

THE NEW YORK CRIMINAL BAR ASSOCIATION

An Affiliate of the National Association of Criminal Defense Lawyers



NYCBA Members Newsletter

Vol. 2, No. 6

March, 2005

Greetings and welcome to the March 2005 issue of our Newsletter. As you may already know, due to the snow storm that hit New York City on February 28, 2005, we did not have a sufficient number of members present to hold our annual meeting. So, as noted below, it has been rescheduled for March 28, 2005 in conjunction with **Richard Ware Levitt's** *Annual Review of Second Circuit* cases. We hope you will make every effort to attend.

Upcoming Events:

The rescheduled annual meeting of the New York Criminal Bar Association will held on **March 28, 2005, at 5:30 p.m.**, in the **9th floor Ceremonial Courtroom of the new Federal Courthouse, 500 Pearl St., New York, N.Y.** 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

President:

Vice President:

Secretary:

Treasurer:

Directors:

Candidate

Henry Steinglass

Mathew Mari

Leonard Levenson

Michael Bachrach

Michael Joseph

Michele Maxian

Norman Reimer

Immediately following the Annual Meeting, there will be a special CLE program, entitled "**Recent Developments in the Second Circuit.**" This seminar will be presented Richard Ware Levitt, the noted Defense Attorney and former Board member of the New York Criminal Bar Association. 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 **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. A \$100 discount is available to paid-up New York Criminal Bar Association members, reducing the cost from \$395 to \$295 for the CLE seminar package, and from \$545 to \$445 for the complete seminar and events package. To register or obtain more information, visit 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!**

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. As indicated above, paying your dues now will entitle you to a \$100 discount on the NACDL's April 2005 CLE and events in Manhattan.

Judicial Screening and Nominations:

Robert M. Mandelbaum, Esq., whose business address is 230 Park Avenue, New York, NY 10169 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).

Right to Counsel Celebrated in Albany on March 15, 2005 (Gideon Day)

March 15, 2005 was "Gideon Day", the annual celebration of the *Gideon v. Wainwright* decision and the right to counsel. As in prior years, representatives of bar associations, indigent defenders and other organizations gathered in Albany to meet with legislators about the continuing crisis in indigent defense, including the assigned counsel ("18-b") part of the system. Henry Steinglass participated in this effort as a representative of the New York Criminal Bar Association.

Among the many current challenges facing us are the reduction in 18-b assignments in New York County and throughout the state. As noted in the New York Criminal Bar Association's February 2005 newsletter, Henry Steinglass testified before the 32-member N.Y.S. Commission on the Future of Indigent Defense Services on 2/11/05, expressing his personal views that the role of 18-b lawyers should be expanded. The Commission, appointed by Chief Judge Kaye and co-chaired by Hon. Burton Roberts and Prof. William Hellerstein of Brooklyn Law School, welcomes written submissions, which should be e-mailed to Paul Lewis, Esq., at nyscid@courts.state.ny.us or mailed to the Commission, c/o Paul Lewis, OCA, 25 Beaver St., New York NY 10004.

This year there has been an emphasis on improving the quality of indigent defense, including a proposal to impose state-wide standards which apparently would apply to assigned counsel as well as defender organizations. Whether and how to attempt to enforce such standards on assigned counsel is an issue on which those doing 18-b work may wish to be heard.

In addition, it has been suggested by Leonard Levenson, Treasurer of the New York Criminal Bar Association, that 18-b rates should be tied to the cost of living or some other mechanism for periodic increase, so that we will not have to endure another long hiatus before rates are raised again by the legislature.

If you are concerned about such issues, or would like more information, please contact Henry Steinglass, tel. (212) (406-7700), fax (212) 406-7702, email hjsteinglasslaw@earthlink.net, so that we can work together for a better system of indigent defense.

"Booker" BulletinBoard on NYCBA Website

The "Bulletin Board" feature of the NYCBA Website is an excellent way for NYCBA members to exchange information about the latest developments regarding *Booker*. A member can post letter submissions, and write memos about oral arguments and judges' reactions and rulings. For example, Henry Steinglass has posted his 3/2/05 letter in a S.D.N.Y. case regarding how the the Guidelines should be "considered", and posted a memo, dated March 5, 2005, summarizing his oral arguments against Utah District Judge Cassell's view, elaborated on in "*Wilson II*", that "great weight" should be given to the Guidelines. Formal motions and briefs can also be posted. To post an item, just go to the "Bulletin Board" section of the Website, click on "new message", select an existing subject (such as "*Booker*") or, if there is no existing subject for your topic, create a new descriptive subject, then fill in your name, etc., as directed, and type in your message or "copy and paste" your posting from your word processing program.

U.S. v. Booker Update:

Through the kind courtesy of Prof. Daniel J. Capra, the Reed Professor of Law at Fordham University Law School, we have posted on our Web site copies of his comprehensive review of the published Circuit Court and District Court decisions as of March 14, 2005 which have applied Booker. See, [*Application of Booker by the Courts of Appeal*](#) and [*Review of District Court Sentencing Decisions Rendered After United States v. Booker*](#).

See also "[*Circuit Offers Further Guidance on 'Booker'*](#)," by Mark Hamblett, New York Law Journal, February 28, 2005.

For those interested in following the latest *Booker* developments we continue to recommend the special *Booker* Resource Center on the Internet maintained by *Punch and Jurists* at <http://www.ussguide.com/members/BulletinBoard/Booker/index.cfm/> and Professor Douglas Berman's [*Sentencing Law and Policy*](#) site on the Internet. Although the *P&J* site requires a Username and a Password, all members of the NYCBA have free and 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. Professor Berman's site is also free.

N.Y. County's First "DTAP" Reduction for Out-Patient Program

Henry Steinglass reports that, in what the Manhattan District Attorney's Office called a "first", a "DTAP" agreement has been entered into which will result in a reduction from a "B" felony to a misdemeanor if the defendant successfully completes a 20-month outpatient program. While there were some unusual circumstances, *e.g.*, the client had voluntarily entered the out-patient program months before this agreement was reached, this case may indicate that New York County prosecutors are approaching treatment programs with increased flexibility. For further information, contact Henry Steinglass (212) 406-7700, email hjsteinglasslaw@earthlink.net.

NYCBA Web Site Features:

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

Court Decisions:

[*People v. Combest, 2005 N.Y. LEXIS 236 \(N.Y. Ct. of Appeals Feb. 22, 2005\) \(Judge Kaye\)*](#) - The defendant in this case, James Combest, appealed from his conviction for manslaughter on the grounds that the state trial court had improperly denied his motion to force a television production company to turn over to him tapes it took while making a documentary about the Brooklyn North Homicide Squad for Court TV. The defendant argued that the tapes would show that the New York City Police had used trickery in eliciting his confession; and that they would confirm that his confession was not only involuntary but that he had acted in self defense.

The television company opposed the motion on the grounds that the release of the tapes would violate its journalistic privilege; and it argued that Combest had not met the three-pronged test for entitlement of the tapes under New York's "Shield Law" (Civil Rights Law § 79-h (c)), which affords journalists and newscasters a qualified privilege in nonconfidential news.

The Court of Appeals, by a 6-to-1 vote, held that Combest had met the strict legal standards required under the Shield Law to force the television production company to turn over the tapes; and it granted Combest a new trial and ordered that he be allowed to use the tapes. The Court reasoned that, in criminal cases, a

"defendant's interest in a non-confidential material weighs heavily."

[U.S. v. Zedner, 2005 U.S. App. LEXIS 3809 \(2nd Cir. 03/08/2005\) \(Judge Leval\)](#) -

Citing concerns about allowing serious crimes to go unpunished, the Second Circuit held that errors made under the Speedy Trial Act (18 U.S.C. §§ 3161-3174) should be evaluated under a "harmless error analysis" to determine whether the error(s) at issue caused harm to the defendant or the public interest.

In its decision, the Court reviewed at some length the public policy considerations against permitting broad waivers of speedy trial rights, stating "public interest would be undermined if the provisions of the Act intended for the public benefit could be routinely nullified by a defendant's waiver." However, the Court also acknowledged that, in an effort to reach a reasonable balance between the interests of the public and of the defendant, most Circuits have recognized an exception to the non-waiver rule "when defendant's conduct causes or contributes to a period of delay"; although it noted that various Circuits (citing the First, Fourth, Fifth and Seventh) have taken different approaches to such waivers of speedy trial rights. Without joining that debate by attempting to define the exact scope of the exception to the non-waiver rule, the Court stated that "at the very least, when a defendant requests an adjournment that would serve the ends of justice, that defendant will not be heard to claim that her Speedy Trial rights were violated by the court's grant of her request, regardless whether the court made an 'ends of justice' finding under § 3161(h)(8)."

Finally, the Court reaffirmed the proposition that a downward departure under U.S. S.G. § 5K2.13 for diminished mental capacity is permissible even if the jury concluded that the defendant had the requisite mens rea to have committed the offense.

Briefs and Motions - Legal Memoranda:

We have recently posted in this section of our Website an excellent article entitled "[Queen For a Day - Proffer Your Life Away](#)," by Barry Tarlow, as published in The Champion Magazine, March 2005.

Court Websites:

We have also posted on the Court Websites - Federal Courts page of our Website a document entitled [Ninth Circuit Judges' Benchbook for Pretrial Criminal Proceedings](#) - 2004 Edition, prepared by District Judge John M. Roll (D.Ariz.) (435

pages). Even though this document does not cover the procedures used in the Second Circuit, it contains such a comprehensive review of so many common pretrial matters that we thought it would be helpful to our members.

New on the Web and in the Media

[The State of Prison Health Services in New York State](#): The New York Times published an explosive three-part series of articles on the state of prison health services in New York State entitled "*Harsh Medicine: Dying Behind Bars*," by Paul von Zielbauer. Because of their significance to the criminal defense bar, we have posted the full set of those articles on our Web site, as follows.

Part I - "[Private Health Care in Jails Can be a Death Sentence](#)" (Feb. 27, 2005);

Part II - "[In City's Jails, Missed Signals Open Way to Season of Suicides](#)" (Feb. 29, 2005); and

Part III - "[A Spotty Record of Health Care at Juvenile Sites in New York](#)" (Mar. 1, 2005).

The principal focus of the series is a Tennessee for-profit company, known as [Prison Health Services, Inc.](#) (PHS), which claims on its Website to have delivered "value-driven healthcare to literally hundreds of jails, prisons and juvenile facilities across the United States." Mr. von Zielbauer noted that PHS has "moved aggressively into New York State in the last decade, winning jail contracts worth hundreds of millions of dollars with an enticing sales pitch: Take the messy and expensive job of providing medical care from overmatched government officials, and give it to an experienced nationwide outfit that could recruit doctors, battle lawsuits and keep costs down." The tenor of the well-documented story is that PHS has achieved some remarkable profits simply by cutting its staff and hiring personnel that not even the prisons would touch. Who knows? These articles may well become "Exhibit A" in future lawsuits against the New York State Department of Corrections.

Comments and Newsletter Contributions Welcome

Comments on this and future issues of this Newsletter are most welcome, as are

your own stories about cases, issues, arguments, events. etc. - whether just a sentence or a paragraph to alert us to a recent development, or a longer piece. Please send your material to Scott Tulman , Tel.: (212) 867-3600; email: stulman@aol.com - or send an email to our committee at nycrimbar@nyc.rr.com.

Yours for a better defense,

Harvey Fishbein
President

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