack previous conviction as part of his proceedings for his felon-in-possession conviction per Lewis v. United States, 445 U.S. 55 (1980) and, to the extent he sought to attack the prior conviction as part of his sentencing proceeding he could do so only if the prior conviction was constitutionally infirm under the standards of Gideon v. Wainwright, 372 U.S. 335 (1963), which was not the case here. Should he later obtain habeas relief from this prior conviction, he might be able to seek to have his present sentence reopened. United States v. Sharpley, 399 F.3d 123 (2d Cir. February 16, 2005) (Pooler).

Supervised Release

District court had the power under 18 U.S.C. 3583(i) to adjudicate the allegations of defendant’s supervised release violation even though he had completed his term of supervised release, where a warrant for defendant’s arrest for a violation of his supervised release was issued and filed before his term had been completed and the delay was reasonably necessary due, inter alia, to the pendency of the state criminal case in which defendant was charged with the same conduct that formed the basis for the revocation. Additionally, in the absence of prejudice, court rejects defendant’s claim that the alleged delay in the process that resulted in the adjudication that he had violated the terms of his supervised release and his incarceration therefore, violated his due process rights. United States v. Ramos, 401 F.3d 111 (2d Cir. March 14, 2005) (Sack).
SPEEDY TRIAL
Constitutional Right to Speedy Trial

Balancing Barker v. Wingo factors (i.e. length of delay; reason for delay; whether and how the defendant asserted the speedy trial right; and prejudice to defendant), court holds that defendant’s Sixth Amendment right to a speedy trial was not violated by seven-year delay between indictment and trial. United States v. Zedner, 401 F.3d 36 (2d Cir. March 8, 2005) (Leval).

Excludable Time – Harmless Error

When a defendant – as occurred here – requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that his speedy trial rights were violated by the court’s grant of her request, regardless whether the court made an “ends of justice” finding under 18 U.S.C. §3161(h)(8). Also holding that harmless error analysis applies to Speedy Trial Act violations, court finds that defendant was not entitled to dismissal on theory that his trial did not begin at a time when, as a practical matter it could not have begun because defendant was incompetent, as well as because defendant’s counsel was unavailable for trial. United States v. Zedner, 401 F.3d 36 (2d Cir. March 8, 2005) (Leval).

STATEMENTS OF DEFENDANT – SEPARATE SOVEREIGN RULE

Affirming suppression of statement taken by state police in violation of defendant’s Sixth Amendment right to counsel after formal state charges had been filed regarding the subject matter of the interrogation, court rejects government’s “separate sovereign” argument in support of admitting statement at defendant’s federal trial, and holds that suppression in federal court of statement suppressed in state prosecution is required unless the state and federal charges were distinct under the Blockburger formulation, and here, both the state and federal prosecutors charged defendant with essential the same crime – unlawful possession of a weapon. United States v. Mills, 412 F.3d 325 (2d Cir. June 21, 2005) (Parker).

SUBPOENAS

Court dismisses appeal from denial of motion to quash IRS summons for lack of a case or controversy because IRS summons have no force or effect unless the Service seeks to enforce them though a proceeding under 26 U.S.C. § 7604. Hence no taxpayer can be punished for not complying with a summons prior to § 7604 proceedings, no matter what the taxpayer’s reasons or lack of reasons for so refusing; only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings. Schulz v. IRS, 395 F.3d 463 (2d Cir. January 25, 2005) (p.c.).

TRIAL
Right to Present Defense

Court reverses denial of habeas petition. Defendant was denied his right to present witnesses on his own behalf at his retrial, after a hung jury, upon remaining charge of criminal possession of a weapon in the third degree, when court refused to permit him to introduce the prior testimony of a critical defense eyewitness. Defendant had adequately demonstrated that the testimony was critical and that the witness, an entertainer who defense counsel was unable to locate notwithstanding substantial efforts, was unavailable. State court’s ruling was contrary to clearly established Supreme Court precedent. Prosecutor argued at the second trial that defendant and his friends were not to be believed because they had criminal records, whereas the missing witness had none. Christie v. Hollins, 409 F.3d 120 (2d Cir. May 27, 2005) (Newman).

Public Trial

In separate cases, in an exercise of its supervisory powers and interpreting Press Enterprises Co. v. Superior Court, 478 U.S. 1 (1986), Fed.R.Crim.P. 11 and 18 U.S.C. § 3553(c), court remands a plea and a sentence for further proceedings to be held in the public courtroom, where such proceedings had been held in the robing room. No reason for holding the proceedings in the robing room was apparent in the record of either case. Because the public and the press have a qualified First Amendment right to access to plea and sentencing proceedings, such proceedings cannot be closed unless the District Court provides notice to the public of the closure and makes findings on the record demonstrating the need for the closure – which was not done here. United States v. Alcantara, 396 F.3d 189 (2d Cir. January 24, 2005) (Straub).

VENUE

In prosecution for offering child pornography on the Internet, venue was proper in the Southern District of New York, and court did not err when it refused to transfer the prosecution to the Eastern District of Kentucky, since defendant’s posting of an advertisement for his child porn site reached the government undercover officer via the Internet in New York, and defendant’s conduct met the “substantial contacts” test of this Circuit. Additionally there was no evidence that New York juries disfavor the conduct at issue any more than Kentucky juries. United States v. Rowe, 04-1142 (2d Cir. July 5, 2005) (Feinberg).
BULLETIN BOARD

(Items not archived.)
BULLETIN BOARD

(Items not archived.)
**AMICUS REPORT**

*by Richard D. Willstatter*

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

A man named Rodney Bellony was arrested in Brooklyn and charged with multiple A-1 sales of controlled substance. He was indicted by a Kings County Grand Jury. The People sought and obtained an *ex parte* Lock-down Order*, which prohibits Bellony from contacting anyone save his lawyer including even legal assistants or paralegals. The Order also requires solitary confinement, shackling while in movement outside the cell, only three 10-minute showers a week, and only six-hours per week to review legal materials. The defense was given a redacted version of the Order and the basis on which it was obtained was orally said to be a “threat.” The defense was not told the source of the information, who was allegedly threatened, when the threat was supposedly issued, or any other details. Bellony’s counsel, NYSACDL member Scott Leemon, filed an Article 78 proceeding in the Appellate Division, Second Department to challenge the Order. NACDL and NYSACDL filed an amicus brief in early December 2004 in which we assert that Bellony’s due process rights to notice of the charges and a hearing have been violated and that Bellony’s right to counsel has been infringed. The National Federation of Paralegal Associations, Inc. filed a brief in support of the defendant’s right to have the assistance of a paralegal. The Court granted our motions to appear as amici but never decided the underlying case despite the defendant’s continued punishment without due process. Recently, a Kings County court modified the original order but did not eliminate all of the unlawful restrictions. We urged the Second Department to decide even those issues which are now moot because the Appellate Division’s delay in deciding these issues should not allow the People to avoid appellate review. The work of amici should be considered and a decision rendered.

Along with the Center for Community Alternatives, NACDL, and the Sentencing Project, NYSACDL submitted an amicus brief in the Second Circuit supporting the appellant in *Muntaqim v. Coombe*, 01-7260, arguing that New York’s felon disenfranchise-ment law violates the Voting Rights Act. We argued that racial disparities in felony conviction rates exist on both the state and federal criminal justice systems. Johanna Schmitt, Jonathon D. Hacker, Derek Douglas and others at O’Melveny & Meyers LLP prepared our brief.

NYSACDL also joined NACDL in an amicus brief attacking the Federal Bureau of Prisons’ February 2005 regulations which restrict prisoners’ access to community corrections centers also known as halfway houses. In *Levine v. Menifee*, 05-2590-pr, we argued that the new rule was enacted in violation of the Administrative Procedure Act because the BOP did not adequately consider facts and comments submitted by those (including NACDL) opposed to the proposed new rule. Our brief was authored by NACDL Corrections Committee Co-Chair Todd A. Bussett of New Haven, CT, NACDL Amicus Committee Third Circuit Co-Chair Peter Goldberger, Mary Price of FAMM and Michael L. Waidman of Fried, Frank, Harris, Shriver and Jacobson LLP in Washington, D.C.

NYSACDL’s position prevailed in the case of *Court TV Network v. State of New York*, 2005 N.Y. LEXIS 1260 (June 16, 2005). The Court held that there was no constitutional right to televising a trial. Thomas O’Connor and Jennifer Wilson of Chadbourne & Parke submitted NYSACDL’s amicus brief and argued, *inter alia*, that the broadcast of criminal proceedings may tend to encourage grandstanding by litigants, lawyers and judges. We pointed out that lawyers, particularly appointed counsel, may be unable to muster sufficient resources to oppose broadcasts just prior to trial when their concentration on trial preparation (such as reviewing Rosano mate-rials) is most acute.

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

On Friday, September 16, the Broome County Public Library in Downtown Binghamton will be the site of a 4 CLE credit hour Sentencing Update featuring presentations by Alan Rosenthal, and Craig Schlanger on Restitution in a DWI Case.

The Palisades Mall in Nyack is the site of a 4 credit Cross to Kill program featuring lectures by Past-President Murray Richman, President-Elect Ray Kelly, DWI Maven Tom O’Hern, and Patrick Burke, on Friday afternoon, October 21.

Saturday, October 15 the NYSACDL will present Defense of a Sex Crime: What A Criminal Defense Lawyer Needs to Know, in Rochester. The 6 credit program will feature lectures on Cross of a Sex Abuse Nurse Practitioner by Ray Kelly, Everything You Need to Know About SORA, Sentencing Advocacy and Mitigation in the Sex Offender Case, Jury Selection in a Child Sex Abuse Case, Preparing the Forensic Expert: What You Need to Know; Medical Evaluation of the Victim; and Handling a Child Witness.

The Annual Weapons for the Firefight will be held on Friday, October 28 at St. Francis College in Brooklyn. The 6 credit program features lectures by Past-President Martin B. Adelman on Subpoena Power, Chuck Ross and Stephanie Carvlin on Federal Practice, Ray Fasano on Immigration Consequences to Criminal Convictions, Richard DeSimone with a Sentencing Update and Craig Schlanger on DWI and Out-of-State Licenses.

A Criminal Trial Skills Update will be presented on Saturday, November 5 at Syracuse College of Law. The program features lectures by (in alphabetical order) Past-President Dick Barbuto on Preservation of Error; a Sentencing Update by Richard deSimone of the New York State Department of Correctional Services, Interviewing Your Client by Past-President Jim Harrington; Cross Examination by President-Elect Ray Kelly, Basic Motion Practice by Donald Thompson, Ethics, by Donald G. Rehkopf, Jr., and Crime Scene Investigation: What a Criminal Defense Lawyer Needs to Know.

The Annual Mid-Hudson Trainer will be held on Friday, November 18 at the Grand Hotel in Poughkeepsie.

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

To register or for information on our 2005 CLE Schedule, contact Patricia Marcus at (212) 532-4434 or via email at nysacdl@aol.com
THE PEN REGISTER: A CONSTITUTIONAL EXCRUSUS

by Andrew Schatkin

Andrew Schatkin is a member of the NYSACDL in private practice in Jericho.

The pen register may be defined as a device that serves to record on its installation, all numbers dialed from a specific telephone line. Pen registers are not listening devices. They record no sound or conversations. On its face, it would appear that the installation of a pen register may be in some sense a violation of a person’s Fourth Amendment Constitutional Right to be free from this unreasonable search and seizure.

The Fourth Amendment of the United States Constitution sets forth the parameters on the reach and ability of the government to search for evidence without a warrant. If the search is warrantless, as a pen register would be, the criterion for this sort of warrantless search is that the government’s intrusion — in this case the installation of a pen register — does not violate the person’s “reasonable expectation of privacy.” What constitutes and defines what may be considered a reasonable expectation of privacy is set forth in the seminal and significant United States Supreme Court Case, Katz v. United States. In Katz, the Government placed an electronic listening device on the outside of a telephone booth, where Katz made his call from, for the purpose of eavesdropping. Katz argued that he had a reasonable expectation of privacy as to his seized conversations.

The Court ruled that listening to and recording Katz’s phone conversations with an electronic listening device attached to the outside of a phone booth constituted a “search and seizure” subject to Fourth Amendment protection. In the case of Katz, the court devised a two-pronged “test;” whether the individual’s conduct reflected a subjective expectation of privacy, and whether the subjective expectation is one society is prepared to recognize as reasonable.

The Court ruled that a search is constitutional if it does not violate a person’s “reasonable” or “legitimate” expectation of privacy. In the case of Katz, the Court held Katz had a reasonable expectation of privacy. When Katz shut the door to the telephone booth, the Court held that he expected his telephone conversation to be private and that the police violated his privacy by attaching an electronic listening device to the telephone booth. In short, the Court held that listening to and recording telephone conversations was a “search and seizure” subject to Fourth Amendment protection.

On the other hand, pen registers record all numbers dialed from a specific telephone line, but do not record conversations. Because pen registers do not overhear oral communications, they have received different treatment by some courts than other electronic surveillance instruments such as wiretaps. Smith v. Maryland, 442 U.S. 735 (1979), states the current view in this area of law. In Smith, the court held that the installation and use of a pen register was not a search within the meaning of the Fourth Amendment and hence, no warrant was required. In applying the Katz analysis to the case, the Court concluded that because pen registers do not hear sound and do not record conversation, they do not infringe on Fourth Amendment rights in the same fashion a wiretap or other recording devices do. Moreover, all dialed calls already transmit information to a third party, that is, to the telephone company, and so the Court observed, under this factual scenario no ground for a reasonable expectation of privacy existed.

Both Mr. Justice Marshall and Mr. Justice Stewart dissented from the majority opinion of Mr. Justice Blackmun, who held that once the individual conveyed numeric information to the telephone company and to its equipment somehow, he assumed the risk that the company would reveal the information to the police or others.

1. AMENDMENT IV [1971] U.S. CONSTITUTION
   “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

2. AMENDMENT XIV [1868] U.S. CONSTITUTION
   Section 1. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

4. Smith v. Maryland, 44 U.S. 735 (1979)
A better and more forward view on this emerging issue is expressed by the Supreme Court in *Kyllo v. U.S.*, where the Supreme Court had occasion to address the issue of the use of technology and electronic surveillance, and its use by law enforcement, as a Fourth Amendment issue.

Mr. Justice Scalia noted in this opinion, that where the search of the interior of a home is involved, there exists under that particular circumstance, a minimal expectation of privacy, which we all acknowledge to be reasonable, and the Fourth Amendment privacy guaranteed is present there.\(^5\)

**CONCLUSION**

This very brief note on the use of pen registers reveals that at present, their installation and use, whether in a home or office, is not a violation of the Fourth Amendment guarantee of privacy.

*Kyllo* represents a more enlightened and informed view of the use of technology to reach or, if you will, intrude, on a person and his affairs. In the opinion of this writer, it could be stated that *Kyllo*’s fine distinction of an intrusion into one’s home is a distinction without a difference. The reasoning of *Smith* that one’s privacy rights are lost when they are revealed to and given access to the telephone company and so to the public; government; and police is a mistaken view. When one places a call overheard or not, in one’s home or office, one assumes privacy and restriction of the event. It is no argument and it is fallacious to say that making the call represents some sort of assumption of the risk. One has no reason to suspect, and this is a reasonable expectation, that the numbers will be taken and disseminated to the authorities. *Smith* is the wrong view. There is intrusion and invasion here and saying numbers are different from sound begs the question. The expectation of privacy is the same in both and the Fourth Amendment guarantee should be afforded in both.\(^6\)

The author notes that he is indebted for the research in this article to Magaly Peña, a student in his Paralegal Course at the Borough of Manhattan Community College.

---


5. Justice Marshall wrote in his dissent in *Smith* that one is entitled, when one dials a number from his home, that it will be recorded solely for phone company business purposes and held that law enforcement must and should obtain a warrant to make use of a Pen Register. Similarly, Mr. Justice Stewart stated that numbers dialed from a private telephone are subject to constitutional protection and that the information obtained from a Pen Register is information in which the telephone subscriber, whether in home or office, has a legitimate expectation of privacy. *Smith v. Maryland Id.*

6. On this see *Commonwealth v. Beauford*, 475 A. 2d 783 (Pa. Super. 1984). The Pennsylvania Court held that the use of a Pen Register constituted an intrusion of a person’s legitimate expectation of privacy and was protected by the state constitution, and required some sort of Judicial Order.
MEMBERSHIP APPLICATION

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

(Please print or type.)

Name:__________________________________________________________________________

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

(check all that apply)

Firm Name:____________________________________________________________________

Address:_______________________________________________________________________

City/State/ZIP ________________________County__________________________________

Phone: (         )_________________________  Fax: (          )_____________________________

Admission to Bar:  State: _________________________________Year Admitted:__________

E-Mail Address: ________________________________________________________________

MEMBERSHIP APPLICATION

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

(Please print or type.)

Name:__________________________________________________________________________

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

(check all that apply)

Firm Name:____________________________________________________________________

Address:_______________________________________________________________________

City/State/ZIP ________________________County__________________________________

Phone: (         )_________________________  Fax: (          )_____________________________

Admission to Bar:  State: _________________________________Year Admitted:__________

E-Mail Address: ________________________________________________________________

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

❑ CONTINUING LEGAL EDUCATION       ❑ INDIGENT DEFENSE
❑ LEGISLATIVE ❑

What issues and activities would you like to see NYSACDL concern itself with?
____________________________________________________________________________
____________________________________________________________________________

Membership dues can be paid by check, or charged to Master Card, Visa, American Express or Discover Card.
Please make your check payable to NYSACDL and send to:
NYSACDL, 245 Fifth Avenue - 19th Floor, New York, NY 10016

Please charge my account #_______________________________________________ Expiration Date___________

Signature of Applicant________________________________________________________Date________________

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

Enclosed is my payment for membership in NYSACDL:

______________________________
Signature of applicant

Law Student $25

School:_____________________________
Graduation date:___________________

Lifetime Member $2,500

President's Club $500

Sustaining Member $300

Regular Member $175

Regular Member (Income over $50,000) $100

Regular Member (Income under $50,000) $150

Associate Member $150

(18 ) Mouthpiece Volume 18 • Number 5 • September/October 2005 New York State Association of Criminal Defense Lawyers
For years, trial courts have chosen not to heed the ruling of the Supreme Court by adequately instructing juries as to the government’s burden when it prosecutes an all-too-common charge under the provisions of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) statute. (18 USC 1961-68)

Instead it is only post-verdict, when the trial court first examines the proof in light of the High Court’s teaching.

Given the enormous penalties for a RICO violation, juries in the first instance should be instructed appropriately so that they can shoulder the responsibility, which properly is theirs to discharge.

It is not enough to say that, when the trial court post-verdict subjects the proof to what the Supreme Court has held is the proper burden, the prosecution must carry in order to prevail on a charge of violating the RICO statute, the defendant’s rights are adequately protected. To embrace that, is to deny a defendant the constitutional right to have a properly instructed jury decide his guilt or innocence to a serious felony charge.

Eighty years ago Judge Learned Hand made this familiar observation with respect to a charge of conspiracy, namely that it is the "darling of the modern prosecutor's nursery." One can only wonder what his observation would be today at a time when virtually all serious prosecutions contain a charge of conspiracy to violate RICO (RICO conspiracy) (18 USC 1962 (d)).

The RICO Statute

RICO is a statute unlike any other in the criminal code. It established new penal violations, provided enhanced sanctions and armed the prosecutors with new civil and criminal remedies. With the allegation that a criminal enterprise exists, a prosecutor can join numerous members of the enterprise alleging that one or more members committed separate criminal offenses known as predicate acts that involve violations of listed penal sections, most often federal, but at times including certain state statutes. The result is often a megatrial with what amounts to separate minitrials being conducted involving distinct crimes committed by one or more members — defendants. The sole linkage being that the defendants are members of the same criminal enterprise. The risk of guilt by association and prejudicial spillover is grave despite cautionary instructions that a particular piece of evidence is to be considered against only certain defendants.

The correct observation, and one that might appeal to Judge Hand were he to be in a position to comment on a charge of RICO conspiracy, is by no means related to a "nursery;" rather, such a charge is equivalent to an atomic bomb and it is the "darling of the modern prosecutor’s" arsenal. The bringing of such a charge often evokes terror in those accused of the crime. One commentator has outlined the problems with overly broad RICO applications in his article "Spiraling Out of Control: Ramifications of Reading RICO Broadly."

A conviction of RICO conspiracy parallels in penalty the offense that was the object of said conspiracy. In addition, courts have permitted consecutive sentences when the conspiracy and the substantive violation are proved.

Section 1962 in part, prohibits any person or entity from using monies derived from a pattern of racketeering, from acquiring an interest in any business, or maintaining, through a pattern of racketeering activity, an interest in any enterprise or conducting the affairs of an enterprise through a pattern of racketeering activity. It is §1962 (d), that we will be dealing with in this article, namely conspiracy to participate in the aforesaid activities.

It is not the purpose of this article to analyze all the intricacies of the RICO statute. Others have done that.

Trial Courts Lighten Prosecution’s Burden

The focus of this article instead will be that despite the clear holding of the U.S. Supreme Court, which sets forth what the government must prove to establish a RICO conspiracy, trial courts, not only in New York, but elsewhere, improperly have chosen to lighten the burden of the prosecution in such cases, all to the detriment of a defendant’s right to a fair trial.

The general federal conspiracy statute, 18 USC 371, has its roots in the common law. That statute has a five-year penalty. To ensure that there would be no punishment merely by reason of an agreement between the parties, that statute requires one of the parties to commit an act (the overt act) in furtherance of the agreement before criminal liability attaches.
RICO CONSPIRACY
continued from page 19

As crime became more sophisticated and criminal organizations, enterprises if you will, emerged, whose function was to infiltrate legitimate businesses through a myriad of criminal activity, it was believed that the general conspiracy statute was inadequate to punish those offenders. To deal with the problem, RICO was enacted in 1970 as part of the "Organized Crime Control Act." This law was intended to provide a direct and powerful attack on organized crime, but as members of the profession know, it has far outgrown its intended use. RICO provides for a unique formulation, which may permit conviction of RICO conspiracy even though the predicate offenses be two state offenses as long as they are punishable by a year or more in jail and are listed as predicate acts. Congress made it clear, that the terms used in RICO were to be broadly construed.6

Risk of Guilt by Association

For a period of 18 years, the circuit courts divided over what the government had to prove in order to convict a defendant of RICO conspiracy. The very nature of the charge, as noted, carried with it a paramount risk of guilt by association. Nonetheless, the defense bar gained solace from the U.S. Court of Appeals for the Second Circuit holding in United States v. Ruggiero.7

There the court held that to convict a defendant of RICO conspiracy, it had to be shown that the defendant personally agreed to commit two or more predicate acts. In other words, despite how many defendants were indicted, and however many diverse predicate acts were alleged to have been committed as part of the pattern of racketeering, the jury in order to convict on a charge of RICO conspiracy had to focus on the actions of the defendant in order to determine whether that defendant had personally agreed to the commission of the predicate acts. Such a holding reinforced the basic principle that the question of guilt or innocence is to be answered by focusing on the activities of the defendant, not merely his association with a criminal enterprise.

The majority of courts followed the Second Circuit view. This was a critical brake on a criminal statute that ignores any principle of leniency.

In 1997, the Supreme Court granted certiorari in the case of Salinas v. United States.8 There were a number of issues before the court, including whether an overt act was required to be proved and just what the government had to prove to fix individual liability on a defendant under a charge of RICO conspiracy.

The sheriff of a county in Texas and a prisoner entered into an agreement in which the sheriff agreed to accept bribes to allow the prisoner to have conjugal visits. Mr. Salinas was the chief deputy and while the sheriff was away he stood guard when the visits took place and accepted watches and a truck in return for his assistance. He was charged with a substantive violation of RICO and a count of conspiring with the sheriff and the prisoner to violate RICO. The receipt of bribes by the sheriff were predicate acts also charged to Mr. Salinas. He was convicted only on the RICO conspiracy count. On appeal, he contended that there was no proof that he personally agreed to commit two of the predicate acts involving receipt of monies by the sheriff. The U.S. Court of Appeals for the Fifth Circuit held that such proof was not necessary in order to sustain the conviction.

Not Prove an Overt Act

The Supreme Court's decision dealt several blows to the defense. The first was that the government did not have to allege or prove an overt act. The second was that, in a RICO conspiracy prosecution, there was no need for the government to prove the defendant had personally agreed to commit two predicate acts. The reed, slim indeed, that tied the defendant to the conspiracy was proof that he intended to further the endeavor, which if completed would satisfy all the elements of a substantive offense. The Court went on to rule that it was enough that the defendant adopted the goal of furthering or facilitating the criminal objective.

Following this decision, commentators, without dissent, warned that the Supreme Court had expanded the RICO net. A leading RICO scholar, wrote that the practical effect of Salinas was to make it far easier for prosecutors to convict an individual who is indirectly associated with a RICO enterprise.9 Obviously, there being no need to prove that the defendant personally agreed to commit the predicate acts, the risk was heightened that membership in a criminal enterprise, without more, would be enough to result in a RICO conspiracy conviction. The specter of guilt by association was acknowledged by the Supreme Court, but it obviously believed that it had set forth a clear enough test to be fairly administered by the trial courts.

If one examines the Pattern Jury Instructions in each of the circuits as well as Judge Sand's treatise, Modern Federal Jury Instructions, in particular §52-32 "Membership in the RICO Conspiracy," the form provides that jurors are to be instructed that in order for the government to meet its burden it need not prove that the defendant committed or agreed to commit any of the predicate acts "as long as the government proves that the defendant participated in some manner in the overall objective of the conspiracy." (italics added) Some trial courts instruct that the government proves its case when it demonstrates that the defendant "participated" in the conspiracy.

7. United States v. Ruggiero, 726 F2d 913
8. Subsequently reported at 522 US 52 (1997)
Not one circuit adopts the language used in Salinas: to wit, the government is required to prove in a RICO conspiracy that the defendant intended to further the criminal act or that he acted to facilitate the criminal endeavor, which if completed would satisfy all elements of a substantive criminal offense. Inexplicably the courts substitute for the language used by the Supreme Court, words that are patently vague and not subject to any uniform meaning. How can any juror, and for that matter each deliberating juror, possibly know what it meant by the phrase, "participated in some manner"?

'SIn Some Manner'

It is elementary that instructions to a jury must convey an understanding of what is necessary for their decision-making. While the words "participated in some manner" might some have meaning, if at all, in general conversation, how is the jury educated when such broad terms are used? What extra effort would be required were a trial court, after the use of the words "participated in some manner" to proceed to fully and accurately state the critical language of Salinas?

We submit the following example, which illustrates the inappropriateness of the standard instruction that trial courts give with respect to membership in a RICO conspiracy.

In United States v. Chen, the defendant was charged with the substantive offense of violating 18 USC 894 (a)(1), that being the collection of a debt through extortionate means. The proof was clear that the defendant participated in collecting the debt, which had been the object of extortionate means. However, the court ruled that it was not enough to sustain the conviction simply because the defendant acted to enable the lender to collect the debt, knowing that "extortion is afoot." Rather, the defendant had to involve himself in the extortion itself and it was not enough that he aided the lender in collection of the debt.

If one were to assume, that the defendant was charged with RICO conspiracy (alone with another predicate act, other than the extortionate collection of this debt) a jury receiving the standard instruction related to such a charge would more than likely convict the defendant. He certainly participated in some manner in the criminal objective. But that is not consistent with what the Supreme Court instructed when considering a charge of RICO conspiracy. A conviction on such a charge must be bottomed, according to Salinas, not merely on proof that the defendant simply "participated in some manner" in the criminal conduct, but rather on proof that the defendant intended to further or facilitate the criminal conduct, satisfying all elements of the substantive criminal offense.

It is hornbook law that a defendant, like Mr. Chen, not guilty of the substantive offense, may still be convicted if there is proof of an agreement to commit the substantive crime.

However, there was no agreement in Chen to satisfy all elements of the substantive criminal offense by his resorting to extortion. True, Mr. Chen participated in the extortionate collection. However, would it then be appropriate for the trial court to ignore both the holding in Chen and Salinas and instruct the jury that it was enough to convict the defendant of RICO conspiracy, by proving that the defendant "participated in some manner" in the overall criminal objective? The answer is: no that would not be appropriate.

Jury Instructions: Precision

Precision when the court instructs the jury should be the order of the day, in every case, and particularly so when we deal with a statute such as RICO that has such enormous negative consequences. Vagueness does not instruct. Rather, it leads to confusion and this does not serve the ends of justice.

The instruction now given with respect to RICO conspiracy does not follow from Salinas. It does not accurately convey to the jury what is necessary for the government to prove in order to meet its burden. In addition, it violates a principle firmly engrained in our criminal law, that a citizen is entitled to know the kind and nature of his conduct that exposes him to criminal liability. In short, the words "participated in some manner" or "participate" simply do not pass muster. It is not enough — as we earlier noted, for a court post-verdict to analyze the sufficiencies of the proof, in light of Salinas — to rely on that alone; this would deprive a defendant of the verdict of a properly instructed jury.

Conclusion

Why this problem has not attracted critical comment may well be the result of the large number of guilty pleas when defendants are faced with a charge of RICO conspiracy. However small the number of defendants proceeding to trial on a charge of RICO conspiracy, they have the right to a verdict from a jury that is fully and correctly instructed in line with the dictates of the U.S. Supreme Court.

10. See Modern Federal Jury Instructions, §1.01
I just returned from two weeks at the National Criminal Defense College in Macon, Georgia courtesy of the Twelve Angry Men scholarship. Simply put, it was without a doubt two of the most intense, yet incredibly worthwhile weeks of my life. Regardless of how long you have practiced or how many trials you have under your belt, the NCDC is an excellent educational (and social) experience which I would highly recommend.

Typically, I look forward with spending any time – let alone two weeks – with a bunch of lawyers about as pleasant as going to a dentist who doesn’t believe in novocaine or nitrous oxide. My apprehension was lessened somewhat by the fact that I would be spending the time with fellow members of the criminal defense bar – but I was nonetheless expecting the atmosphere to be about as exciting and lively as a Marcel Marceau record. Needless to say, any doubts or concerns I had were quickly put to rest upon my arrival.

The ninety-six students were broken up into groups of eight based upon jury trial experience. Our group consisted of men and women from across the country with remarkably diverse backgrounds and experiences. Yet, soon after meeting, we bonded and developed close friendships which (hopefully) will last for many years.

As for the work itself, we essentially took four cases from start to finish spending each day on a particular aspect of the trial. Each day a different member of the faculty would be our instructor, helping with the mechanics of what we were doing, the more esoteric (nonetheless as important) aspects of trial such as finding our voice and place. The faculty was nothing short of incredible and dedicated. The feeling was universal that in addition to their helping us become better criminal defense lawyers – they more importantly made us feel like peers. I was lucky to have as faculty NYSACDL Past-Presidents David Lewis (our emcee for the banquet) and Kathryn Kase, and Tony Cueto – all of whom received rave reviews.

As for the social aspects of Macon, we were told on the first day by Dean Daryl Dantzler that the reason the NCDC is in Macon is that there is “nothing else to F-ing do here”. She could have not been more right. Despite the fact that it was as hot and muggy as Satan’s steamroom (we had another way to describe it), that the entire city closed at 5:00 p.m., and that the Macon “social scene” was an oxymoron – much fun was had. It was not uncommon to see groups of 10 or more at dinner outside the hotel or at one of the few watering holes in town. Also, The NCDC sponsors a “hospitality suite” (a/k/a “The Cave”) at the hotel where the students and faculty met each evening and socialized, played cards, and traded war stories, etc. In short, we worked hard and played hard.

Does my sojourn at the NCDC sound a bit corny and perhaps maudlin? Sure. But the experience was nothing short of incredible and the people I met — fellow students and instructors alike — I now consider friends.

If anyone would like to know more about the NCDC, please feel free to contact me directly at mbaker@co.broome.ny.us. NYSACDL members in good standing are eligible for the Twelve Angry Men scholarship, funded by the 1993 special presentation of the play. To apply, contact Executive Director Patricia Marcus at (212) 532-4434, or via email at nysacdl@aol.com.
NEW MEMBERS

John Balestriere..........................Manhattan
Anne J. D’Elia.............................Kew Gardens
Simone Gordon, DSW, LCSW.........Manhattan
Brandon New.........................Hackensack, New Jersey
Dennis B. Loughlin......................Cherry Valley
Allen Popper...........................Kew Gardens
Kim E. Richman..........................Bronx
Alan Silber...............................Roseland, New Jersey
Robert J. Zaccheo, Jr....................New Paltz
NYSACDL FALL CLE CALENDAR

September 16..........................Sentencing Update
Broome County Public Library,
Binghamton

October 15..............................Sex Abuse and Domestic Violence:
What a Criminal Defense Layer
Needs to Know
Rochester

October 21...............................Cross to Kill
Palisades Mall, Nyack

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

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

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

See our website at www.nysacdl.org
for more information
or e-mail us at nysacdl@aol.com

New York State Association of Criminal Defense Lawyers
245 Fifth Avenue - 19th Floor
New York, NY 10016