

# THE NEW YORK CRIMINAL BAR ASSOCIATION

An Affiliate of the National Association of Criminal Defense Lawyers



## *NYCBA Members Newsletter*

Vol. 2, No. 5

February, 2005

**Greetings** and welcome to the February 2005 issue of our Newsletter.

### **President's Message:**

This is my final message as your President, and I want to thank all of you for your active support and participation in our organization during my tenure. It has been an honor and pleasure to serve as your President. I want to take this opportunity to thank my fellow officers Henry Steinglass and Len Levenson, and the members of the Board of Directors for their time and invaluable help. In particular I want to thank Peter Schmidt, Michael Bachrach and Past-President Scott Tulman for their terrific efforts each month in bringing you this Newsletter.

I look forward to the New York Criminal Bar Association continuing, under the leadership of Henry Steinglass, to help all of us deliver the highest quality of representation for our clients.

### **Upcoming Events:**

The annual meeting of the New York Criminal Bar Association will held on **February 28, 2005, at 5:30 p.m.**, in the **15th floor Central Jury Room at 100 Centre St.**, New York, NY. At the meeting, the Members will be asked to vote on the new officers and directors for the coming year. In that connection, the Board has nominated the following persons for the offices set forth below:

**Position**

**Candidate**

President:	Henry Steinglass
Vice President:	Mathew Mari
Secretary:	Leonard Levenson
Treasurer:	Michael Bachrach
Directors:	Michael Joseph Michele Maxian Norman Reimer

Immediately following the Annual Meeting, there will be a special CLE program, entitled "**Update in the New York Court of Appeals.**" This seminar will be presented by the Hon. James A. Yates, Justice, N.Y.S. Supreme Court, 1st Judicial District. Two hours of New York State MCLE credit will be awarded to all who arrive by 5:45, register and stay for the full program.

On **Tuesday, March 15, 2005**, Gideon Day, the annual celebration of Gideon v. Wainwright, will be held in Albany at the Empire State Plaza. If you are able to join Henry Steinglass and other bar association representatives to meet with our state legislators about the need to improve the quality of indigent defense services and to raise 18-b rates, please let us know (by calling Henry Steinglass at (212) 406-7700 or emailing him at [hjsteinglasslaw@earthlink.net](mailto:hjsteinglasslaw@earthlink.net)).

On **April 14-17, 2005**, the **National Association of Criminal Defense Lawyers** ("NACDL") will hold its Spring meeting and CLE programs at the Marriott Financial Center, 85 West Street, in Manhattan. There will be receptions at 6:30 p.m. on Thursday, 4/14, and Friday, 4/15, lunch on Saturday, 4/16 (co-sponsored by New York Criminal Bar Association and other metropolitan area affiliates of NACDL), CLE on 4/15 and 4/16, and NACDL Committee meetings and a Board of Directors meeting on Sunday morning, 4/17. To register or obtain more information, visit [www.nacdl.org](http://www.nacdl.org) or call (202) 872-8600, x 232.

On **June 1, 2005**, the New York Criminal Bar Association will hold our annual dinner at Tavern on the Green. **SAVE THE DATE!**

## NYS Commission on the Future of Indigent Defense Services Holds Hearings:

On **March 11, 2005**, the 32-member N.Y.S. Commission on the Future of Indigent Defense Services, appointed by Chief Judge Kaye and co-chaired by Hon. Burton Roberts and Prof. William Hellerstein of Brooklyn Law School, held its first public hearing. Among those testifying were Henry Steinglass who (expressing his personal views) urged that the role of 18-b lawyers be expanded.

Additional hearings will be held on March 11 in Rochester and March 23 in Ithaca. The Commission also welcomes written submissions, which should be e-mailed to Paul Lewis, Esq., at [nyscid@courts.state.ny.us](mailto:nyscid@courts.state.ny.us) or mailed to the Commission, c/o Paul Lewis, OCA, 25 Beaver St., New York NY 10004.

## N.Y. Court of Appeals Upholds OCA Rule on Review of 18-b Vouchers:

On February 15, 2005, the Court of Appeals upheld the OCA rule permitting administrative judges to review enhanced 18-b compensation granted by trial judges. The decision, which reversed the Appellate Division, First Department, was 6-0, with Chief Judge Judith Kaye taking no part. The case was brought by New York Criminal Bar Association Treasurer Leonard Levenson (acting in his individual capacity) and also by Richard Siracusa and James Tatem.

## Annual Dues:

If you have not yet paid your New York Criminal Bar Association dues for 2005, which were due on Jan. 1, please make your payment today by sending your check or faxing your credit card authorization for \$100 to Leonard Levenson, Treasurer, 225 Broadway, New York, New York, tel. (212) 732-0522, fax (212) 587-0570.

## Judicial Screening and Nominations:

Michael Munjun Yi, whose business address is Yi, Cho & Brunstein, LLC, 350 Fifth Avenue, New York, NY 10118 has submitted an application for consideration by the Mayor's Advisory Committee on the Judiciary for appointment to the Criminal

Court.

If anyone has any information that would bear upon his candidacy, please advise the Committee at 36 West 44th Street, Suite 1408, New York, NY 10036, Att. Desiree Kim (212-944-6225).

## *U.S. v. Booker Update:*

Only a month has gone by since our last newsletter and already the post-*Booker* jurisprudence has unfolded exponentially. We highlight here three cases from the Second Circuit which we suggest all Members review carefully: *United States v. Crosby*, 2005 WL 240916, \_\_\_ F.3d \_\_\_ (2d Cir. February 2, 2005); *United States v. Flemming*, 2005 WL 237200 (2d Cir. February 2, 2005); and *Green v. United States*, 2005 WL 237204 (2d Cir. February 2, 2005).

In *Crosby*, Judge Newman offered the Court's most thorough analysis of *Booker* to date, identifying five new sentencing concerns: (1) the Guidelines are no longer mandatory; (2) the sentencing judge must nonetheless "consider" the Guidelines but with a renewed emphasis on 18 U.S.C. § 3553(a); (3) consideration of the Guidelines will normally require a determination of the applicable Guideline range, or, at a minimum, an identification of the arguably applicable Guideline ranges and policy statements; (4) the sentencing judge should decide whether to impose a sentence similar to what would have been imposed under the formerly-mandatory Guidelines, or to impose a non-Guidelines sentence; and (5), "the sentencing judge is entitled to find all facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence."

This final concern is easily the most problematic as well as controversial. The Court did not make clear, and has not since clarified, whether "all facts" refers only to mitigating factors, which would be consistent with Justice Stevens' opinion in *Booker*, or mitigating and aggravating factors, which could have the practical effect of overturning *Apprendi*. Further, under either scenario the court did not set forth the standard of proof to be applied, although at least one Southern District judge was quick to conclude that a reasonable doubt standard should at least be applied to aggravating factors. See *United States v. Ochoa-Suarez*, Docket No. 03 Cr. 747 (JFK), 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. February 7, 2005) (rejecting enhancement for "role in the offense" under U.S.S.G. § 3.1.1 "because there has been no finding beyond a reasonable doubt by a jury to this effect," but exercising discretion to examine reductions and departures) (Keenan, J.).

In *Flemming*, also authored by Judge Newman, the Court examined the standard of appellate review, concluding that the *Booker* "standard of reasonableness

[should also] be applied ... to review of sentences for which there are no applicable guidelines;" and noting in dicta, "[a]lthough the brevity or length of a sentence can exceed the bounds of 'reasonableness,' we anticipate encountering such circumstances infrequently".

Finally, in *Green*, the Court concluded in a per curiam opinion that *Booker* only applies to cases on direct review and does not apply retroactively to cases on collateral review. Clearly, *Green* will disappoint many of those presently incarcerated, but with *Booker* only six weeks old we suspect that there will still be many challenges to come.

For those interested in following the latest *Booker* developments we recommend Professor Douglas Berman's [Sentencing Law and Policy](#) site on the Internet and the special *Booker* Resource Center on the Internet maintained by *Punch and Jurists* at <http://www.ussguide.com/members/BulletinBoard/Booker/index.cfm/>. Although that latter site requires a Username and a Password, all members of the NYCBA have full access privileges to it simply by using the same access codes they use to login to the NYCBA's Website at [www.nycrimbar.org](http://www.nycrimbar.org).

There are a number of excellent articles analyzing the *Booker* decision on the Media Articles section of that Website, including:

["Judges Maintain Sentencing Formula Despite Ruling,"](#) by Gary Fields and Laurie P. Cohen, Wall Street Journal, February 11, 2005.

["2nd Circuit Upholds Ruling that 'Considered' Guidelines Range,"](#) by Mark Hamblett, New York Law Journal, February 10, 2005.

["2nd Circuit Gives Guidance on Sentencing,"](#) by Mark Hamblett, New York Law Journal, February 4, 2005.

## Second Circuit Blog:

Spearheaded by Paul M. Rashkind, the Chief of Appeals for the Federal Public Defender's Office for the Southern District of Florida, the different Federal Public Defenders' offices from across the country have quietly commenced creating a computer network for defense lawyers to help combat the massive database system operated by the Department of Justice which is available to all Federal

prosecutors. The new network, called [D-Web Law Blogs](#), covers proceedings in the Supreme Court and in all twelve Circuit Courts of Appeal - and it holds promise of becoming an incredibly important asset for the criminal defense bar.

Each Circuit has its own special Blog (all of which can be accessed from the D-Web Law Blog site). Some of the Circuit sites are still under construction (such as the First, Fifth and D.C. Circuits); and some have not posted any information since December, 2004 (such as the Fourth and Tenth Circuits). But several of the Circuit sites have been extremely active and are beginning to attract a large following. Included in that latter group are the sites for the Second, Third and Ninth Circuits - all of which have been posting new case materials and commentary on a frequent, if not daily, basis.

The Second Circuit site, known as [Second Circuit Blog](#), is located at <http://circuit2.blogspot.com/>. The current contributors to that site (principally some of the most experienced appellate lawyers from the Federal Defender Division of The Legal Aid Society) are:

David Lewis

Sean Hecker

David Patton

Steve Statsinger

Paul M. Rashkind

Yuanchung Lee

If you want to stay abreast of the latest developments in the Second Circuit, this is the place to go. Not only do the contributors post, on a daily basis, outstanding analyses of and commentary on the latest Circuit rulings (both published and unpublished), they also note and comment on procedural rules and directives from the Court which are often difficult, if not impossible, to find. For example, on February 4, Yuanchung Lee posted this note:

"Just moments ago, the Second Circuit issued a blanket order addressing all previously decided criminal cases in which the mandate had been withheld pending the Supreme Court's decision in Booker, pursuant to Chief Judge Walker's August 6, 2004, order. Please see the Circuit's website for this blanket order ([www.ca2.uscourts.gov](http://www.ca2.uscourts.gov)).

## New York State Judicial Directory - At Last:

While biographical data on Federal judges has long been available online at the [Federal Judges Biographical Database](#), which is maintained by the Federal Judicial Center, there has been no official Judicial Directory of the New York State judges -

until now. In fact, many judges in New York State have long opposed such a database. (See, "[Judges' Data? The Objections Are Overruled](#)," by Joyce Purnick, The New York Times, February 10, 2005.)

Earlier this month, a directory of New York State judges has finally made its debut on the New York State Unified Court System Website at <http://www.nycourts.gov/judges/directory.shtml>

So far, this Directory covers judges from the following Courts:

[The New York State Court of Appeals](#)

[The Appellate Division - Third Department](#)

[The Appellate Division - Fourth Department](#)

[Judges of the Trial Courts](#)

There is also an excellent [Administrative Directory](#) of the court system's Executive Officers, Administrative Judges, and Supervising Judges.

Notable by absence are the Justices from the First and Second Departments of the Appellate Division; and so far the data from and about the various judges varies enormously. But, it's a beginning - and we will keep you posted as this Directory expands and improves its coverage.

## NYCBA Web Site Features:

Each month, we try to point out some of the latest resources that we have posted on our Web site at [www.nycrimbar.org/](http://www.nycrimbar.org/). In keeping with that tradition, we note the following items:

### Criminal Records:

Because the airwaves have been filled lately with advertisements from a company known as [ISpyNY.com](http://ISpyNY.com) which offers "instant access" to criminal records in New York State for a fee of \$78.95, we remind our Members that the [New York State Office of Court Administration](#) makes those same records available for a fee of \$52.00. In addition, as we noted in the [November 2004 Issue](#) of this Newsletter,

criminal records can also be obtained through PACER through PACER (Public Access to Court Electronic Records) - the Federal courts' online system which can be accessed at <http://pacer.psc.uscourts.gov>.

For updated information about the availability of criminal records both in New York and nationwide, check out the "[Obtaining Criminal Records](#)" page on our own Website.

## Court Decisions:

[People v. Pitts, No. 9, N.Y.S. Ct. of Appeals, Feb. 15, 2005](#)

[People v. Barnwell, No. 10, N.Y.S. Cy. of Appeals, Feb. 15, 2005](#)

In this consolidated decision, the Court of Appeals held that there is no time bar for bringing a post-conviction DNA challenge and that the defendant has no burden to show that potential DNA evidence exists or that it exists in quantities sufficient to analyze. Writing to the Court, Judge Smith wrote: "We hold that there is no time limit for bringing a post-conviction motion requesting the performance of forensic DNA testing. A defendant may move for DNA testing pursuant to CPL 440.30 (1-a) at any time. We further hold that the defendant does not bear the burden of showing that the specified DNA evidence exists and is available in suitable quantities to make testing feasible. To the contrary, it is the People, as the gatekeeper of the evidence, who must show what evidence exists and whether the evidence is available for testing."

[People v. Hardy, No. 11, N.Y.S. Ct. of Appeals, Feb. 17, 2005](#)

[People v. Douglas, No. 12, N.Y.S. Ct. of Appeals, Feb. 17, 2005](#)

The New York Court of Appeals has finally addressed the impact of the Supreme Court's landmark Confrontation Clause decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004) on prevailing New York jurisprudence. In these two separate decisions, the Court backed away from its 1986 holding in *People v. Thomas*, 68 N. Y.2d 194, and said that judges can no longer admit testimonial hearsay statements, such as the plea allocution of a co-defendant who is not available for cross-examination. However, the Court also stressed that the issue is subject to harmless error analysis. Thus, while the Court overturned Hardy's conviction based on a *Crawford* error, it upheld Douglas' conviction (even though he cited a similar infirmity) because the evidence against him was overwhelming and the error was harmless.

## New on the Web

- "[Perfecting PDF Files](#)" - An article by Brett Burney of Legal Technology, which describes in detail what lawyers should know about PDF files - the Internet formatting technology developed by Adobe Systems, Inc. which has now become the standard for electronic filing in most courts. Even if you already know how to convert legal documents into a PDF file, you should read this article to see what is happening on the horizon.
- "[Federal Criminal Case Processing, 2002 - With Trends 1982-2002, Reconciled Data](#)," a new Report from the [Bureau of Justice Statistics](#) of the Department of Justice which shows, *inter alia*, the number and disposition of suspects investigated by U.S. attorneys, the number of arrests for Federal offenses, the number of defendants in cases filed in U.S. district courts, sanctions imposed on criminal defendants, the number of persons under Federal correctional supervision (probation, parole, supervised release, and incarceration), and trends in annual Federal criminal case processing.
- "[Barred For Life: Voting Rights Restoration in Permanent Disenfranchisement States](#)," by Marc Mauer and Tushar Kansal, [The Sentencing Project](#), February, 2005 - A new study which shows that an estimated 4.7 million Americans are not eligible to vote as a result of felony disenfranchisement laws that apply in 48 states and the District of Columbia. Of that total, 1.5 million felons who have completed their criminal sentences are still denied the right to vote.
- [The "new" BOP Website](#) - While the Federal Bureau of Prisons is busy closing prison camps and shutting down its boot camp programs (which is says is necessary to save money), it apparently still had enough money left over to design a flashy new Website - complete with a slide-show of some of its prize prison facilities.

Yours for a better defense,

Harvey Fishbein  
President

## Internet and Newsletter Committee:

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Henry J. Steinglass  
Scott Tulman  
Michael K. Bachrach  
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