

2016 Criminal Law Academy

Friday, October 7, 2016
9 a.m. – 4:30 p.m.

*Mohawk Valley Community College
1101 Sherman Drive
Alumni College Center (ACC 116)*

Program Coordinator
Tina L. Hartwell, Esq.
First Assistant Oneida County Public Defender
Criminal Division

Sponsored by:
Oneida County Bar Association

In Cooperation With:
Oneida County Supplemental Assigned Counsel Program
Oneida County Public Defender, Criminal Division
New York State Defenders Association, Inc.
New York State Office of Indigent Legal Services



PLEASE TO SURE TO TURN OFF YOUR CELLPHONE

AND



**YOU MUST SIGN IN FOR THE MORNING SESSION AND
AGAIN IN THE AFTERNOON**

The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association in cooperation with the Criminal Division of the Oneida County Public Defender's Office, the Oneida County Supplemental Assigned Counsel Program, the New York State Office of Indigent Legal Services and the New York State Defenders Association, Inc. as a regional effort to provide low and reduced cost training programs for public defenders and assigned counsel. A major part of the Series is the annual Criminal Law Academy that is presented in the Fall. The Criminal Law Academy was designed to provide fundamental knowledge of the practice of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. The faculty is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The two full-day course provides continuing legal education credits in skills, professional practice and ethics.

Again this Spring, under a grant from the New York State Office of Indigent Legal Services, the Oneida County Supplemental Assigned Counsel Program sponsored the Oneida County Assigned Counsel School in conjunction with the Criminal and Civil Divisions of the Oneida County Public Defenders' offices. There were two, full day sessions – one on criminal trial practice and one on family law.

UPCOMING CRIMINAL TRACK PROGRAMS

Saturday, October 22nd: “General Immigration Issues” with Joanne Macri, Esq., *Director of Regional Initiatives, NYS Office of Indigent Legal Services* and Sharon Ames, Esq. and Robert Reittinger, Esq., *Directors of the Region 2, Regional Immigration Assistance Center (RIAC) in Rome.*

Saturday, October 29th: “Criminal Law Update” with Gerard Neri, Esq., *Special Counsel to 5th Judicial District Administrative Judge James Tormey.*

These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A \$25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. The Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website.

2016 Criminal Law Academy Friday, October 7th

This year the Academy will only provide one full day due to the Columbus Day weekend. As usual the lectures will be centered on criminal law and criminal procedure including one ethics credit at the Utica campus of Mohawk Valley Community College. Registration cost for the program is \$65 or \$50 for members of the Oneida County Bar Association. Continental breakfast and lunch is included.

The New York State Defenders Association, Inc. is also a valuable resource for criminal law practitioners through their website <http://www.nysda.org/>.

Our special thanks to Mohawk Valley Community College for offering their first class facilities for our use. Welcome to today's program. I hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

THE SPONSOR & OUR PARTNERS

The Oneida County Public Defender, Criminal Division is fortunate to work with the Oneida County Bar Association, the sponsors of the annual Criminal Law Academy and our Criminal Track Programs. We are grateful to the CLE Committee for granting us the latitude to develop meaningful and significant programs for the criminal defense bar. We are especially appreciative for the help given to us by the Bar Association's Executive Director, Diane Davis. Without her able assistance, the Academy and the Criminal Track Programs would not be possible.

The Oneida County Bar Association offers a wide range of CLE programs on other topics throughout the year. A full calendar of programs is available at their website www.oneidacountybar.org. Oneida County Bar members are eligible to purchase a Sempass which entitles the holder to attend any or all of the programs offered by the Association.

The Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Programs and the Criminal Law Academy available at our website: <http://www.ocgov.net/oneida/pdcriminal/training>.

The Criminal Law Academy especially takes a lot of time and effort to develop and produce. We would like to acknowledge the assistance of the New York State Defenders Association, Inc. and Managing Attorney Charles O'Brien whose advice has proved invaluable in developing our programs. NYSDA is also a valuable resource for criminal law practitioners through their website <http://www.nysda.org/>. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year. We encourage you to visit their website and become a member.

We would be remiss if we failed to mention the New York State Association of Criminal Defense Lawyers (NYSACDL). Many of their members have been featured faculty at both the Academy and the Criminal Track Programs and they sponsor many CLE training programs across the state each year. Their listserv provides critical assistance to criminal defense practitioners throughout the year. You can check out their website at <http://www.nysacdl.org/>.

Last but not least, we gratefully recognize the support and encouragement of the staff of the New York State Office of Indigent Services. Director Bill Leahy and his staff, especially Matt Alpern, Director of Quality Enhancement for Criminal Defense Trials; Joanne Macri, Director of Regional Initiatives and Patricia Warth, Chief Hurrell-Harring Implementation Attorney.

The members of the Criminal Track Program Committee and the faculty of the 2016 Criminal Law Academy welcome you and hope you find the Academy informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

2016 Criminal Law Academy

Friday, October 7, 2016

*REGISTRATION: 8:30 a.m. – 9:00 a.m.
Alumni College Center (ACC) Room 116*

- 9:00 a.m. – 10:15 a.m.** **“Accusatory Instruments: A Critical First Step”**
*Cory A. Zennamo, Esq., First Assistant Public Defender
Oneida County Public Defender, Criminal Division*
- 10:15 a.m. – 10:25 a.m.** **BREAK**
- 10:25 a.m. – 11:25 a.m.** **“Investigation of Veterans Cases”**
*Gary A. Horton, Esq., Director, Veterans Defense Program
New York State Defenders Association, Inc.*
- 11:25 a.m. – 12:15 p.m.** **“Convictions and Consequences for Non-Citizens”**
*Sharon L. Ames, Esq. and Robert R. Reittinger, Esq.
Regional Immigration Assistance Center, Region #2*
- 12:15 p.m. – 1:00 p.m.** **LUNCH**
- 1:00 p.m. – 2:15 p.m.** **“Unseen Consequences of Convictions in the Wake of Padilla”**
*Michael T. Baker, Esq., Chief Assistant Public Defender
Broome County Public Defender’s Office*
- 2:15 p.m. – 2:25 p.m.** **BREAK**
- 2:25 p.m. – 3:40 p.m.** **“The Theory, Development and Brainstorming of Your Case”**
*Matthew W. Alpern, Esq., Director of Quality Enhancement for Criminal
Defense, Trials New York State Office of Indigent Legal Services*
- 3:40 p.m. – 4:30 p.m.** **“Communication and Beyond: What You Need to Know to
Avoid the Grievance Committee”**
*Patrick J. Marthage, Esq., Chief Appellate Counsel,
Oneida County Public Defender, Criminal Division*

**MCLE Credits: 7.5
3.5 Skills; 3 Professional Practice; 1 Ethics**

SPEAKERS

Matthew Alpern is the Director of Quality Enhancement for Criminal Defense Trials for the New York State Office of Indigent Legal Services. He graduated with a B.A. degree from Emory University in 1985 and received his J.D. from the George Washington University National Law Center in 1989. Matt has dedicated his legal career to providing high quality legal representation to indigent persons accused of criminal offenses. After graduating from law school, Matt joined the Public Defender Service for the District of Columbia, an agency whose national reputation for excellence stems, in part, from its commitment to training, supervision and teamwork. At PDS, Matt worked for ten years in a variety of capacities including Deputy Chief of the Trial Division and Senior Litigation Attorney. During the majority of Matt's tenure at PDS, his caseload consisted of clients accused of high level felony offenses including homicides, sexual assaults, and other armed violent offenses. From 1999 to 2005, Matt served as a Deputy Capital Defender with the New York State Capital Defender Office. At CDO, Matt worked as a trial attorney representing indigent persons facing the death penalty. As part of a team consisting of attorneys, investigators and mitigation specialists, Matt's responsibilities included determining and implementing guilt and penalty phase trial strategies, conducting intensive factual investigation, developing mitigation evidence, and providing support, training and consultation for the capital defense bar. In 2005, after the elimination of the death penalty in New York State, Matt entered private practice with The Proskin Law Firm where he represented both indigent and retained clients accused of criminal offenses. In 2007, Matt returned to full time representation of indigent clients with the Albany County Office of the Alternate Public Defender. As an Assistant Alternate Public Defender, Matt's caseload consisted primarily of clients charged with serious felony offenses. Since 2009, Matt has also been an adjunct professor at Albany Law School, where he teaches Pre-trial Preparation and Trial Practice for criminal cases.

Sharon L. Ames is the Director, Immigration of the Region #2, Regional Immigration Assistance Center (RIAC) in Rome, New York. She had her own solo law practice in Syracuse since 1984, where she practiced in the areas of criminal defense both in private practice and as an Assistant Public Defender in Cortland County; and in family law, both as assigned counsel and as a Law Guardian. Since 1999, she has practiced exclusively in Immigration law. She earned her B.A. degree from St. Lawrence University and her J.D. from Syracuse University College of Law. Sharon is fluent in Spanish.

Michael T. Baker is Chief Assistant Public Defender of Broome County. Mike is a graduate of Hamilton College and Albany Law School. He is currently Vice-President of the New York Association of Criminal Defense Lawyers (NYSACDL) and a member of the New York State Defender's Association (NYSDA). He is a frequent CLE lecturer for both organizations. He is a former President of the Broome County Bar Association and previously a member of the Local Rules Committee (criminal) for the United States District Court for the Northern District New York.

Gary Horton is Director of NYSDA's Veterans Defense Program. He is a graduate of Hobart College and Hofstra University School of Law. Horton's practice has centered on the defense of the indigent for more than thirty years, and he was Genesee County Public Defender for twenty years, before becoming the Director of the Veterans Defense Program. Horton is the recipient of the NYSBA Criminal Justice Section David S. Michaels Award (2006), the New York State Defenders Association Wilfred R. O'Connell Award (2011) and the United States District Court for the Western District of New York, Special Service Award (2005). Gary is a founding member and past President of Genesee Veterans Support Network (GVSN).

Patrick J. Marthage is the Chief Appellate Counsel for the Oneida County Public Defender's Office, Criminal Division, graduated *magna cum laude*, *Phi Beta Kappa* from Hamilton College in Clinton in 1982 and from New York Law School in Manhattan in 1986 where he wrote for its *Human Rights Annual* and was recognized by its Moot Court Board. He has practiced law privately, served as Assistant Corporation Counsel for the City of Utica and in 1997 became an Assistant Public Defender for Oneida County. He has handled several high-profile cases while a member of its Violent Crimes Unit, most notably having represented David Trebilcock who, in 2011, was accused of having stabbed his girlfriend's 6-year-old daughter to death in the bedroom of her home in Sherrill. "Of 5,910 murder cases completed in the last decade statewide", Mr Trebilcock was one of "only seven defendants [to] have been found at trial to be not responsible by reason of mental disease or defect, according to the state Division of Criminal Justice Services" as reported in *The New York Times* on April 4, 2013. Mr. Marthage is also a professional baritone, having sung locally as well as in the chorus of the New York City Opera at Lincoln Center. He has been a member of the choir of Historic Old St. John's Church in Utica since he was eight.

Robert R. Reitinger is the Director, Criminal of the newly created Region #2, Regional Immigration Assistance Center in Rome, New York. Robert is a graduate of St. Thomas University School of Law, Miami Florida, where he received his Juris Doctorate and Master of Laws. Robert began his legal career working as an intern and assistant public defender for the Broward County Public Defender's Office. Upon returning to New York State Robert began his private practice focusing on criminal law. Robert was appointed Assistant County Attorney for the County of Oneida Department of Law as Kendra's Law attorney and as lead family court attorney. Robert has also worked as first assistant Oneida County Public Defender, Criminal Division as DWI defense counsel, First Assistant Appellate Counsel and Chief Appellate Counsel.

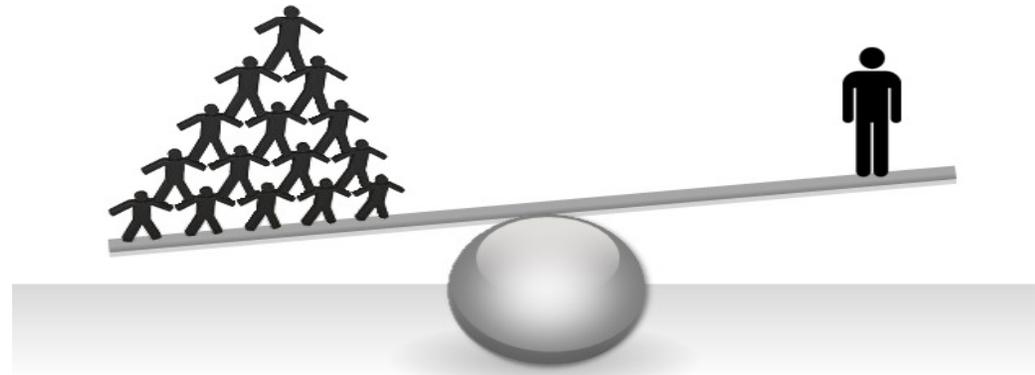
Cory A. Zennamo is a First Assistant Oneida County Public Defender, Criminal Division assigned to the Major Crimes Section. Cory received his Juris Doctor from the Syracuse University College of Law and graduated *magna cum laude* from Utica College of Syracuse University where he was inducted into Sigma Tau Delta International English Honor Society. Over the last five years Cory has tried more than fifteen jury trials and litigated numerous other criminal matters. Mr. Zennamo has lectured on pretrial criminal procedure at the Criminal Law Academy.

Accusatory Instruments
A Critical First Step

Cory A. Zennamo, Esq.
First Assistant Public Defender
Major Crimes Section
Oneida County Public Defender
Criminal Division

2016 Criminal Law Academy
Mohawk Valley Community College
Friday, October 7, 2016

Leverage



**Using the Accusatory Instrument
to Ruin Your Opponent's Day
(And Week)
So Your Client Can Succeed**

A Small Rant About Responsible Representation

- **DO NOT BE A PUSHOVER**
 - Friends understand you have a job and expect you to do it.
 - Judges will pressure you: respectfully pressure back.
 - Know the Law and Argue it.
 - Confidence Rules the Court

Leverage Everything

- **RESPONSIBLE MEANS YOUR DAY MAY SUCK**
 - Skip lunch, blow off your date, get some Mint Chocolate Chip and make love to your CPL.
 - Take time to know who you are as an advocate and own it no matter what it takes.

Analyzing the Accusatory

1. Formal requirement met?
2. Reasonable cause to believe crime occurred and defendant committed it?
 - If either of these requirements are not met, the type of accusatory does not matter; must be dismissed (or amended). If these are met, look to conversion issues below.
3. Does the reasonable cause include hearsay without an exception?
 - If yes, Δ cannot be held longer than 5 days and case cannot progress beyond place holder status.
4. Is there non-hearsay reasonable cause supporting each and every element of the offense AND Δ 's commission thereof.

Definitions

[CPL § 100.10](#) (Numbers Correspond with Subsections, Etc.)

1. An “**information**” is a verified written accusation by a person, filed with a local criminal court, charging one or more other persons with the commission of one or more offenses, none of which is a felony. **It may serve as a basis both for the commencement of a criminal action and for the prosecution thereof in a local criminal court.**
2. (a) A “**simplified traffic information**” is a written accusation by a police officer, or other public servant authorized by law to issue same, filed with a local criminal court, which charges a person with the commission of one or more traffic infractions and/or misdemeanors relating to traffic, and which, being in a brief or simplified form prescribed by the commissioner of motor vehicles, designates the offense or offenses charged but contains no factual allegations of an evidentiary nature supporting such charge or charges. It serves as a basis for commencement of a criminal action for such traffic offenses, alternative to the charging thereof by a regular information, and, **under circumstances prescribed in [section 100.25](#), it may serve, either in whole or in part, as a basis for prosecution of such charges.**
4. A “**misdemeanor complaint**” is a verified written accusation by a person, filed with a local criminal court, charging one or more other persons with the commission of one or more offenses, at least one of which is a misdemeanor and none of which is a felony. It serves as a basis for the commencement of a criminal action, **but it may serve as a basis for prosecution thereof only where a defendant has waived prosecution by information pursuant to [subdivision three of section 170.65](#).**
5. A “**felony complaint**” is a verified written accusation by a person, filed with a local criminal court, charging one or more other persons with the commission of one or more felonies. **It serves as a basis for the commencement of a criminal action, but not as a basis for prosecution thereof.**

Necessary Components

[CPL § 100.15](#)

1. Document Must Include :
 - Name of Court;
 - Title of the Action;
 - (Be) Subscribed (**Signed**) and Verified (**Sworn To**);
 - Actual **Knowledge** or Information and **Belief**;
 - Two Sections: **Accusatory** (Violation of the Statute Language) and **Factual** (What happened);
 - (Verification applies to Factual only).
2. Accusatory Section Must:
 - Designate **Offense(s)**.
3. Factual Section Must:
 - Evidentiary Facts Supporting Charge;
 - **May be Information and Belief or Personal Knowledge**;

Comparison

Information

- Verified
- Commencement of Criminal Action
- Prosecution of Criminal Action

Complaint

- Verified
- Commencement of Criminal Action
- **CANNOT Prosecute on Complaint UNLESS:**

[CPL § 170.65](#)

WAIVER

3. A defendant who has been arraigned upon a misdemeanor complaint **may waive prosecution by information** and consent to be prosecuted upon the misdemeanor complaint. In such case, the defendant must be required, either upon the date of the waiver or subsequent thereto, to enter a plea to the misdemeanor complaint.
 - Although waiver requires an [affirmative act](#), failure to raise the issue before the trial court will waive preservation on appeal.

INFORMATION VS. COMPLAINT

[CPL § 100.40](#) AND [CPL § 170.35](#)

1. An information is sufficient on its face when it:
 - a) Has everything from [section 100.15](#); and
 - b) The factual part + any supporting depositions = [reasonable cause](#) defendant committed offense; and
 - c) **Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof. PRIMA FACIE CASE REQUIREMENT**

VS

4. A complaint is sufficient on its face when it:
 - a) Has everything from [section 100.15](#); and
 - b) The factual part + any supporting depositions = [reasonable cause](#) defendant committed offense;

Note that Subsection 2. Deals with Simplified Informations: Failure to supply ordered Supporting Depositions by Officer makes it Facially Insufficient

WHO THE F----- CARES?

- [CPL § 170.70](#) (Hearsay = 5 day release)
 - Defendant request release after more than 5 days in custody when charged by complaint, not including Sunday, and no superseding information, court must release defendant.
 - (Unless you waive prosecution by information or “some compelling circumstance” exists as to why the complaint wasn’t converted)
- NOT required to enter a plea!
 - If based on hearsay only a placeholder for prosecution.
- Informations require more detail
 - More detail = more information for you;
 - More chance for the C/W to give inconsistencies;
 - Dismissal or Release requires additional filing = LEVERAGE;

Jurisdictional Issues: Keep it close

[People v. Casey 95 N.Y.2d 354 \(2000\)](#)

Δ charged with Contempt. Hearsay elements included in the complaint. Δ never objects to hearsay element. COA finds that although hearsay element was present in accusatory, since the issue was not timely raised it was not preserved for appeal.

“...[C]onfronted with the issue whether a hearsay pleading violation of [CPL 100.40\(1\)\(c\)](#) is jurisdictional and non-waivable, we conclude that it is not.”

Jurisdictional Defects

- Violations of [CPL § 100.15](#) (technical construction)
- Facial Insufficiency
 - No reasonable cause to believe crime committed or Δ committed it.
 - Informations: Reasonable Cause lacking for a single element .
 - No Element or accusations of element, [including mental state](#). (P v. Hall)

Waivable Defects

- Accusatory includes Hearsay
- Reasonable Cause support includes hearsay, but must be brought up to the trial court to preserve for appeal.

Don't confuse the holding in *Casey* with all facial insufficiency: It only extends to hearsay as proof for an element, not the lack of sufficient proof of an element.

CONVERSION: COMPLAINT TO INFORMATION

[CPL 170.65](#)

- Hearsay must be cured;
- At least 1 charge must stem from facts in Complaint;
- ***Δ MUST be arraigned on new information;
 - Speedy Trial implications AND [No prosecution without arraignment](#)

[People v. England, 84 N.Y.2d 1 \(1994\)](#)

“Defendant could not have been brought to trial before arraignment, the process by which the court acquires jurisdiction over a defendant ([CPL 1.20\[9\]](#)). That is an elemental prerequisite to trial readiness.”

Speedy Trial, Conversion and You

- Court are a jumble on this issue...
 - ~~Sturgis-Colon Rationale: Absconded Δ does not preclude DA from timely prosecution in Δ's absence including conversion of Complaint to Information Overruled with [CPL § 30.30\(4\)\(c\)\(i\)](#) and [People v. Bolden, 81 N.Y.2d 146 \(1993\)](#) only to be overruled again by 30.30(4)(c) however— The Sturgis-Colon rational reasoned that Δ's absence did not preclude the People from indicting or converting an accusatory instrument and therefore, such absence, was not excludable time under 30.30.~~
 - *People v. Worley*, 66 N.Y.2d 523 (1985)
 - Before the battle between the Legislature and the COA, but still not overruled to date, the COA used the now overruled reasoning above to force counsel to be tricky with adjournments:

“The *Sturgis-Colon* rationale should not apply [to pretrial motions or consent to adjourn] even though defendants' actions did not prevent the People from obtaining accusatory instruments sufficient for trial, defendants waived the delay in the proceedings by requesting or consenting to them.”

Speedy Trial, Conversion and You Continued

- In application:
 - **People v. Masellis, 140 Misc.2d 1024 (NY Crim Ct. 1988)**
 - **Two B Misd Charges**
 - **No conversion within 60 days Δ moves to dismiss.**

Court Holds:

The *Worley* exception rests on theories of waiver and estoppel. [Worley, supra, 66 N.Y.2d at 528, 498 N.Y.S.2d 116, 488 N.E.2d 1228](#). **In the case at bar, the defendant neither requested nor consented to the change of counsel or to the adjournment.** Unlike in *Worley* where the defendant's **consent or request for an adjournment implies a waiver of any objections to the delay, here there is no such waiver.** The transcript demonstrates that this adjournment was over defense counsel's strenuous objection. Nor is this a situation in which the defendant can be barred from raising an objection under an estoppel theory. As the Court stated in *Worley*, a request for an adjournment is a delay “caused by the defendant *for his own benefit* ... under circumstances in which both the defendant and the court have determined that the adjournment is desirable.” [People v. Worley, supra at 527, 498 N.Y.S.2d 116, 488 N.E.2d 1228](#). (emphasis added).

Note: At least on NY Crim Ct has refused to apply this, but in an unreported disposition from 2015 which I would just ignore given COA reference herein.

Informations and Specific Facial Sufficiency Issues

The Life Altering Case of People v. Alejandro, 70 N.Y.2d 133 (1987)

- Δ Charged with Resisting Arrest (among other things) (Penal Law § 205.30), an element of which is the effectuation of an authorized arrest, and convicted after trial of resisting arrest, acquitted of Reckless End and no verdict on Assault 3.
- Nothing in the factual section of the information expresses facts that show and authorized arrest occurred on the date in question.
- Conviction Reversed by Appellate Division.
- The People Appealed (Of Course).

The COA comes in STRONG:

1. AN INFORMATION MUST MAKE A PRIMA FACIE SHOWING OF EVERY ELEMENT WITH REASONABLE CAUSE FOR EVERY SINGLE ONE
2. **JURISDICTIONAL DEFECT—CANNOT BE WAIVED OR TIME BARED!**
 - It may be advisable in a number of situations to sit tight on this jurisdictional defects until speedy trial has passed.

Informations and Specific Facial Sufficiency Issues

Sex (not really), Drugs and Conclusory Statements

[People v. Dumas, 68 N.Y.2d 729 \(1986\)](#)

- Δ Charged with Criminal Sale of Marijuana by **misd complaint** with only a bare allegation that the item sold was marijuana without any proof of the same. Motion made and local court dismissed.
- People Appeal and Appellate division reversed.
- COA Reversed AD stating:
 - “In each case the complaint contains a conclusory statement that the defendant sold marihuana, but in neither case is this supported by evidentiary facts showing the basis for the conclusion that the substance sold was actually marihuana.”
 - The conclusion fails to satisfy the basic “reasonable cause” test of a complaint so the Court doesn’t even need to reach a prima facie analysis.
 - This Defect is such that cannot be cured by amendment ([People v. Brightman, 150 Misc.2d 60\(Nassau DC, 1991\)\)](#)
 - Structure of the Complaint can be amended, factual allegations cannot. Converting an insufficient complaint does not cure facial insufficiency. **If reasonable cause doesn’t exist, it must be dismissed.** [Fitzpatrick v. Rosenthal, 29 A.D.3d 24 \(Fourth Dept., 2006\)](#)

Informations and Specific Facial Sufficiency Issues

LOUD NOISES and Disorderly Conduct

[People v. Jones, 9 N.Y.3d 259](#)

- Δ charged with Disorderly Conduct and Resisting Arrest, Pled Guilty to Disorderly Conduct and appealed.
- Appellate Division affirmed conviction.
- Δ Appeals and COA reversed. (People also request “reinstatement of Resisting Charge)
- COA States (and refuses to reinstate because no valid arrest exists):
 - “Nothing in the information indicates how defendant, when he stood in the middle of a sidewalk at 2:01 A.M., **had the intent to or recklessly created a risk of causing “public inconvenience, annoyance or alarm.”** The conduct sought to be deterred under the statute is “considerably more serious than the apparently innocent” conduct of defendant here ([People v. Carcel, 3 N.Y.2d 327, 331, 165 N.Y.S.2d 113, 144 N.E.2d 81 \[1957\]](#)). Something more than a mere inconvenience of pedestrians is required to support the charge ([id. at 332, 165 N.Y.S.2d 113, 144 N.E.2d 81](#)). Otherwise, any person who happens to stop on a sidewalk—whether to greet another, to seek directions or simply to regain one's bearings—would be subject to prosecution under this statute.”

Informations and Specific Facial Sufficiency Issues

I didn't Intend to Piss You OR the Neighbors Off

[People v. Hall, 48 N.Y.2d 927 \(1979\)](#)

[People v. Tarka, 75 N.Y.2d 966 \(1990\)](#)

- In Hall, Δ was convicted of Harassment 2nd and in Tarka, Disorderly Conduct: in both cases the COA held that no factual proof of either Δ's intent was a non-waivable, jurisdictional defect requiring dismissal.
- The COA Appeals said in Hall,
- “Here the information charging harassment recited only that defendant, who it also alleges indicated that his desire was that the complainant leave the defendant's premises, “did strike, shove and otherwise subject (the complainant) to physical contact and threatened physical harm.” It failed to specify an essential element of the crime, which is that the acts be done “with intent to harass, annoy or alarm” ([Penal Law, s 240.25](#)). Absent such an allegation, the acts complained of did not constitute criminal conduct and, hence, defendant's conviction was jurisdictionally defective.”

People v. McLaughlin, 2016 N.Y. Slip

Op. 26260 (2016)

- Δ Charged with Sale of Imitation Controlled Substance;
- Pretty significant circumstances related to the incident would lead seeming lead a reasonable person to believe the buyer believed the item was an illegal substance;
- Court found that accusatory lacking in SPECIFICS showing a representation by Δ that substance was a Controlled Substance (as require by [Public Health Law 3383\(2\)](#)) is insufficient.
- “In the instant case, defendant is accused of putting an item in another person's hand. The other person sniffed the item. The officer who observed this item states it appeared to be cocaine. When defendant was about to be arrested, he dropped two “zips” of what also appeared to be cocaine on the ground and stepped on them. The officer who observed the item placed in the other person's hand and the “zips” that defendant dropped on the ground concluded that they appeared to be cocaine based upon his experience and the appearance and packaging of the item and the “zips”. The information is mute as to whether defendant made any oral representation regarding the item he put in the other person's hand. The information likewise offers no description of the packaging or appearance of the item. The mere allegation that defendant placed an item that resembled cocaine in another person's hand, an item subsequently sniffed by the receiving person, will not permit a reasonable inference that defendant represented that the item was a controlled substance.”

People v. Mosley, 36 N.Y.S.3d 389 (2016) Justice Court

- Allegations state: Δ “Did take a wallet containing \$495.00 cash belonging to Sequita Wright from the cafeteria area of Xerox, 800 Phillips Road. The defendant left the building with the wallet then returned to hand the wallet over to security. Although the wallet was returned the \$495.00 cash was missing. According to security surveillance, the defendant is the only one who could have taken the money.”
- Court Asked: “Can non-hearsay allegations be established by circumstantial evidence?”
- Court found that it may be permissible to do so, but a determination of reasonable cause must still be made (note sure why the hearsay issues was looked at first) and subsequently found that reasonable cause could not be established based on the above statement.

People v. Velez, 2015CN008005 (2016 City Court)

- Δ charged with CPM 5th for dropping joint on ground.
- Court found that information claiming joint was dropped “on the ground” was not enough to provide facts to believe the ground was in public as required by crime.
- People argue that the allegation that the marihuana was recovered "from the ground" permits the court to reasonably infer that the defendant was in a public place since "the ground" connotes being out in the open. The court disagrees. The word "ground" indicates the surface of the earth; a place a person might tread or stand. Grounds, however, may be public or private, and nothing in the instant complaint permits the court to reasonably infer one or the other. As the public place element is insufficiently plead, the People have failed to establish reasonable cause to believe every element of the offense charged. Defendant's motion to dismiss count one charging Criminal Possession of Marihuana in the Fifth Degree (Penal Law §221.10 [1]) is granted.

(I Hope You Have A Handle on All the Previous Material) **Complaints and Warrantless Arrests, One in the Same**

Right out of Syracuse, NY, [Fitzpatrick v. Rosenthal, 29 A.D.3d 24 \(Fourth Dept., 2006\)](#)

- Warrantless felony arrest based on Probable Cause (same as reasonable cause).
- Felony Complaint's cite "eye witness accounts" for the source of the factual section of the complaint without a supporting deposition of any kind.
- Judge ruled the Reasonable Cause requirement of [CPL 100.40](#) was not met because reasonable cause requires evidence "which appears reliable " and the Judge ruled that without the identity of the eye witness, neither the veracity or the reliability of the witness could be ascertained and therefore making the information in the complaint unreliable.
- The DA, as they so often do, says "lets have a secret meeting in the back and I will whisper sweet nonsense about why this should not be dismissed for facial insufficiency and we can forget this happened and move on."
- Judge says "supersede the complaint with some information or its dismissed."
- Case gets dismissed.
- DA brings a and article 78 and requests declaratory relief against the Judge and wins;
- Judge Appeals to 4th Department, Appellate Division.

Judge Rosenthal, Slayer of Demons

Part II

[CPL § 140.45](#)

- If a local criminal court accusatory instrument filed with a local criminal court pursuant to [section 140.20](#), [140.25](#) or [140.40](#) is not sufficient on its face, as prescribed in [section 100.40](#), and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face, it must dismiss such accusatory instrument and discharge the defendant.
 - [in the whiniest voice you ever heard] “But [insert Judge], obviously this stupid defense attorney doesn’t know that all motions have to be made in writing, always and forever....”

And yet the Supreme Court Says: “When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. **Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.**” [Gerstein v. Pugh, 95 S.C.T. 854 \(1975\)](#)

Rosenthal III

- So an oral “reminder” to the Judge in these cases isn’t a bad thing.
- **Warrantless Arrests :**
 - Standard is Probable Cause which = Reasonable Cause (Look Familiar)?
 - Reliability is a requirement of Reasonable Cause ,
 - Aguilar-Spinelli (**long and short, how do we know this information is reliable without knowing who gave it**)
 - **DA wants to explain how it is in private and claims that CPL 140.45, “ basis of available facts or evidence”** means information outside the 4 corners of the complaint. 4th Department backs up the Judge and says NO:
“The concern expressed by the District Attorney for the confidentiality and protection of witnesses is both understandable and proper. Both the District Attorney and the courts, however, are bound by the constitutionally-based statutory requirement that reasonable cause must be demonstrated **on the face of an accusatory instrument** in order to confer jurisdiction of the criminal action and control over the liberty of an accused person.”

So what does this teach us:

1. **Oral Motion** (for Reasonable Cause) is not only ok, it is mandatory.
2. **No Sneaky Bits:** The 4 corners of the accusatory and attached depositions.
3. Reasonable Cause requires **appearance of reliability!!** (which can't exist if we don't know who said it).

Slightly Confusing:

Initial review for “reasonable cause” of any accusatory under [CPL § 100.40](#) requires the “appearance of reliability” under [CPL § 70.10](#) but that is different than the second review of reasonable cause for EACH ELEMENT of an information for the prima facie showing.

Police and Drunken Accusatories

**SUPPORTING DEPOSITION / CPL 710.30 NOTICE TO
SUPPORT SIMPLIFIED TRAFFIC INFORMATION
LOCAL CRIMINAL COURT**

COUNTY OF LEWIS

STATE OF NEW YORK
THE PEOPLE OF THE STATE OF NEW YORK
VS
JEFFREY J. BLISS

UTT NUMBER 3D3708NLSP

Officer Heath Rupert of the New York State Police

a Police Officer and the Complainant alleges that the Defendant committed a violation of

1. (Law/Section/Subsection) **VTL1192 03 UM0**
2. Description of Violation **DRIVING WHILE INTOXICATED (MISD)**
3. Date **09/03/2013** Time **08:34:00 A** C/T/V of **TOWN OF DENMARK**
4. Vehicle Year **2014** Make **SUBA** Color **GY** License Plate No. **ECW5961** State **NY**
5. General Direction of Travel by Defendant **NORTH**
6. Highway (Type/Name) **2 / STATE ROUTE 26**
7. Charge based on Officer's **Direct observation**
8. Additional Information

TO THE ABOVE NAMED DEFENDANT:

PLEASE TAKE NOTICE THAT PURSUANT TO SECTION 710.30(1)(A) OF THE CRIMINAL PROCEDURE LAW, THE PEOPLE INTEND TO OFFER AT A TRIAL OF THE ABOVE ENTITLED ACTION EVIDENCE OF A STATEMENT MADE BY YOU ON 09/03/2013 AT 08:34:00 A AT STATE ROUTE 26, To Officer Name Heath Rupert a public servant

IN WHICH YOU SUBSTANTIALLY STATED AS FOLLOWS:

FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A
MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW OF THE
STATE OF NEW YORK

Affirmed Under Penalty of Perjury
09/03/2013

Heath Rupert

Analyzing the Accusatory

1. Formal requirement met?
2. Reasonable cause to believe crime occurred and defendant committed it?
 - If either of these requirements are not met, the type of accusatory does not matter; must be dismissed. If these are met, look to conversion issues below.
3. Does the reasonable cause include hearsay without an exception?
 - If yes, Δ cannot be held longer than 5 days and case cannot progress beyond place holder status.
4. Is there non-hearsay reasonable cause supporting each and every element of the offense AND Δ 's commission thereof.

Investigation of Veteran's Cases

Gary A. Horton, Esq.
Director, Veterans Defense Program
New York State Defenders Association, Inc.

2016 Criminal Law Academy
Mohawk Valley Community College
Friday, October 7, 2016

**TOOLS FOR THE FIREFIGHT:
VETERAN DEFENSE FROM
INVESTIGATION TO SENTENCE**



New York State Defenders Association
Veterans Defense Program

Gary A. Horton, Director

**INVESTIGATION:
THE CLIENT INTERVIEW**

HOW TO APPROACH YOUR VETERAN CLIENT

- Show gratitude for their sacrifice.
- Don't try to use military jargon unless you really understand what you are saying, and even then sparingly.
- Conversation starters, get your client talking with easy subjects.
 - What was your job in the military?
 - Where did you serve?
 - That must have been difficult, can you tell me about it?

TALKING TO YOUR VETERAN CLIENT

- Don't fake military knowledge.

If you don't understand the jargon or the acronyms, ask your client to explain.

"I haven't had your experience can you explain to me what that means?"

THE RELUCTANT CLIENT

- If your client shows any discomfort when being questioned about his or military experience don't press.

"Maybe we can come back to that".

- But, don't give up.

"I wouldn't ask you these questions if it wasn't important to your defense".

IF THE CLIENT DOESN'T WANT TO TALK

- If your client says:

"I never talk about these things, I don't want to talk about them with you."

Proceed carefully, this might be indicative of PTSD. The better course might be to involve a therapist to delve into the specific information.

As an alternative, your client may be willing to write about his experience.

CLIENT INTERVIEW QUESTIONS

I. Pre Military

- Family
- Education
- Prior Arrests/Convictions



II. Origins of Military Service

- Why?
- Reaction by parents, teachers, friends

III. Level of Certainty

- How sure were you about wanting to be in the military?
- Buyer's Remorse?
- Preparation

IV. Military Occupational Specialty (MOS) Selection

- What was your desired MOS?
- Did it match your actual MOS?
- Once you received your MOS, how did you feel about it?

V. Boot Camp

VI. First Unit

VII. Combat



VIII. Redeployment

IX. Non-Combat Injuries/Trauma

X. Non-Judicial Punishment/Disciplines

XI. Voluntary Discharge

- Why?
- Reaction by Others?



XII. Post-Service Attitude

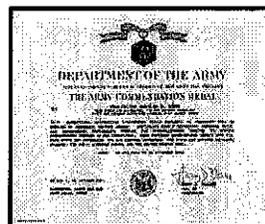
- At time of Discharge
- 6 months
- Ongoing
- Keep in touch with service buddies?

**XIII. Interface with the Veterans Administration**

- When?
- Where?
- Why?
- Ongoing?

**XIV. Documents**

- Knowledge of the location of hard copy documents – (DD 214, Award Citations, Evaluations . . .)

**XV. Online Resources**

- My HealtheVet
- eBenefits.va.gov
- Facebook, Rally Point. Linked-In. (if incarcerated, username and ID)
- Military Data bases (Branch Human Resources Databases) (if incarcerated, username and ID)

VA 10-5345

The image shows a sample of VA Form 10-5345, titled 'Request for Copy of Military Records'. The form includes sections for 'Requester Information', 'Service Information', and 'Request Details'. It contains various checkboxes and text boxes for providing personal and service-related data.

Collecting Military Records: VA

- Ask veteran "Have you ever used the VA?" Some veterans, due to discharge status and time in service are ineligible. Some may have private insurance, others just do not choose to use VA.
- Complete the 10-5345 and send to all the VA facilities where your client has been treated or the appropriate VA HUB. It is critically important that the form is filled out correctly, or you will not receive records. Send to Release of Information Office (ROI).
- You will receive Treatment Notes that include self reported information, diagnosis, medications, therapies, medical tests, surgeries, etc.
- Sample with instructions in hand-out section.

VA 10-5345A

The image shows a sample of VA Form 10-5345A, titled 'Request for Copy of Military Records'. This form is simpler than the 10-5345, with fewer sections and checkboxes. It includes fields for 'Requester Name', 'Address', and 'Service Information'.

Collecting Military Records: VA

- if your client is not incarcerated, he/she can fill out this form and take it to their local ROI office and get their Treatment Notes.
- Clients can typically acquire their own records through the local ROI office faster than an agency acting on their behalf.
- The form is less complicated than the 10-5435 and someone can assist the veteran at VA, if needed.
- Sample with instructions in hand-outs.

VA RECORDS

- **10-5345:** www.va.gov/vaforms/medical/pdf/vha-10-5345-fill.pdf
- **10-5345A:** <http://www.va.gov/vaforms/medical/pdf/vha-10-5345a-fill.pdf>
- **My HealthVet:** Your client may have a profile, it will be password protected, but could include VA treatment records, notes, medications, etc. and possibly a DD 214. Available at: myhealth.va.gov
- **Personal Records:** It's likely your client or a family member may have copies of military paperwork, possibly a DD 214.

DoD STANDARD FORM 180 (SF-180)

Collecting Military Records: DoD

- This is a 3 page form. This form will allow you to obtain your clients ACTIVE DUTY personnel and military records.
- Boxes on the form allow you to request a copy of a DD 214, records from a specific event (overseas or stateside hospitalization, etc.) and your client's Official Military Personnel File, better known as an OMPF.
- Be aware, turnaround time for DoD records is typically 6-9 weeks or more.
- Sample with instructions in hand-outs.

DEPARTMENT OF DEFENSE (DoD)

- **SF-180:** www.archives.gov/research/order/standard-form-180.pdf
- **eBenefits.va.gov.** Your client may have a profile, it will be password protected, but could include service related comp, pension, claims, appeals, etc.
- **Again, Personal Records.**
- **DoD:** Medical & Service treatment records Department of Veteran Affairs: 888-533-4558
- **DoD:** Personnel Records. National Personnel Records Center: 314-801-0800

CHAIN OF COMMAND

- **What kind of soldier was he/she?**
 - Open- ended
- **Initial Impression**
 - Ahead/behind when he/she arrived?
 - Initial Leadership Assignment/Position – Why?
 - Growth
- **Performance**
 - Overall Assessment
 - Turning Points (“He/she changed after”)
 - What’s not in the records. “We didn’t write this but”
 - “Nobody said anything but we all knew that”
 - Unrecognized Performance – “He/she got screwed because”
 - Discipline?
- **Overall Reputation**
 - Veteran was best known for
 - Would you have him/her in your unit again? Why or why not?
- **Further Investigation**
 - Name/contact data for people that vet hung out with.
- **Availability as Affiant/Witness**



CIVILIAN SOURCES

- Interviews:
 - Family, Friends and Teachers
- Documents:
 - School records, Newspaper Articles and Photos
- Social Media:
 - Facebook and RallyPoint



SUBPOENA FOR RECORDS

- If you know or believe your client had a non-judicial conduct proceeding ("Article 15" or "Captain's Mast") or a Court-Martial, the investigative records relating to those proceedings can be obtained by means of Judicial Subpoena.
- In your materials, you will find a subpoena form and information regarding subpoenas for each branch of the military.
- The prosecution gets the documents!

UNDER FIRE? CALL FOR SUPPORT



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FAX: 585-219-4862



REQUEST FOR AND AUTHORIZATION TO RELEASE MEDICAL RECORDS OR HEALTH INFORMATION

Privacy Act and Paperwork Reduction Act Information: The execution of this form does not authorize the release of information other than that specifically described below. The information requested on this form is solicited under Title 38, U.S.C. The form authorizes release of information in accordance with the Health Insurance Portability and Accountability Act, 45 CFR Parts 160 and 164, 5 U.S.C. 552a, and 38 U.S.C. 5701 and 7332 that you specify. Your disclosure of the information requested on this form is voluntary. However, if the information including Social Security Number (SSN) (the SSN will be used to locate records for release) is not furnished completely and accurately, Department of Veterans Affairs will be unable to comply with the request. The Veterans Health Administration may not condition treatment, payment, enrollment or eligibility on signing the authorization. VA may disclose the information that you put on the form as permitted by law. VA may make a "routine use" disclosure of the information as outlined in the Privacy Act systems of records notices identified as 24VA10P2 "Patient Medical Record - VA" and in accordance with the Notice of Privacy Practices. You do not have to provide the information to VA, but if you don't, VA will be unable to process your request and serve your medical needs. Failure to furnish the information will not have any affect on any other benefits to which you may be entitled. If you provide VA your Social Security Number, VA will use it to administer your VA benefits. VA may also use this information to identify veterans and persons claiming or receiving VA benefits and their records, and for other purposes authorized or required by law. The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 2 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

ENTER BELOW THE PATIENT'S NAME AND SOCIAL SECURITY NUMBER IF THE PATIENT DATA CARD IMPRINT IS NOT USED.

TO: DEPARTMENT OF VETERANS AFFAIRS (Print or type name and address of health care facility)	PATIENT NAME (Last, First, Middle Initial)
	SOCIAL SECURITY NUMBER

NAME AND ADDRESS OF ORGANIZATION, INDIVIDUAL OR TITLE OF INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

VETERAN'S REQUEST: I request and authorize Department of Veterans Affairs to release the information specified below to the organization, or individual named on this request. I understand that the information to be released includes information regarding the following condition(s):

DRUG ABUSE ALCOHOLISM OR ALCOHOL ABUSE TESTING FOR OR INFECTION WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) SICKLE CELL ANEMIA

INFORMATION REQUESTED (Check applicable box(es) and state the extent or nature of the information to be disclosed, giving the dates or approximate dates covered by each)

COPY OF HOSPITAL SUMMARY COPY OF OUTPATIENT TREATMENT NOTE(S) OTHER (Specify)

PURPOSE(S) OR NEED FOR WHICH THE INFORMATION IS TO BE USED BY INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

NOTE: ADDITIONAL ITEMS OF INFORMATION DESIRED MAY BE LISTED ON THE BACK OF THIS FORM

AUTHORIZATION: I certify that this request has been made freely, voluntarily and without coercion and that the information given above is accurate and complete to the best of my knowledge. I understand that I will receive a copy of this form after I sign it. I may revoke this authorization, in writing, at any time except to the extent that action has already been taken to comply with it. Written revocation is effective upon receipt by the Release of Information Unit at the facility housing the records. Redislosure of my medical records by those receiving the above authorized information may be accomplished without my further written authorization and may no longer be protected. Without my express revocation, the authorization will automatically expire: (1) upon satisfaction of the need for disclosure; (2) on [] (date supplied by patient); (3) under the following condition(s):

I understand that the VA health care practitioner's opinions and statements are not official VA decisions regarding whether I will receive other VA benefits or, if I receive VA benefits, their amount. They may, however, be considered with other evidence when these decisions are made at a VA Regional Office that specializes in benefit decisions.

DATE (mm/dd/yyyy)	SIGNATURE OF PATIENT OR PERSON AUTHORIZED TO SIGN FOR PATIENT (Attach authority to sign, e.g., POA)

FOR VA USE ONLY

IMPRINT PATIENT DATA CARD (or enter Name, Address, Social Security Number)	TYPE AND EXTENT OF MATERIAL RELEASED	
	DATE RELEASED	RELEASED BY

INSTRUCTIONS FOR COMPLETING A VA 10-5345 FORM

What is a Department of Veterans Affairs Form 10-5345? This form will you allow you collect treatment records and information concerning your veteran client from post active duty, if he/she has been treated at a VA Facility.

Instructions for filling out VA -10-5345 Form:

Box 1: Enter the VA or Outpatient Treatment Center and address of where your client was treated.

Box 2: Client's name

Box 3: Social Security Number

Box 4: Attorney/Agency name & mailing address

Box 5: Veteran's Request: If you want information concerning any of these categories, you must check the appropriate box or HIPAA will preclude the release of the information.

Box 6: Information Requested: Check first two boxes. Check "other" box only if you want specific information regarding a very specific event, such as a specific surgery, etc.

Box 7: Ask client to write in this box "Please release any and all information regarding myself, (client's name), as a patient of the VA."

Box 8: Purpose: LEGAL

Box 9: Typically your client should circle option #1, unless client wants to provide a revocation date or provide a condition. Note: should your client provide a date and it expires while case is ongoing, you will need to have client fill out another VA Release. Circle choice 1, 2 or 3. Do not leave blank.

Box 10: Have client date & sign form.

Mailing: Send completed form to VA center listed in Box 1. Faxing to facility is also acceptable. It will typically take 30-60 days or more to receive client's records.

Forms are available at www.va.gov.



INDIVIDUALS' REQUEST FOR A COPY OF THEIR OWN HEALTH INFORMATION

PRIVACY ACT AND PAPERWORK REDUCTION ACT INFORMATION

The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Act. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 2 minutes. This includes the time it will take to read the instructions, gather the necessary facts and fill out the form. The purpose of this form is to provide an individual the means to make a written request for a copy of their information maintained by the Department of Veterans Affairs (VA) in accordance with 38 CFR 1.577.

The information on this form is requested under Title 38, U.S.C. 501. Your disclosure of the information requested on this form is voluntary. However, if the information including Social Security Number (SSN) (the SSN will be used to locate records for release) is not furnished completely and accurately, VA will be unable to comply with the request. Failure to furnish the information will not have any affect on any other benefits to which you may be entitled.

VETERAN'S LAST NAME- FIRST NAME- MIDDLE INITIAL	SOCIAL SECURITY NO.	DATE OF BIRTH
<input type="text"/>	<input type="text"/>	<input type="text"/>

DESCRIPTION OF INFORMATION REQUESTED

Check applicable box(es) and state the extent or nature of information to be copied/printed, giving the dates or approximate dates covered by each

FACILITY WHERE TREATED:	DATES OF TREATMENT:
<input type="text"/>	<input type="text"/>

- COPY OF HOSPITAL SUMMARY COPY OF OUTPATIENT TREATMENT NOTE(S) OTHER (Specify)

COPY OF HEALTH INFORMATION IS TO BE DELIVERED TO THE INDIVIDUAL

<input type="checkbox"/> IN-PERSON	<input type="checkbox"/> BY MAIL, TO ADDRESS BELOW (include City, State & ZIP)	PHONE NO.	<input type="text"/>
------------------------------------	--	-----------	----------------------

PATIENT SIGNATURE	DATE (mm/dd/yyyy)
<input type="text"/>	<input type="text"/>

NOTE: If signed by someone other than the patient, indicate the authority (e.g., guardianship or power of attorney) under which request is made.

REQUEST PERTAINING TO MILITARY RECORDS

Requests from veterans or deceased veteran's next-of-kin may be submitted online by using eVetRecs at <http://www.archives.gov/veterans/military-service-records/>
 To ensure the best possible service, please thoroughly review the accompanying instructions before filling out this form. PLEASE PRINT LEGIBLY OR TYPE BELOW.

SECTION I - INFORMATION NEEDED TO LOCATE RECORDS (Furnish as much information as possible.)

1. NAME USED DURING SERVICE (last, first, full middle)	2. SOCIAL SECURITY #	3. DATE OF BIRTH	4. PLACE OF BIRTH
--	----------------------	------------------	-------------------

5. SERVICE, PAST AND PRESENT (For an effective records search, it is important that ALL service be shown below.)

	BRANCH OF SERVICE	DATE ENTERED	DATE RELEASED	OFFICER	ENLISTED	SERVICE NUMBER (If unknown, write "unknown")
a. ACTIVE	-			<input type="checkbox"/>	<input type="checkbox"/>	
b. RESERVE	-			<input type="checkbox"/>	<input type="checkbox"/>	
c. STATE NATIONAL GUARD	-			<input type="checkbox"/>	<input type="checkbox"/>	

6. IS THIS PERSON DECEASED? NO YES - *MUST provide Date of Death if veteran is deceased:* _____

7. DID THIS PERSON RETIRE FROM MILITARY SERVICE? NO YES

SECTION II - INFORMATION AND/OR DOCUMENTS REQUESTED

1. CHECK THE ITEM(S) YOU ARE REQUESTING:

DD Form 214 or equivalent. Year(s) in which form(s) issued to veteran: _____
 This form contains information normally needed to verify military service. A copy may be sent to the veteran, the deceased veteran's next-of-kin, or other persons or organizations, if authorized in Section III, below. An **UNDELETED DD214 is ordinarily required to determine eligibility for benefits.** If you request a **DELETED** copy, the following items will be blacked out: authority for separation, reason for separation, reenlistment eligibility code, separation (SPD/SPN) code, and, for separations after June 30, 1979, character of separation and dates of time lost.
 An **UNDELETED** copy will be sent **UNLESS YOU SPECIFY A DELETED COPY** by checking this box: I want a **DELETED** copy.

Medical Records Includes Service Treatment Records, Health (outpatient) and Dental Records. **IF HOSPITALIZED (inpatient) the FACILITY NAME and DATE (month and year) for EACH admission MUST be provided:** _____

Other (Specify): _____

2. **PURPOSE:** (Providing information about the purpose of the request is **strictly voluntary**; however, it may help to provide the best possible response and may result in a faster reply. Information provided will in no way be used to make a decision to deny the request.)

Benefits (explain) Employment VA Loan Programs Medical Genealogy Correction Personal Other (explain)

Explain here: _____

SECTION III - RETURN ADDRESS AND SIGNATURE

1. **REQUESTER NAME:** _____

2. I am the MILITARY SERVICE MEMBER OR VETERAN identified in Section I, above.

I am the DECEASED VETERAN'S NEXT-OF-KIN (*MUST submit Proof of Death. See item 2a on instruction sheet.*)

 (Relationship to deceased veteran)

I am the VETERAN'S LEGAL GUARDIAN (*MUST submit copy of Court Appointment*) or AUTHORIZED REPRESENTATIVE (*MUST submit copy of Authorization Letter or Power of Attorney*)

OTHER

 (Specify type of Other)

3. **SEND INFORMATION/DOCUMENTS TO:**
 (Please print or type. See item 4 on accompanying instructions.)

Name _____

Street _____ Apt. _____

City _____ State _____ Zip Code _____

4. **AUTHORIZATION SIGNATURE:** I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the information in this Section III is true and correct and that I authorize the release of the requested information. (See items 2a or 3a on accompanying instruction sheet. Without the Authorization Signature of the veteran, next-of-kin of deceased veteran, veteran's legal guardian, authorized government agent, or other authorized representative, only limited information can be released unless the request is archival. No signature is required if the request is for archival records.)

Signature Required - Do not print _____ Date _____

Daytime phone _____ Fax Number _____

Email address _____

* This form is available at <http://www.archives.gov/veterans/military-service-records/standard-form-180.html> on the National Archives and Records Administration (NARA) web site. *

INSTRUCTIONS FOR COMPLETING A SF-180 FORM

What is a Department of Defense (DoD) SF-180 Form? This form will provide you with information and treatment records on your client while he/she was on *active* duty or active Reserve Duty. This form will allow you to apply for a copy of a DD 214, all documents in the Official Military Personnel File (OMPF), Medical Records and Other.

Section I: Have veteran client fill out in as much detail, as possible.

Section II: Part 1, you can request a new DD214, Medical Records or using the box marked "Other" enter the words FULL OMPF. Part 2, Purpose: use "Other" box and write LEGAL.

Section III: Part 1, Requester Name will be your veteran client's name. Part 2, check appropriate box and have veteran client sign under Part 4, Authorization. A signature and date is required. Part 3, enter attorney/agency and address, where paperwork will be sent.

Mailing: The SF-180 is a 3 page form. Forms are available at <http://www.archives.gov/research/order/standard-form-180.pdf>. After completing the second page, using the information in Section 1, use page 3, titled Location of Military Records, to determine where records request should be sent. Often the Record Request Form will be required to be sent to two different addresses in order to receive the Personnel Record and the Medical or Service Treatment Record.

In order to gain your veteran client's entire treatment and personnel record, consider using both the VA 10-5345 and the DoD SF-180.

INSTRUCTION AND INFORMATION SHEET FOR SF 180, REQUEST PERTAINING TO MILITARY RECORDS

1. General Information. The Standard Form 180, Request Pertaining to Military Records (SF180) is used to request information from military records. Certain identifying information is necessary to determine the location of an individual's record of military service. Please try to answer each item on the SF 180. If you do not have and cannot obtain the information for an item, show "NA," meaning the information is "not available." Include as much of the requested information as you can. Incomplete information may delay response time. To determine where to mail this request see Page 2 of the SF180 for record locations and facility addresses.

Online requests may be submitted to the National Personnel Records Center (NPRC) by a veteran or deceased veteran's next-of-kin using eVetRecs at <http://www.archives.gov/veterans/military-service-records/>.

2. Personnel Records/Military Human Resource Records/Official Military Personnel File (OMPF) and Medical Records/Service Treatment Records (STR). Personnel records of military members who were discharged, retired, or died in service **LESS THAN 62 YEARS AGO** and medical records are in the legal custody of the military service department and are administered in accordance with rules issued by the Department of Defense and the Department of Homeland Security (DHS, Coast Guard). STRs of persons on active duty are generally kept at the local servicing clinic. After the last day of active duty, STRs should be requested from the appropriate address on page 2 of the SF 180. (See item 3, Archival Records, if the military member was discharged, retired or died in service more than 62 years ago.)

a. **Release of information:** Release of information is subject to restrictions imposed by the military services consistent with Department of Defense regulations, the provisions of the Freedom of Information Act (FOIA) and the Privacy Act of 1974. The service member (either past or present) or the member's legal guardian has access to almost any information contained in that member's own record. The authorization signature of the service member or the member's legal guardian is needed in Section III of the SF180. Others requesting information from military personnel records and/or STRs must have the release authorization in Section III of the SF 180 signed by the member or legal guardian. If the appropriate signature cannot be obtained, only limited types of information can be provided. If the former member is deceased, the surviving next-of-kin may, under certain circumstances, be entitled to greater access to a deceased veteran's records than a member of the general public. The next-of-kin may be any of the following: unremarried surviving spouse, father, mother, son, daughter, sister, or brother. Requesters **MUST provide proof of death, such as a copy of a death certificate, newspaper article (obituary) or death notice, coroner's report of death, funeral director's signed statement of death, or verdict of coroner's jury.**

b. **Fees for records:** There is no charge for most services provided to service members or next-of-kin of deceased veterans. A nominal fee is charged for certain types of service. In most instances, service fees cannot be determined in advance. If your request involves a service fee, you will receive an invoice with your records.

3. Archival Records. Personnel records of military members who were discharged, retired, or died in service **62 OR MORE YEARS AGO** have been transferred to the legal custody of NARA and are referred to as "archival records".

a. **Release of Information:** Archival records are open to the public. The Privacy Act of 1974 does not apply to archival records, therefore, written authorization from the veteran or next-of-kin is not required. In order to protect the privacy of the veteran, his/her family, and third parties named in the records, the personal privacy exemption of the Freedom of Information Act (5 U.S.C. 552 (b) (6)) may still apply and may preclude the release of some information.

b. **Fees for Archival Records:** Access to archival records are granted by offering copies of the records for a fee (44 U.S.C. 2116 (c)). If a fee applies to the photocopies of documents in the requested record, you will receive an invoice. Photocopies will be sent after payment is made. For more information see <http://www.archives.gov/st-louis/archival-programs/military-personnel-archival/ompf-archival-requests.html>.

4. Where reply may be sent. The reply may be sent to the service member or any other address designated by the service member or other authorized requester. If the designated address is NOT registered to the addressee by the U.S. Postal Service (USPS), provide BOTH the addressee's name AND "in care of" (c/o) the name of the person to whom the address is registered on the NAME line in Section III, item 3, on page 1 of the SF 180. The COMPLETE address must be provided, INCLUDING any apartment/suite/unit/lot/space/etc. number.

5. Definitions and abbreviations. DISCHARGED -- the individual has no current military status; SERVICE TREATMENT RECORD (STR) -- The chronology of medical, mental health, and dental care received by service members during the course of their military career (does not include records of treatment while hospitalized); TDRL -- Temporary Disability Retired List.

6. Service completed before World War I. National Archives Trust Fund (NATF) forms must be used to request these records. Obtain the forms by e-mail from inquire@nara.gov or write to the Code 6 address on page 2 of the SF 180.

PRIVACY ACT OF 1974 COMPLIANCE INFORMATION

The following information is provided in accordance with 5 U.S.C. 552a(e)(3) and applies to this form. Authority for collection of the information is 44 U.S.C. 2907, 3101, and 3103, and Public Law 104-134 (April 26, 1996), as amended in title 31, section 7701. Disclosure of the information is voluntary. If the requested information is not provided, it may delay servicing your inquiry because the facility servicing the service member's record may not have all of the information needed to locate it. The purpose of the information on this form is to assist the facility servicing the records (see the address list) in locating the correct military service record(s) or information to answer your inquiry. This form is then retained as a record of disclosure. The form may also be disclosed to Department of Defense components, the Department of Veterans Affairs, the Department of Homeland Security (DHS, U.S. Coast Guard), or the National Archives and Records Administration when the original custodian of the military health and personnel records transfers all or part of those records to that agency. If the service member was a member of the National Guard, the form may also be disclosed to the Adjutant General of the appropriate state, District of Columbia, or Puerto Rico, where he or she served.

PAPERWORK REDUCTION ACT PUBLIC BURDEN STATEMENT

Public burden reporting for this collection of information is estimated to be five minutes per request, including time for reviewing instructions and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to National Archives and Records Administration (ISSD), 8601 Adelphi Road, College Park, MD 20740-6001. **DO NOT SEND COMPLETED FORMS TO THIS ADDRESS. SEND COMPLETED FORMS TO THE APPROPRIATE ADDRESS LISTED ON PAGE 2 OF THE SF 180.**

The various categories of military service records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. Please refer to the Instruction and Information Sheet accompanying this form as needed.

BRANCH	CURRENT STATUS OF SERVICE MEMBER	Personnel Record	Medical or Service Treatment Record
AIR FORCE	Discharged, deceased, or retired before 5/1/1994	14	14
	Discharged, deceased, or retired 5/1/1994 – 9/30/2004	14	11
	Discharged, deceased, or retired 10/1/2004 – 12/31/2013	1	11
	Discharged, deceased, or retired on or after 1/1/2014	1	13
	Active (including National Guard on active duty in the Air Force), TDRL, or general officers retired with pay	1	
	Reserve, IRR, Retired Reserve in non-pay status, current National Guard officers not on active duty in the Air Force, or National Guard released from active duty in the Air Force	2	
	Current National Guard enlisted not on active duty in the Air Force	2	13
COAST GUARD	Discharge, deceased, or retired before 1/1/1898	6	
	Discharged, deceased, or retired 1/1/1898 – 3/31/1998	14	14
	Discharged, deceased, or retired 4/1/1998 – 9/30/2006	14	11
	Discharged, deceased, or retired 10/1/2006 – 9/30/2013	3	11
	Discharged, deceased, or retired on or after 10/1/2013	3	14
	Active, Reserve, Individual Ready Reserve or TDRL	3	
MARINE CORPS	Discharged, deceased, or retired before 1/1/1895	6	
	Discharged, deceased, or retired 1/1/1905 – 4/30/1994	14	14
	Discharged, deceased, or retired 5/1/1994 – 12/31/1998	14	11
	Discharged, deceased, or retired 1/1/1999 - 12/31/2013	4	11
	Discharged, deceased, or retired on or after 1/1/2014	4	8
	Individual Ready Reserve	5	
	Active, Selected Marine Corps Reserve, TDRL	4	
ARMY	Discharged, deceased, or retired before 11/1/1912 (enlisted) or before 7/1/1917 (officer)	6	
	Discharged, deceased, or retired 11/1/1912 – 10/15/1992 (enlisted) or 7/1/1917 – 10/15/1992 (officer)	14	
	Discharged, deceased, or retired 10/16/1992 – 9/30/2002	14	11
	Discharged, deceased, or retired (including TDRL) 10/1/2002 – 12/31/2013	7	11
	Discharged, deceased, or retired (including TDRL) on or after 1/1/2014	7	9
	Current Soldier (Active, Reserve (including Individual Ready Reserve) or National Guard)	7	
NAVY	Discharged, deceased, or retired before 1/1/1886 (enlisted) or before 1/1/1903 (officer)	6	
	Discharged, deceased, or retired 1/1/1886 – 1/30/1994 (enlisted) or 1/1/1903 – 1/30/1994 (officer)	14	14
	Discharged, deceased, or retired 1/31/1994 – 12/31/1994	14	11
	Discharged, deceased, or retired 1/1/1995 – 12/31/2013	10	11
	Discharged, deceased, or retired on or after 1/1/2014	10	8
	Active, Reserve, or TDRL	10	
PHS	Public Health Service - Commissioned Corps officers only	12	

ADDRESS LIST OF CUSTODIANS and SELF-SERVICE WEBSITES (BY CODE NUMBERS SHOWN ABOVE) – Where to write/send this form

1	Air Force Personnel Center HQ AFPC/DPSIRP 550 C Street West, Suite 19 Randolph AFB, TX 78150-4721	6	National Archives & Records Administration Research Services (RDTIR) 700 Pennsylvania Avenue NW Washington, DC 20408-0001	11	Department of Veterans Affairs Records Management Center ATTN: Release of Information P.O. Box 5020 St. Louis, MO 63115-5020
2	Air Reserve Personnel Center Records Management Branch (DPTSC) 18420 E. Silver Creek Avenue Building 390 MS 68 Buckley AFB, CO 80011	7	US Army Human Resources Command's web page: https://www.hrc.army.mil/TAGD/Accessing%20or%20Requesting%20Your%20Official%20Military%20Personnel%20File%20Documents or 1-888-ARMYHRC (1-888-276-9472)	12	Division of Commissioned Corps Officer Support ATTN: Records Officer 1101 Wootton Parkway, Plaza Level, Suite 100 Rockville, MD 20852
3	Commander, Personnel Service Center (BOPS-C-MR) MS7200 US Coast Guard 2703 Martin Luther King Jr Ave SE Washington, DC 20593-7200 MR_CustomerService@uscg.mil	8	Navy Medicine Records Activity (NMRA) BUMED Detachment St. Louis 4300 Goodfellow Boulevard, Building 103 St. Louis, MO 63120	13	AF STR Processing Center ATTN: Release of Information 3370 Nacogdoches Road, Suite 116 San Antonio, TX 78217
4	Headquarters U.S. Marine Corps Manpower Management Records & Performance (MMRP-10) 2008 Elliot Road Quantico, VA 22134-5030	9	AMEDD Record Processing Center 3370 Nacogdoches Road, Suite 116 San Antonio, TX 78217	14	National Personnel Records Center (Military Personnel Records) 1 Archives Drive St. Louis, MO 63138-1002 eVetRecs: http://www.archives.gov/veterans/military-service-records/
5	Marine Forces Reserve 2000 Opelousas Avenue New Orleans, LA 70146-5400	10	Navy Personnel Command (PERS-313) 5720 Integrity Drive Millington, TN 38055-3120		

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

This Report Contains Information Subject to the Privacy Act of 1974, As Amended.

1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BRANCH ARMY/RA	3. SOCIAL SECURITY NUMBER 000 50 0000
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4a. GRADE, RATE OR RANK SSG	b. PAY GRADE E06	5. DATE OF BIRTH (YYYYMMDD)	6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD) 00000000
--------------------------------	---------------------	-----------------------------	--

7a. PLACE OF ENTRY INTO ACTIVE DUTY NIAGARA FALLS, NEW YORK	b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known) ALBION NEW YORK 14411-0000
--	---

8a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND 0041ENCO B REAR FC	b. STATION WHERE SEPARATED FORT DRUM TC, NY 13602
--	--

9. COMMAND TO WHICH TRANSFERRED N/A	10. SGLI COVERAGE AMOUNT: \$ 400,000.00
--	--

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.) 12B30 COMBAT ENGINEER - 7 YRS 5 MOS//NOTHING FOLLOWS	12. RECORD OF SERVICE			
	a. DATE ENTERED AD THIS PERIOD	YEAR(S)	MONTH(S)	DAY(S)
	b. SEPARATION DATE THIS PERIOD	2008	01	07
	c. NET ACTIVE SERVICE THIS PERIOD	2015	10	03
	d. TOTAL PRIOR ACTIVE SERVICE	0007	08	27
	e. TOTAL PRIOR INACTIVE SERVICE	0000	00	00
	f. FOREIGN SERVICE	0000	00	00
	g. SEA SERVICE	0003	08	03
	h. INITIAL ENTRY TRAINING	0000	00	00
	i. EFFECTIVE DATE OF PAY GRADE	0000	00	00

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service) AFGHANISTAN CAMPAIGN MEDAL W/ 2 CAMPAIGN STARS//IRAQ CAMPAIGN MEDAL W/ TWO CAMPAIGN STARS//ARMY COMMENDATION MEDAL W/ V DEVICE //ARMY COMMENDATION MEDAL (2ND AWARD)//ARMY ACHIEVEMENT MEDAL (3RD AWARD)//NATO MEDAL //ARMY GOOD CONDUCT MEDAL (2ND AWARD)// NATIONAL DEFENSE SERVICE//CONT IN BLOCK 18	14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed) ADVANCED LEADERS CRS, 6 WEEKS, 2012// ADVANCED SITUATIONAL AWARENESS BASIC CRS, 1 WEEK, 2015//COMBAT LIFE SAVERS CRS, 1 WEEK, 2008//COMBATIVES LEVEL 1 CRS, 1 WEEK, 2010 //COMBATIVES LEVEL 2 CRS, 2 WEEKS, 2013// DEFENSE LANGUAGE INSTITUTE GATEWAY TO GERMANY CRS, 1 WEEK, 2008//CONT IN BLOCK 18
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15a. COMMISSIONED THROUGH SERVICE ACADEMY	YES	X	NO
b. COMMISSIONED THROUGH ROTC SCHOLARSHIP (10 USC Sec. 2107b)	YES	X	NO
c. ENLISTED UNDER LOAN REPAYMENT PROGRAM (10 USC Chap. 109) (If Yes, years of commitment: NA)	YES	X	NO

16. DAYS ACCRUED LEAVE PAID 15	17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION	YES	NO
			X

18. REMARKS
 ////////////////////////////////////
 IMMEDIATE REENLISTMENTS THIS PERIOD -- 20091103-20140620, 20140621-20151003//BLOCK 6, PERIOD OF DELAYED ENTRY PROGRAM: 20071207-20080106//SERVED IN A DESIGNATED IMMINENT DANGER PAY AREA//SERVICE IN IRAQ 20081204-20091115//SERVICE IN AFGHANISTAN 20110318-20120307//SERVICE IN AFGHANISTAN 20131026-20140727//SEPARATION PAY -- \$13775.16 //MEMBER HAS COMPLETED FIRST FULL TERM OF SERVICE//MEMBER IS ENTITLED TO HALF SEPARATION PAY//CONT FROM BLOCK 13: MEDAL//GLOBAL WAR ON TERRORISM SERVICE MEDAL//NON COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT RIBBON (2ND AWARD)//SEE ATTACHED CONTINUATION SHEET

The information contained herein is subject to computer matching within the Department of Defense or with any other affected Federal or non-Federal agency for verification purposes and to determine eligibility for, and/or continued compliance with, the requirements of a Federal benefit program.

19a. MAILING ADDRESS AFTER SEPARATION (Include ZIP Code)	b. NEAREST RELATIVE (Name and address - include ZIP Code)
--	---

20. MEMBER REQUESTS COPY 6 BE SENT TO (Specify state/locality) NY OFFICE OF VETERANS AFFAIRS	X	YES	NO
a. MEMBER REQUESTS COPY 3 BE SENT TO THE CENTRAL OFFICE OF THE DEPARTMENT OF VETERANS AFFAIRS (WASHINGTON, DC)	X	YES	NO

21a. MEMBER SIGNATURE ESIGNED BY:	b. DATE (YYYYMMDD) 20150923	22.a. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title, signature) DAVID SP... GS09, CHIEF SEPARATION	b. DATE (YYYYMMDD) 20150923
--------------------------------------	--------------------------------	---	--------------------------------

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION DISCHARGE	24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AR 635-200, PARA 5-8	26. SEPARATION CODE JDG	27. REENTRY CODE 3

28. NARRATIVE REASON FOR SEPARATION
PARENTHOOD

29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) NONE	30. MEMBER REQUESTS COPY 4 (Initials) NJC
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CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY (Continuation Sheet)

This Report Contains Information Subject to the Privacy Act of 1974, As Amended.

1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BRANCH ARMY/RA	3. SOCIAL SECURITY NUMBER
-------------------------------	--	---------------------------

(Specify the item number of the block continued for each entry.) //////////////////////////////////////
 CONT FROM BLOCK 18: //ARMY SERVICE RIBBON//OVERSEAS SERVICE RIBBON (3RD AWARD)//COMBAT ACTION BADGE//EXPERT MARKSMANSHIP BADGE W/ RIFLE BAR//DRIVER AND MECHANIC BADGE W/ DRIVER-WHEELED VEHICLE(S) CLASP//CONT FROM BLOCK 14: //JAVELIN TRAIN THE TRAINER CRS, 2 WEEKS, 2011//ROUTE RECONNAISSANCE/CLEARANCE-OPERATOR CRS, 2 WEEKS, 2010//ROUTE RECONNAISSANCE/CLEARANCE-SAPPER CRS, 2 WEEKS, 2013//WARRIOR LEADER CRS, 3 WEEKS, 2010// NOTHING FOLLOWS

21.a. MEMBER SIGNATURE
 BY: _____
 64286992

b. DATE (YYYYMMDD)
 20150923

22.a. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title, signature)
 SIGNED BY: _____
 GS09, CHIEF SEPARATION

b. DATE (YYYYMMDD)
 20150923

JUDICIAL SUBPOENA DUCES TECUM

STATE OF NEW YORK

COUNTY OF MONROE

TO: U.S. Army Crime Records Center
27130 Telegraph Road
Quantico, VA 22134

RE: Records relating to drug treatment/usage, alcohol treatment, and/or disciplinary records
of

Indictment No. 0150/2014

PLEASE SUBMIT A COPY OF THIS SUBPOENA WITH REQUESTED MATERIALS.

YOU ARE HEREBY COMMANDED TO APPEAR before the County Court (Victoria Argento, J.), County of Monroe, State of New York, at the Hall of Justice, Rochester, New York, on December 14, 2015, at 9:00 a.m., and at any recessed or adjourned date to give testimony as a witness in a criminal action prosecuted by the People of the State of New York vs. and to bring with you and produce any and all records specified in the above reference.

Dated at the City of Rochester on November 30, 2015.

County Court Judge

NOTE: Materials specified to be produced will be retained in the custody of the court. Date of return of a Subpoena is not necessarily the date testimony will be offered. Production of records shall be sufficient compliance. Personal appearance will not be required at this time.

SUBPOENAS AND BRANCHES OF THE MILITARY

Navy and Marines

A subpoena for naval records should be served on the general counsel at the Department of the Navy, Office of the General Counsel, Navy Litigation Office, 720 Kennon Street SE, Bldg. 36 Room 233, Washington Navy Yard, DC 20374-5013, who will then refer the matter to the proper delegate for action. The request for records must identify the parties, their counsel, and the nature of the litigation; identify the information or documents requested; and describe why the information is needed. There are a number of factors affecting whether the Navy will comply with the subpoena. For example, subpoenas that are unduly burdensome, conflict with existing laws, or interfere with ongoing law enforcement proceedings will likely be rejected. If the Navy complies with the subpoena, then expect certified copies of records to be forwarded to the clerk of the court from which the subpoena was issued.

Army

A subpoena for army records should be served on the Chief, U.S. Army Litigation Division, 9275 Gunston Rd. Ft. Belvoir, VA 22060. The Army's policy is to make records reasonably available, including for use in criminal cases pending in state courts, unless the information is classified, privileged, or otherwise protected from public disclosure.¹⁹ Similar to the Navy, there are factors affecting whether the Army will comply with the subpoena. Serve the subpoena, including a cover letter describing the nature and relevance of the Army records you are seeking, at least 14 days before the desired date of production. If the Army decides not to challenge the subpoena, then expect full compliance.

Air Force

A subpoena for Air Force records should be served on the Chief, General Litigation Division, Office of the Judge Advocate General. All releases of information from Air Force records, whether the requester cites the FOIA or not, must comply with the principles of the FOIA. Accordingly, a subpoena will be treated no differently from a standard FOIA request. Procedures on how to make a FOIA request to the Air Force are found at www.foia.af.mil/index.asp. The Privacy Act applies, so you will need to coordinate with the Air Force's FOIA/PA representative to obtain records responsive to your subpoena.

Coast Guard

The Coast Guard is the only military branch that is a part of the Department of Homeland Security. Refer to relevant sections of 6 C.F.R. part 5 for rules pertaining to the disclosure of records and information from the Department of Homeland Security. A subpoena for Coast Guard records may be served on the Office of General Counsel, Department of Homeland Security. The subpoena and cover letter must identify the nature and relevance of the information sought with as much specificity as possible.

NYSDA Veterans Defense Program Veteran Interview Guide

Origins of Military Service

- When did the idea of joining the military first occur to you?
- What were your reasons for joining the military?
- What did you tell people who asked?

Reaction to Decision to Enlist

- What was the reaction of your father?
- What was the reaction of your mother?
- Siblings?
- Friends?
- Teachers?
- Significant Other?

Level of Certainty

- How sure were you about wanting to be in the military?
- What was the time period like between the decision to enlist and actual enlistment?
Was it a time of anxiety, anticipation, dread?
- What did you do to prepare yourself for entry into the military? Mentally, Physically?
- Please complete the following: Two years after my enlistment date. I expected to be _____(doing what?) at _____(where?). Two years after my enlistment date. I was _____(doing what?) at _____(where?).

Military Occupational Specialty (MOS) Selection

- What was your desired MOS?
- Did it match your actual MOS?
- Once you received your MOS, how did you feel about it?

Boot camp

- Where did you attend boot camp?
- Describe your relationship with your Drill Sgt.?
- Did you graduate with your class from boot camp? If not, why not?
- Who was/is your closest friend at boot camp?
- Contact data?
- Did you have a significant other, prior to boot camp?
 - Did the relationship survive boot camp?

Disclaimer: Each veteran must be treated as an individual and the interviewer must consider and determine the readiness of the veteran client to discuss a particular topic. The interviewer must guard against re-traumatizing the veteran.

NYSDA Veterans Defense Program Veteran Interview Guide

- What was first, second, or third, etc. unit in the military?
- Is this unit what you wanted?
- In processing? (Did you feel welcome, needed, part of mission)
- Reaction of loved ones to assignment?

Relationships

- Who was the unit 1Sgt? Contact data?
- Who was the unit commanding officer? Contact data?
- Who was your platoon leader? Contact data?
- Who was your platoon sergeant? Contact data?
- Who was your squad leader? Contact data?
- Senior mentor? Contact data?
- Battle buddy? Contact data?
- Other friends? Contact data?
- Military significant other? Contact data?
- People you did not like within the unit? Why not?

Utilization

- Was your role in this unit within your MOS?
- If not, what was your primary duty?
- Were you satisfied with that duty?
- Satisfied with mission contribution?
- Did you receive the support of the chain of command in training for any new duty ?

Live in Barracks (military housing) or off post?

- If off post – where and who with (contact data).

Combat Tours (A combat tour is one in which you were eligible for, or received, Imminent Danger Pay)

- Did you have any combat deployments? If so,
 - Summary of Combat deployments
 - How many such tours have you had?
 - Location of each?
 - Duration of each?
 - Interval between each combat deployment?
 - Unit of each?

NYSDA Veterans Defense Program Veteran Interview Guide

Combat Tours (Con't)

- Rank in each combat deployment?
- MOS on each deployment?
- Primary weapon on each deployment (M4, M9, 240, SAW, etc?) '
- Are there any awards and decorations for which you were eligible that you did not receive? If so, which ones? What would be your narrative for each?
- I know your MOS was _____, but when you got to _____ (combat theater), what did you do?
- What was your real job? MOS did you take on? Did you feel prepared for this?
- Best memory of each deployment?
- Worst memory of each deployment (see how open vet is at this point, may have to revisit at a later interviews)
- Death or injury to friends?
- Significant losses to nearby units?
- What do you remember most about the deployment?
- Do you have pictures from the deployment? (group, or individual picture of the Vet)
- On line unit web page from the deployment
- Cruise book
- Unit or ship newspapers from deployment
- Exposure to danger
- Trips outside the wire
- Typical weapons status outside wire (red, green, amber)
Actual Combat (commonly known as "kinetics")
- How often under fire?
- Indirect (rocket, mortar)
- Direct (Small arms, RPG)
- IED's
- Intensity
- Duration of indirect attacks
- Duration of firefights
- Engagements (need to be careful trauma wise here)
- Did you engage enemy? If so what was the result?
- Engage enemy with what result
- Discuss with professionals?
- Who?
- Where (for records search)?
- Were you prescribed any medication?
- Who else was present?

NYSDA Veterans Defense Program Veteran Interview Guide

Redeployment

- Describe redeployment process
- In theatre redeployment station. Where, Duration, activity?
- First US base — Duration, activity?
- Did you indicate on redeployment questionnaire any issues/needs?

Training Accidents

- Non – Combat Injuries suffered or observed

Non-judicial Punishment (NJP)/discipline

- Article 15's/Captain's Mast
- What level – company grade, field grade
- Charged offense
- Adjudication
- Records
- Who was defense counsel/contact data
- Counseling Statements, Issue? Retain copy?
- Promotions on time, If behind, what was rationale?

Voluntary Discharge

- When was decision made to depart service? Rationale? Rationale provided to others?
- Reaction of others?
- Chain of Command
- Service buddies
- Family/significant other

Post Deployment

- Attitude
 - Towards your service at time of discharge (pride/regret/shame)
 - Attitude towards your service 6 weeks after discharge?
 - Attitude towards your service 6 months after discharge?
 - Keep in touch with service buddies?
 - Does your Superior Officer (SO) keep in touch with buddies/buddies SO's.

NYSDA Veterans Defense Program Veteran Interview Guide

Veterans Administration Health Services

- Overall experience with VA?
- What facilities have you been to?
- Treatment regimen?
- On Line Data
 - Does veteran use My HealtheVet? This website includes VA treatment records, notes, medications, etc. and is password protected.
 - Does veteran use eBenefits.va.gov? This website includes service related comp, pension, claims, appeals, etc. and is password protected.

Note: Access to either of those websites could quickly produce the start of collecting essential military records like a DD 214, without waiting for a VA Release.

**Convictions & Consequences
For
Non-Citizens**

Sharon L. Ames, Esq.
Director, Immigration
Region #2, Regional Immigration Assistance Center

Robert R. Reittinger, Esq.
Director, Criminal
Region #2, Regional Immigration Assistance Center

2016 Criminal Law Academy
Mohawk Valley Community College
Friday, October 7, 2016

BASIC CONCEPTS IN "CRIMMIGRATION" :

IMMIGRATION CONSEQUENCES IN CRIMINAL COURT

Sharon L. Ames, Esq.

Regional Immigration Assistance Center, Region 2

315.356.5794

Criminal Law Academy 2016

Alumni College Center, MVCC
1101 Sherman Drive, Utica, NY

Oneida County Bar Association
Oneida County Public Defender, Criminal Division
Oneida County Assigned Counsel Program
NYS Office of Indigent Legal Services
NYS Defenders Association, Inc.

I. PADILLA V. KENTUCKY

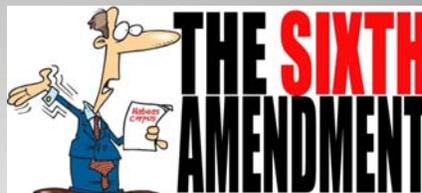


130 S.Ct. 1473 (2010)

- Who was Jose Padilla? Jose Padilla was a permanent resident for 40 years. He was a Viet Nam war veteran.
- Charges: Marijuana possession and trafficking for having marijuana in his commercial truck
- Pled guilty in a **plea agreement** for marijuana trafficking after defense attorney told him he did not have to worry about immigration because he had lived in the U.S. for so long

Holding in *Padilla v. Kentucky*

- 6th Amendment requires defense counsel to provide *affirmative, competent advice* to a noncitizen defendant regarding the immigration consequences of a guilty plea.



Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.



N.Y. C.P.L.
ARTICLE 440—
POST-JUDGMENT
MOTIONS

Key points

- Requires affirmative, competent advice.
- Non-advice, or silence is insufficient.
- *Strickland v. Washington*, 104 S. Ct. 2052 (1984) still applies.
- Must show detriment to defendant by relying on advice of counsel.
- Court endorsed “informed consideration” of immigration consequences by BOTH defense and prosecution during plea bargaining.

Duties of Defense Counsel

Use intake form to gather information.

Copy all documents.



Duties of Defense Counsel, Cont'd:

- Obtain advisal from RIAC



Duties of Defense Counsel, cont'd:

Identify client's priorities and advise client

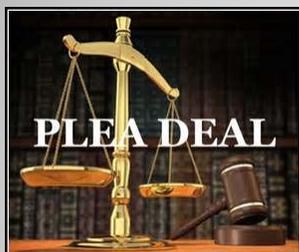


or



Duties of defense counsel, cont'd:

- Defend case according to client's priorities



or



Client Intake: Determine Client's Immigration Status

- Question: **"Where were you born?"**
- If the answer is anywhere BUT the United States, your client may be a **NONCITIZEN.**

Client Intake, Cont'd:

- Be sensitive:
To client, you are part of the system and trust is an issue.



Client Intake, Cont'd:

Ask for facts, not legal conclusions. (e.g. "Do you have a green card?" Instead of "are you legal here?")



Client Intake, Cont'd:

- Never assume status from a rap sheet, police report, name, appearance, language, accent or anything else.



Client Intake, Cont'd: Criminal History

- Complete prior criminal history
- FBI Criminal history
- NY DCJS report

Client Intake, Cont'd: Client's Immigration History

- When did the client FIRST enter the U.S.?
- What was the client's status when he/she first entered the U.S.?
- When did the client LAST enter the U.S.?
- All dates of any departures and re-entry to the U.S. since he/she first came here

Client Intake, Cont'd: Immigration History

- Has the client ever been deported or removed from the U.S.?
- Has the client ever left the U.S. under "voluntary departure?"
- Has the client ever been excluded or denied entry at a U.S. land border, sea port of entry or airport?
- (Remember, ask for facts, not legal conclusions...e.g. Where did you come into the US? Were you ever sent back home? Have you ever seen an immigration judge?)

Other Important information

- Family members in the U.S.?
If so, how long have they been here? What is their immigration status?
- Employment history?
- Medical issues?
- Other equities?

II. Determine Immigration Consequences

- Intake/investigation + criminal history + plea offer + client's goal = advisal
- Contact **RIAC2** and use available online resources
- Advise as to both clear and unclear consequences of the charge(s); any plea offer; any alternate plea dispositions that are attainable and meet the client's goal

Consequences of Criminal Offenses: The "Big 3"

- Mandatory removal from the U.S. ("deportation")
- Inability to return to the U.S. after removal
- Mandatory detention



Other Consequences of Criminal Offenses:

- Inability to obtain U.S. citizenship for failing to meet “good moral character” requirement (INA §101(f))
- Denial of Lawful Permanent Resident (green card) status
- Inability to renew green card or travel outside the U.S.



Identify Client's Priorities

- Client may need to choose whether immigration consequences or criminal sentence concerns are most important.
- Give client immigration analysis regardless of their stated desire to fight deportation. Give the client the basic information.

Defend the case according to the client's priorities

- If immigration consequences are client's priority, conduct defense with this in mind: *Padilla*, 130 S. Ct. at 1484
- a) If current offer fits client goals with most favorable immigration outcome = take offer
- b) If offer doesn't fit client goals:
 - Negotiate plea offer to particular section of statute
 - Litigate case towards motions hearing and trial if less risky than immigration consequences of the plea
 - If applicable, negotiate sentencing concession
- Remember *Padilla*'s instruction on prosecutor's duty

Mitigation Strategies

In addition to or if it is impossible to negotiate non-removable plea/sentence, strategies may include:

- Avoiding sentencing trigger (e.g. 364 days, 179 days)
- Pre-plea diversion (must be without entering a plea in the first instance)
- Control allocation of potentially removable offense:
 - Avoid admissions of any conduct beyond bare elements of offense (esp. for potential CIMTs)
 - Sanitize record
- Loss amount strategies

Mitigation Strategies, cont'd:

- Negotiate prosecutor's sponsorship of S or U visa for cooperators/cross-complainants
- Avoid ICE contact via jail or probation
- File appeal
- Seek post-conviction relief
- Avoid sex offender registry

POST CONVICTION RELIEF: FILE NOTICE OF APPEAL AND/OR
CPL 440.10 MOTION TO VACATE THE PLEA/SENTENCE

II. Basic immigration concepts: Types of immigration status

- U.S. Citizen: Birth; Naturalization; Automatic Derivation/Acquisition
- Lawful Permanent Resident (LPR) ("green card")
- Nonimmigrant Visa (tourist, student, business professional, seasonal worker)
- Asylee/refugee
- Temporary Protected Status
- Visa Overstay
- Entered Without Inspection ("EWI")

RESOURCES: RIAC2 CONSULTATION

- Collect data on intake form (included)
- Have complaint & rap sheet available
- Contact Sharon Ames, Esq.
sames@ocgov.net
- Contact Robert Reittinger, Esq.
rreittinger@ocgov.net
- Contact Debra Strange, Paralegal
dstrange@ocgov.net

ONLINE RESOURCES

- Immigrant Defense Project
www.immigrantdefenseproject.org
- Defending Immigrants Partnership
www.defendingimmigrants.org
- http://immdefense.org/wp-content/uploads/2016/05/FINALappendix-A_Final5thed2014.pdf
- National Immigration Project, NLG
www.nationalimmigrationproject.org
- Immigrant Legal Resource Center
www.ilrc.org

PRINTED RESOURCES

- N. Tooby, Tooby's Guide to Criminal Immigration Law (2008) free download @ www.criminalandimmigrationlaw.com
- N. Tooby, Criminal Defense of Immigrants (4th ed.)
- N. Tooby, Safe Havens (2005)

QUESTIONS



PLEASE PROVIDE THE FOLLOWING DOCUMENTS ON BEHALF OF YOUR CLIENT. ALTHOUGH IT MAY BE CUMBERSOME TO OBTAIN THESE, **WE CANNOT PROVIDE A TRULY ACCURATE ANALYSIS** WITHOUT THEM. **SEEMINGLY MINOR DETAILS CAN CHANGE AN ENTIRE OUTCOME FOR A CLIENT.**

Passport with visa stamp and /or entry stamp, Green Card, or other evidence of immigration status

Criminal Complaint, Indictment, Information

Family Court Petition, if applicable

Rap sheet (complaint)

QUESTIONS FOR CLIENT:

Full legal name?

Where were you born?

What is your date of birth?

What is your current immigration status? Common answers:

Green card/Permanent Resident

Refugee/Asylee

Undocumented/Visa Overstay

TPS (Temporary Protected Status)

Visa Holder (e.g. student, employment, travel)

DACA (Deferred Action for Childhood Arrivals)

WORK PERMIT IS NOT A STATUS. ASK TO SEE EMPLOYMENT AUTHORIZATION CARD AND WRITE DOWN ELIGIBILITY CODE.

When did you get your current immigration status? Get as specific a date as possible.

When did you come to the U.S.? Get as specific a date as possible.

How did you enter the U.S.? Status when you entered? Common answers:

Undocumented (no papers)

Visa

Green card

Refugee/Asylee

Have you ever had contact with immigration in the past? If so, specify.

Any contact with officers at the border?

Any applications to immigration?

Have you been to immigration court or seen an immigration judge?

Do you have an alien number? If so, what is it? (Not everyone has an A number. A number can be found on green card with immigrations documents.)

Do you have pending immigration applications for a green card, citizenship, or other status?

Is there a deportation case against you? Do you have appointment to see an immigration judge?

Do you have an immigration attorney? If so, contact information?

What is the immigration status of immediate family members? Mother, father, legal spouse or partner, children (include ages of children).

Custody status, including ICE holds if incarcerated.

WHAT WE NEED FROM YOU:

Next court date including the court and the status of the current case.

All charges and/or indicted counts (PLEASE send us the client's RAP sheet and a copy of the complaint(s) and indictment if applicable.

Any and all plea offers or the possibilities of such in the case.

Copies of your client's immigration documents; i.e. green card, work permit, passport stamps, etc.

When all the information is collected, please email or fax to:

Debra Strange

dstrange@ocgov.net

315.356.5794 P

315.356.5795 F

Immigration Consequences of Crimes Summary Checklist

For more comprehensive legal resources, visit the Immigrant Defense Project website at www.immigrantdefenseproject.org or call 212-725-6422 for individual case support.

CRIMINAL INADMISSIBILITY GROUNDS

Will or may prevent a noncitizen from being able to obtain lawful admission status in the U.S. May also prevent a noncitizen who already has lawful admission status from being able to return to the U.S. from a future trip abroad.

Conviction or admission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admission of a **Crime Involving Moral Turpitude (CIMT)**, including:

- Offenses with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Offenses in which *bodily harm* is caused or threatened by an intentional act or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault offenses)
- Most sex offenses
- *Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution (e.g., conviction, admission, or intent to engage in U.S.) and other unlawful **Commercialized Vice**

Conviction of **two or more offenses** of any type + **aggregate prison sentence of 5 yrs.**

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY based on extreme hardship to USC or LPR spouse, parent, son or daughter

- Conviction or admission of a **Controlled Substance Offense** other than a single offense of simple possession of 30g or less of marijuana
- Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- In the case of an LPR (except one who adjusted to LPR status inside U.S. and who has not entered as an LPR from outside U.S.), conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminally Inadmissible offense** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:

- **Aggravated Felony** [see Criminal Deportability Gds]
 - ◆ All aggravated felonies will bar asylum
 - ◆ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- **Violent or dangerous crime** will presumptively bar asylum
- **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)

- DHS reason to believe that the individual is a **drug trafficker**
- **Violent or dangerous crime** is a presumptive bar

CRIMINAL BARS ON NON-LPR CANCELLATION OF REMOVAL based on continuous physical presence in U.S. for 10+ years; and "exceptional and extremely unusual" hardship to USC or LPR spouse, parent or child

- Conviction of an offense described under the criminal inadmissibility or deportability grounds, regardless of whether or not the ground would apply to the person, e.g., one CIMT with a potential sentence of 1 year or longer [see Criminal Deportability Gds] even if the offense was not w/n five years of an admission to the US
- Conviction or admission of crimes barring required finding of good moral character during 10 year period [see Criminal Bars on Obtaining U.S. Citizenship]

CRIMINAL DEPORTABILITY GROUNDS

Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

Conviction of a **Controlled Substance Offense**
EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude (CIMT)** [see Criminal Inadmissibility Gds]

- One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**

➤ *Consequences*, in addition to deportability:

- ◆ Ineligibility for most waivers of removal
- ◆ Permanent inadmissibility after removal
- ◆ Enhanced prison sentence for illegal reentry

➤ *Crimes included*, probably even if not a felony:

- ◆ **Murder**
- ◆ **Rape**
- ◆ **Sexual Abuse of a Minor**
- ◆ **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
- ◆ **Firearm Trafficking**
- ◆ **Crime of Violence + at least 1 year prison sentence***
- ◆ **Theft or Burglary + at least 1 year prison sentence***
- ◆ **Fraud or tax evasion + loss to victim(s) >10,000**
- ◆ **Prostitution business offenses**
- ◆ **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
- ◆ **Obstruction of justice or perjury + at least 1 year prison sentence***
- ◆ **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
- ◆ **Other offenses listed at 8 USC 1101(a)(43)**
- ◆ **Attempt or conspiracy** to commit any of the above

* The "at least 1 year" prison sentence requirement includes a suspended prison sentence of 1 year or more.

CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)

- Conviction of an **Aggravated Felony**
- **Offense** triggering removability referred to in **Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.**

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP – Will prevent an LPR from being able to obtain U.S. citizenship.

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:

- **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- **Crime Involving Moral Turpitude** (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
- 2 or more offenses of any type + aggregate prison sentence of 5 years
- 2 gambling offenses
- **Confinement** to a jail for an aggregate period of 180 days

Conviction of an **Aggravated Felony** on or after Nov. 29, 1990 (and conviction of murder at any time) permanently bars the finding of moral character required for citizenship

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court, **OR**, if adjudication of guilt has been withheld, where:

- A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- The judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed

THUS:

- A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition **IS** a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- A deferred adjudication without a guilty plea **IS NOT** a conviction
- **NOTE:** A youthful offender adjudication **IS NOT** a conviction if analogous to a federal juvenile delinquency adjudication



IMMIGRATION CONSEQUENCES OF CONVICTIONS SUMMARY CHECKLIST – DACA and DAPA Supplement

Criminal bars relating to DACA and DAPA temporary administrative status programs as announced by DHS on 11/20/14

(Last updated December 4, 2014. Note: DACA/DAPA program specifics are likely to be interpreted further and clarified as these programs are implemented.)



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CRIMINAL BARS ON DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

Will generally prevent a noncitizen from being able to obtain DACA status, which is based in part on:

- ◆ entry into the U.S. as a child under age 16 before 1/1/10
- ◆ continuous residence in the U.S. since before 1/1/10
- ◆ currently in school, high school degree or GED, or honorably discharged veteran

One felony conviction

- Any federal, state or local offense that is punishable by imprisonment for a term exceeding one year
 - ◆ Does not include state immigration-related offenses

One “significant misdemeanor” conviction, including:

- An offense punishable by imprisonment of one year or less but greater than five days (regardless of sentence actually imposed) that is:
 - ◆ Domestic violence
 - ◆ Sexual abuse or exploitation
 - ◆ Burglary
 - ◆ Unlawful possession or use of a firearm
 - ◆ Drug distribution or trafficking
 - ◆ Driving under the influence

NOTE: The above list may include certain offenses that are not classified as misdemeanors in the convicting jurisdiction, e.g. domestic violations or driving under the influence traffic infractions, if punishable by more than five days in prison

- Any other offense punishable by imprisonment of one year or less for which the person received a **sentence of time in custody of more than 90 days**
 - ◆ Suspended sentences do not count towards the 90 days

Three misdemeanor convictions

- Three or more misdemeanors not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct
 - ◆ Includes only federal, state, or local offenses punishable by imprisonment of one year or less but greater than five days (thus, may include certain low level offenses not classified as misdemeanors if punishable by more than five days in prison)
 - ◆ Does not include minor traffic offenses (such as driving without a license)
 - ◆ Does not include state immigration-related offenses

SOME OTHER OFFENSES/CONDUCT THAT CAN LEAD TO A DENIAL OF PROSECUTORIAL DISCRETION TO GRANT DACA OR DAPA STATUS

- DACA -- Convictions or other information indicating that the applicant is a threat to national security or public safety, such as convictions/information that indicate gang membership, participation in criminal activities, or participation in other activities that threaten the U.S.
- DAPA -- Convictions or other information indicating that the applicant is engaged in or suspected of terrorism or espionage or otherwise poses a danger to the national security, has unlawfully entered or reentered the U.S., or has intentionally participated while age 16 or older in an organized criminal gang

DISPOSITIONS THAT AVOID AUTOMATIC DISQUALIFICATION (at least for DACA)

- Juvenile dispositions do not bar DACA (but adult convictions of juveniles may do so)
- Expunged convictions do not bar DACA

CRIMINAL BARS ON DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (DAPA)

Will generally prevent a noncitizen from being able to obtain DAPA status, which is based in part on:

- ◆ being the parent on 11/20/14 of a son or daughter who is a U.S. citizen or LPR
- ◆ continuous residence in the U.S. since before 1/1/10
- ◆ physical presence in the U.S. on 11/20/14 and at the time of application for DAPA status

One felony conviction

- Any offense classified as a felony in the convicting jurisdiction, regardless of whether the offense is punishable by imprisonment of more than one year
 - ◆ Does not include state/local offenses for which an essential element is one's immigration status

One “significant misdemeanor” conviction, including:

- A misdemeanor that is:
 - ◆ Domestic violence (but may be mitigated if convicted person also victim of domestic violence)
 - ◆ Sexual abuse or exploitation
 - ◆ Burglary
 - ◆ Unlawful possession or use of a firearm
 - ◆ Drug distribution or trafficking
 - ◆ Driving under the influence
 - ◆ NOTE: DHS initial 11/20/14 guidance memos are unclear on whether the offense must be classified as a misdemeanor in the convicting jurisdiction or be punishable by more than five days in prison as for DACA.
- Any other misdemeanor for which the person is **sentenced to time in custody of 90 days or more**
 - ◆ Suspended sentences do not count towards the 90 days

One misdemeanor conviction constituting an “aggravated felony” (even though not a felony) under the law at the time of conviction – For a list of offenses deemed aggravated felonies under the law in effect since 9/30/96, see “Aggravated Felony” crimes listed under “Criminal Deportability Grounds” on the reverse side of this Checklist.

Three misdemeanor convictions

- Three or more misdemeanors, provided the offenses arise out of three separate incidents
 - ◆ See NOTE above re: uncertainty over applicable definition of misdemeanor for DAPA purposes
 - ◆ Does not include minor traffic offenses (such as driving without a license)
 - ◆ Does not include state/local offenses for which an essential element is one's immigration status

Gang offense conviction

- Offense for which an element was active participation in a criminal street gang (as defined in 18 U.S.C. §521(a))

DHS, in its initial 11/20/14 guidance memos, did not say anything on the effect of juvenile dispositions or expunged convictions on eligibility for DAPA -- guidance on this is expected later

IMPORTANT: Potential DACA/DAPA applicants who may wish to seek LPR or other formal lawful admission status in the future should also consider the Criminal Inadmissibility Grounds on the reverse side because a conviction triggering inadmissibility, even if it does not bar DACA/DAPA, could affect the person's future ability to obtain formal lawful status.

**Unseen Consequences of Convictions
In The
Wake of Padilla**

Michael T. Baker, Esq.
*Chief Assistant Public Defender
Broome County Public Defender's Office*

**2016 Criminal Law Academy
Mohawk Valley Community College
Friday, October 7, 2016**

ADVISING THE CLIENT OF THE
UNSEEN CONSEQUENCES OF A
CONVICTION IN THE WAKE OF
PADILLA

Mike Baker
Chief Assistant Public Defender, Broome County
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October 7, 2016

Padilla v. Kentucky, 599 U.S. 356 (2010)

Defense counsel must give affirmative, competent advice to non-citizen clients about the risk of all penalties ***“enmeshed”*** with the criminal charges or potential pleas. The Court recognized that preserving rights, including but not limited to immigration status, may be more important to the defendant than any jail sentence.

How can Padilla apply to non-immigration cases?

“It is quintessentially the duty of counsel to provide her client with available advice about an issue *like* deportation and the failure to do so ‘clearly satisfies the first prong of the Strickland analysis’. Padilla, at 371

No more difference between “collateral” and “direct” consequences of pleas.

“We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland, 466 U.S., at 689, 104 S.Ct. 2052.”

Padilla, at 365

Let's back up a minute....

5th Amendment vs 6th Amendment

Padilla dealt only with 6th Amendment – ineffective assistance of counsel. a/k/a – the Strickland standard.

It did not address or alter the 5th Amendment Due Process distinction between “collateral” and “direct” consequences.

So, what does that mean?

6th Amendment

Duty of an attorney to provide effective assistance of counsel in advising clients of “enmeshed penalties” inherent in conviction

-vs-

5th Amendment

The Court advising the client as to the “unseen” consequences of a plea to ensure that the plea is “knowing, voluntary and intelligent”

So, what does it really mean?

People v Peque, 22 NY 3d 168, 190 (2013)

Addressed the right to due process and the right to the effective assistance of counsel.

Addresses the difference between “direct” and “collateral” consequences for 5th Amendment purposes.

“Although both of those rights exist to preserve the defendant's entitlement to a fair trial or plea proceeding, **they operate in discrete ways in the plea context**. The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant's interests, gives the defendant essential advice specific to his or her personal circumstances and enables the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea”, at 190

“Given the distinct duties of counsel and the court under these two constitutional doctrines, Padilla's legal classification of deportation as a plea consequence necessitating counsel's advice under the Sixth Amendment does not **inexorably compel the conclusion that deportation implicates the court's responsibility to ensure the voluntariness of a guilty plea.**” Id.

What is ineffective?

NY standard differs from Federal Standard.

In NY, no “two-part analysis” under Strickland.

“Meaningful representation under the totality of the circumstances.

People v Henry, 95 NY 2d (2000); People v Baldi, 54 NY 2d 137 (1981); People v Benevento, 91 NY 2d 708 (1998). NY Constitution, Article I, §6

*Prejudice is not necessarily required.

Pride & Prejudice?

When making a claim under the US Constitution a showing of prejudice is mandatory to satisfy the second prong of Strickland, but not *mandatory* under a NY State Constitution claim – although highly recommended.

So, how does your client prove he or she would not have plead had they known the consequences?

What does “enmeshed” mean?

- Consequences which are an “integral part” of the conviction.
- “These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”(footnote omitted)

Padilla v Kentucky, 559 U.S. 356, 364 (2010)

What consequences are “Integral Parts” of convictions?

Those cases where it is “most difficult’ to divorce the penalty from the conviction”. Padilla, at 366, citing ([United States v. Russell](#), 686 F.2d 35, 38 (C.A.D.C.1982))

So, for 6th Amendment purposes – there is no more distinction between a “direct” and “collateral” consequence of a conviction.

“Hidden Sentences”

“Institutionalized inconspicuousness”*

- Like other legal punishments, hidden sentences are each an (1) adverse restriction or requirement (2) imposed by law (3) as a direct result (4) of criminal status or label.
- National Inventory of the Collateral Consequences of Conviction(NICC) lists 42,634 hidden sentences

*Keiser, Joshua, [Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to](#)

[“Collateral” Punishment Policy](#), Harvard Law and Pol. Rev, 130, Mar. 2016.

TYPES OF POST-RELEASE HIDDEN SENTENCE LEGISLATION AND REGULATION IN THE UNITED STATES

Frequency/percentage

Business license and other property rights -	15,180 - 35.6%
Education -	675 - 1.6%
Employment -	23,715 - 55.6%
Family/domestic rights -	1,874 - 4.4%
Government benefits -	1,180 - 2.8%
Government contracting and program participation -	1,864 - 4.4%
Government loans and grants -	293 - 0.7%
Housing -	1,240 - 2.9%
Judicial rights -	1,436 - 3.4%
Motor vehicle licensure -	2,106 - 4.9%
Occupational and professional license and certification -	15,623 - 36.6%
Political and civic participation -	4,579 - 10.7%
Recreational license, including firearms -	1,459 - 3.4%
Registration, notification, and residency restrictions-	3,499 - 8.2%
Total number of hidden sentences -	42,634- 100.0%

“Institutionalized inconspicuousness”

According to the Harvard article, New York has

1,250 “hidden sentences”

2.7% have a “specific relief provision”

37% have an automatic execution

84% have a *permanent* effect.

Keiser, Joshua, Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy, Harvard Law and Pol. Rev, Table IX, Mar. 2016.

A. Felony Convictions

- a felony conviction will automatically result in the forfeiture of certain Civil Rights

Voting Rights

Election Law § 5-106(2)

- No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him

What does that mean?

In New York, the restoration of the right to vote is automatic upon release from prison or discharge from Parole, and does not require a Certificate of Relief from Disabilities (CRD), regardless of what some Boards of Elections claim.

2. Possessing a Firearm Penal Law § 400.00(1)

- “No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant . . . (c) who has not been convicted anywhere of a felony or ***a serious offense;***”

- License revocation occurs **automatically** upon such a conviction. (Penal Law § 400.00(11))
The conviction of a licensee anywhere of a felony or serious offense or a licensee at any time becoming ineligible to obtain a license under this section shall operate as a revocation of the license.

What is a “Serious Offense”?

- Penal Law § 265.00(17) –
Including, but not limited to,
Possession of Stolen Property,
Stalking, Permitting or promoting
prostitution, Endangering the
Welfare of a Child

What is a “firearm”?

- Penal Law § 265.00(3) – defines “firearm”. A stock shotgun or rifle (a/k/a “long gun”) is not a “firearm”.

Effect of State law on Federal firearm laws

See attached article:

AUSA Richard P. Maigret: “The Federal Firearm Laws and Their Effect on Possession of Rifles and Shotguns for Use For Lawful Sporting and Hunting Purposes”.

Jury Service

Judiciary Law § 510(3)

- In order to qualify as a juror a person must:
- 3. Not have been convicted of a felony.

4. Military Service

10 USC § 504(a)

- No person who is insane, intoxicated, or a deserter from an armed force, ***or who has been convicted of a felony***, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies.

5. Right to Adopt

Social Service Law § 378-a(2)(3))

- a felony conviction at any time involving: (i) child abuse or neglect; (ii) spousal abuse; (iii) a crime against a child, including child pornography; or (iv) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery; or (B) a felony conviction within the past five years for physical assault, battery, or a drug-related offense.

7. Housing

People v Becker, 9 Misc.3d 720 (Crim Ct. Queens Cty. 2005). Incorrect advice regarding effect of conviction on eviction from Public Housing *could* be considered ineffective

a. Federally Subsidized Housing (42 U.S.C. § 1437d(l); 24 C.F.R. § 966.4)

Public Housing Authority (42 U.S.C. § 13661(c)) has the authority to bar eligibility for a reasonable period of time after any criminal activity.

Housing, cont'd.

Mandatory Denial/Eviction

(a) Persons Subject to Lifetime Sex Offender Registration (42 U.S.C. § 13663(a)): Any household with a member who is subject to a lifetime registration requirement under a state sex offender registration program is ineligible for public, federally assisted, or Section 8 housing

Housing, cont'd

- (b) Persons Convicted of Methamphetamine Production (42 U.S.C. § 1437n(f)): Permanent bar for any individual who has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally-assisted housing

Housing, cont'd.

- Presumptive/Discretionary Denials
 - Primarily involves use and/or distribution of drugs

HUD – renting to those with criminal histories

April 4, 2016

Blanket exclusion of renting with those with a criminal history is a violation of the Federal Fair Housing Act

HUD

- Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions

http://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf

New York Times -

<http://www.nytimes.com/2016/04/04/nyregion/federal-housing-officials-warn-against-blanket-bans-of-ex-offenders.html>

Who does this affect?

- Elderly – senior citizen housing
- Disabled
- Veterans
- Parents of clients

8. Employment

- **Does your client have a professional license?**

There are over 100 jobs and professions require some type of license or background check through a state agency

Online Resources

- Legal Action Center: NEW YORK STATE OCCUPATIONAL LICENSING SURVEY
<http://lac.org/wp-content/uploads/2014/12/Occupational-Licensing-Survey-2006.pdf>
-Lists 108 licensed professions in NY and the effect of a conviction.

“Integral parts” of drug-related convictions?

1. Driver’s License Suspension – VTL § 510(2)(b)(v)

For a period of six months where the holder is convicted of, or receives a youthful offender or other juvenile adjudication in connection with, any misdemeanor or felony defined in article two hundred twenty or two hundred twenty-one of the penal law, any violation of the federal controlled substances act, any crime in violation of subdivision four of section eleven hundred ninety-two of this chapter or any out-of-state or federal misdemeanor or felony drug-related offense; provided, however, that any time actually served in custody pursuant to a sentence or disposition imposed as a result of such conviction or youthful offender or other juvenile adjudication shall be credited against the period of such suspension and, provided further, that the court shall determine that such suspension need not be imposed where there are compelling circumstances warranting an exception

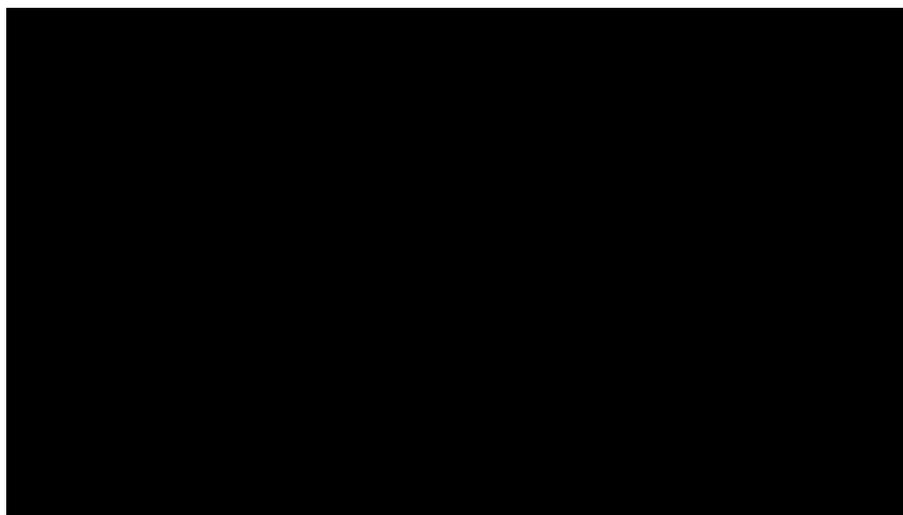
- **however**, that any time actually served in custody pursuant to a sentence or disposition imposed as a result of such conviction or youthful offender or other juvenile adjudication shall be credited against the period of such suspension and, provided further, that the court shall determine that such suspension need not be imposed where there are compelling circumstances warranting an exception

Federal Student Aid

Automatic suspension of eligibility

- Title IV funds - 20 U.S.C. § 1091(r)(1)
- suspends eligibility for any grant, loan, or work assistance for students convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance, but only for conduct occurring while receiving student aid.

Convicted?



Student Aid, cont'd

- a. Does not include Youthful Offender adjudications which are not convictions

Controlled Substance?

- 21 U.S.C. § 802(6). Includes marijuana. (NY does not define marijuana as a “controlled substance”). A conviction for Unlawful Possession of Marijuana, PL 221.05, will make a student ineligible for federal aid if the conduct occurs while the person is then receiving aid. A person is ineligible under Section 1091 because of a conviction for any controlled substance “offense,” not necessarily a “crime.” In New York, PL 221.05 is an offense (a violation), although not a crime, and marijuana is a controlled substance.

Length of Suspension/Ineligibility Period?

- Possession of a Controlled Substance
 - 1st Offense: 1 year
 - 2nd Offense: 2 years
 - 3rd Offense: Indefinite

Length of Suspension/Ineligibility Period?

Sale of a Controlled Substance

- 1st Offense: 2 years
- 2nd Offense: Indefinite

Waiver

- Under § 1091(r)(2), a student may regain eligibility before the above period expires if: i) The student satisfactorily completes a drug rehabilitation program that (1) Complies with criteria set out by the Secretary of Education: (a) Be qualified to receive funds from federal, state, or local government, or from a federally- or state-licensed insurance company; OR (b) Be administered or recognized by a federal, state, or local government agency or court, or a federally- or state-licensed hospital, health clinic, or medical doctor AND (2) Includes two unannounced drug tests. ii) The student passes two unannounced drug tests conducted by a drug rehabilitation program that meets the criteria established by the Secretary of Education (described in (i) above); or iii) The conviction is reversed, set aside, or otherwise rendered nugatory

Sources

The Bronx Defenders: “The Consequence of Criminal Proceedings in New York State, 2015” (pgs. 53-54)

Center for Community Alternatives: “A Guide For Attorneys Representing College Applicants and Students During and After Criminal Proceedings”

<http://www.communityalternatives.org/pdf/publications/Criminal-History-Screening-in-College-Admissions-AttorneyGuide-CCA-1-2013.pdf>

DWI Consequences

New DWI Driver's License Regulations for Repeat Offenders

<http://dmv.ny.gov/print/1934>

Applicants with three or four alcohol/drugged-driving related convictions or incidents within a 25 year period, without a serious driving offense and whose revocation does NOT result from an alcohol or drugged driving conviction or incident, will be denied relicensing for two years in addition to the statutory revocation period, and then will be relicensed with a [problem driver restriction](#) [1] for two years. A serious driving offense is a fatal accident, a driving-related penal law conviction, conviction of two or more violations for which five or more points are assessed, or 20 or more points from any violations.

Applicants with three or four alcohol/drugged-driving related convictions or incidents within the preceding 25 years, without a serious driving offense and whose revocation **DOES** result from an alcohol or drugged driving conviction or incident, will be denied relicensing for five years in addition to the statutory revocation period, and then will be relicensed with a problem driver restriction for 5 years with an ignition interlock.

- Applicants with three or four alcohol/drugged-driving related convictions or incidents within the preceding 25 years, with a serious driving offense will be permanently denied a driver license, unless there are compelling or extenuating circumstances.
- Applicants with five or more alcohol/drugged-driving related convictions or incidents on their lifetime driving record will be permanently denied a driver license, unless there are compelling or extenuating circumstances.

Applicants with two or more alcohol/drugged-driving related convictions or incidents within the preceding 25 years will be required to serve their entire sanction period (suspension or revocation) even if they complete the Drinking Driver Program (DDP) and will be required to submit proof of rehabilitation.

Welfare Fraud

Intentional Program Violations

Social Service Law § 145-c

Will result in the loss of public assistance benefits “on the basis of a plea of guilty or nolo contendere or otherwise, intentionally to have (a) made a false or misleading statement or misrepresented, concealed, or withheld facts, or (b) committed any act intended to mislead, misrepresent, conceal, or withhold facts or propound a falsity, for the purpose of establishing or maintaining the eligibility of the individual or of the individual's family for aid or of increasing (or preventing a reduction in) the amount of such aid.

IPV's

Client given notice of potential penalties for an IPV upon conviction at initial arraignment

IPV's

Penalties

18 NYCRR § 359.9; Social Service Law § 145-c

(i) for a period of six months upon the first occasion of any such offense, (ii) for a period of twelve months upon the second occasion of any such offense or upon an offense which resulted in the wrongful receipt of benefits in an amount of between at least one thousand dollars and no more than three thousand nine hundred dollars, (iii) for a period of eighteen months upon the third occasion of any such offense or upon an offense which results in the wrongful receipt of benefits in an amount in excess of three thousand nine hundred dollars, and (iv) five years for any subsequent occasion of any such offense”.

Sex Offenses

SORA – Sex Offender Registration Act.

-Advising clients that their conviction will trigger registration.

Is the failure to advise clients of such ineffective?

People v Rodriguez, 45 Misc3d 902, 908 (Sup. Ct. Queens Cty. 2014)

“Totality of the circumstances”

“In particular, where neither counsel nor the court inform a defendant of his duty to register as a sex offender but the defendant receives ‘an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel,’ he is afforded meaningful representation”

Sex Offender Management and Treatment Act

SOMTA - Civil Commitment

Article 10 of Mental Hygiene Law

criteria: a mental abnormality involving such a strong predisposition to commit sex offenses and such an inability to control behavior that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility

What do we do?

1. More exhaustive intake interview.

-thorough written questionnaire

Duty to Inquire/Duty to Investigate

People v Oliveras, 21 N.Y.3d 339,348 (2013)

“Trial counsel did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action for his or her client.”

ABA Standards for Criminal Justice

“Defense counsel should conduct a prompt **investigation** of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty” (American Bar Association, ABA Standards for Criminal Justice, Prosecution Function and Defense Function, standard 4–4.1 at 181 [3d ed. 1993],

http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf

Penal Law § 1.05(6)

The general purposes of the provisions of this chapter are:

6. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, ***the promotion of their successful and productive reentry and reintegration into society***, and their confinement when required in the interests of public protection.

What do we do?

2. Per Padilla, “Creative Plea bargaining”.

“Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense ***may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation***, as by avoiding a conviction for offense that automatically triggers the removal consequence”.
at 373

Current Proposed Legislation

Assembly Bill A02925/Senate Bill S00355

Enacts the uniform collateral consequences of conviction act requiring DCJS to collect and publish laws regarding collateral consequences of conviction and requiring notification to convicts of collateral consequences of such convictions.

http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf

Certificate of Relief from Civil Disabilities (CRD)

Correction Law §700 et seq.

1. **What it does** (Correction Law § 701(1)) :
relieves an “eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein”

2. What is does not do:

- a. Expunge or seal the felony or criminal record;
- b. Does not affect the suspension or revocation of a license to operate a taxicab or a commercial driver's license (CDL). Vehicle & Traffic Law § 1196(7)(g)

What do we do?

Certificate of Good Conduct

Correction Law §§ 703-a & 703-b

lifts the bar to "Public Offices" (e.g. police officer; firefighter; court officer; law enforcement jobs; notary public and some elective offices

<https://www.parole.ny.gov/certrelief.html>

What about my guns?

Noteworthy, a state Certificate of Relief from Disabilities or Certificate of Good Conduct may only remove New York State's statutory bar to apply for and receive a license to possess a firearm imposed upon those convicted of a felony or serious offense. It is the position of the ATF that unless an individual has had his or her rights fully restored, then there still exists a Federal disability or bar in this area.

According to the ATF, a person's civil rights have not been **fully restored** unless, under State law, that person is **eligible to hold public office**, register to vote at a general election and serve on a jury in a court of that state. As to ability to hold public office, a Certificate of Relief from Disabilities cannot restore eligibility for public office (see Correction Law §701(1)). However, a **Certificate of Good Conduct** granted by the New York State Board of Parole can restore a person's eligibility to hold public office

See Handout

“CERTIFICATES OF RELIEF FROM DISABILITIES
AND CERTIFICATES OF GOOD CONDUCT
LICENSURE AND EMPLOYMENT OF
OFFENDERS” DCJS

Online Resources

Reentry.net “CERTIFICATES THAT PROMOTE
REHABILITATION: WHY THEY ARE SO
IMPORTANT AND HOW TO GET THEM”

- http://www.lawhelpny.org/files/B23B29BF-0DED-F7B9-2149-1DB14E1A7DE5/attachments/6234B529-AED5-0FB0-710E-BACA1FC47ED0/356701Cert_Relief_traininghandout_Feb2010.pdf

ONLINE RESOURCES

1. Columbia Law School “Collateral Consequences Calculator”:

<http://calculator.law.columbia.edu/>

2. NYSBA:

[http://www.nysba.org/uploadedFiles/NYSBA/Sections/Criminal Justice/Records of Conviction/BaerCollateralConsequences-WEB.pdf](http://www.nysba.org/uploadedFiles/NYSBA/Sections/Criminal%20Justice/Records%20of%20Conviction/BaerCollateralConsequences-WEB.pdf)

3.ABA:

<http://www.abacollateralconsequences.org/search/?jurisdiction=35>

Sources

Smyth, McGregor, “From ‘Collateral’ to ‘Integral’: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation”

<http://www.bronxdefenders.org/wp-content/uploads/2013/05/From-Collateral-to-Integral-Padilla.pdf>

ADDITIONAL PENALTIES OF CRIMINAL ADJUDICATIONS, INCLUDING ACD'S AND VIOLATIONS

EDUCATION

Does my client risk losing eligibility for Student Loans?

If currently enrolled in post-HS education and receiving Federal Student Loans: suspension from receiving such loans for any conviction for any drug offense, including marijuana offenses, and including a marijuana violation. **This means convictions, not ACDs.**

* A felony drug conviction at any time will preclude the client or the client's family from the Hope tax credit for the client's education.

Will my client be subject to School Suspension?



Practice Tip: "School-related" arrests (which is broadly defined) may trigger a school suspension and hearing, which is a great source of discovery & negotiation You can attend.

Find out if your under-21 clients have been suspended from school. If the offense clearly occurred at the school or the client/parent informs you that they were informed that the school is seeking a suspension, contact the suspension hearing office and make arrangements to receive the paperwork from school and serve a notice of appearance at the hearing office. Otherwise, advise the parent to call you if the client is suspended. See AID's School Suspension Hrg Checklist and Guide on LASnet.

ADOLESCENT INTAKE FORMS and RELEASES are available in arraignments and on LASnet. Use them. Get releases signed at arraignment, or as early as possible. You'll need separate releases for regular school & spec. ed records

LAS AID Contacts		
Manhattan	Nancy Ginsburg	298-5190 917-886-6687
	Donna Henken	298-5295 917-693-7970
Bronx	Debbie Rush	579-3136
Queens	Samantha Seda	286-2320 516-659-3739
Brooklyn	Fred Pratt	243-6378 917-453-1186

HOUSING

NYCHA public housing, Sec. 8

Is client Applying for NYCHA or Sect 8 Housing?

- Not eligible for NYCHA housing or Section 8 for period of years based on crime conviction unless shows rehabilitation [Chart available separately]
- Rehabilitation information is key—get a CRD if possible
- Applies to all household members
- May be denied related to drug use
- Practice Note: IMPT: Disorderly Conduct, DWI, or other Violations can require exclusion for 2 or more yrs!

Sect 8 MUST Deny

- Evicted for drugs in assisted housing
- Current illegal drug use
- Lifetime state SORA. Level 2 or 3 in NY

Sect 8 MAY Deny

- Criminal drug activity
- Violent criminal activity
- ANY OTHER criminal activity that "threatens the...right to peaceful enjoyment"

Is client or family member currently in NYCHA or Sect. 8 housing?

- Criminal drug activity near the premises by any person under the tenant's control;
- Any criminal activity by same that threatens the enjoyment of premises by residents.
- NYCHA can seek to evict based on conduct, even w/o arrest or conviction.
- May result in exclusion of a household member.
- If a lifetime SORA relative moves in, PHA will evict; eviction may be avoided by excluding the SORA relative. This may present a conflict for our Civil Practice attorneys.

Is client or family currently in private Housing?

Landlords can seek to evict for:

- Illegal use of premises for Prostitution, Gambling, Drugs
- Results of a search warrant
- DA pressures landlord to bring case
- Nuisance/violation of lease
- Adverse inference can be drawn if Fifth invoked
- No **right to** stay pending outcome of criminal case

Is there an issue of foster care placement?

Practice Note: Find out if 16-21 y.o. not living w/parents is in foster care; placements can be changed or disrupted with arrest and/or incarceration.

LAS Housing Contacts

Bronx	Marshall Green	646 340 1925
Brooklyn	Steve Myers	718 422 2755
Manhattan	Sheryl Karp	212 426-3029
Queens	Susan Gibson-O'Gara	718 286 2454
Staten Island	Teresa DeFonso	347 422 5330

IMMIGRATION

Fill out your IMMIGRATION CHECKLIST - in your file - for all clients not born in U.S. Probe carefully so you have the facts.



Practice Tip: Consult your Padilla v. Kentucky materials and NYSDA's Quick Reference Chart -Immigration Consequences [hard copy at arraignments or on LASnet]

Contact the Immigration Law Unit of our Civil Practice, at 212-577-3300 (Main) or Ward Oliver (646-759-3911), Ben Kanstroom (646-759-3906) or Patty Lavelle (646-759-3908)

EMPLOYMENT

Does your client have or want a Professional License?

- Most frequent: teachers, taxi, security guard, and anyone employed in the education or health-care fields
- See Legal Action Center's Occupational Licensing Survey (available at arraignments or on LASnet)
- Often this is fact-specific
- Security guard license suspended for all felonies and misdemeanors convictions related to the job. Temporary suspension on pending case. See 'Security Guard Conviction Consequences' memo on LASNet

Taxi drivers' licenses follow the same rules as regular drivers' licenses—see driving document. Licensing from TLC may also be affected. If the client is set to plead to a vio, or the charges are going to be dismissed, a call from the ADA to the TLC can end a license suspension. TLC Legal Dept: Bradley McCormick 212-676-1130

Does your client have or want a Government Job (Public Employment)?

- Includes all school (e.g. maintenance, bus driver), and fed, state, & city employees.
- Contact the employee's Union Rep/lawyer to determine likely employment consequences.
- (M)ACD is an open case. Employee may not be allowed to return to work/be reinstated until ACD ripens into a dismissal.

Does your client wish to enter Military Service?

A pending case, incl a non-final ACD, will disqualify entry into military service. Conditional discharges and Probation are also considered "pending" cases. **Practice Note:** ask for an outright dismissal or for an unconditional discharge, as opposed to an ACD or a conditional discharge, and if the judge is not willing to do that immediately, ask for an adjournment with the understanding that it will be done on the adjourned date. **But: keep reference to military service off the record.**

- Each branch has diff. rules to grant waivers for misdemeanor convictions.
- Drug offenses: BAD: **MACD may be a bar even after the dismissal.**

When is Sealing a Conviction to your client's benefit?

- An open case is more likely than a violation to have employment consequences.
- In NY convictions cannot be expunged.
- Sealing a plea to a violation will legally protect your client from employment consequences of the arrest, though not necessarily for the underlying conduct.
- Misd convictions may only be sealed following judicial diversion. See CPL 160.58

The legal protections of sealing do not kick in until the case is actually sealed. Typically, violation convictions are not sealed by the clerk until a year has passed, but this is not based on the statute. If immediate sealing is important to the client, judge may be asked to direct that the case be sealed either immediately, or as soon as the conditions of the sentence (fine, restitution, community service) are satisfied.



Practice tip:

Some of these employment consequences may be avoided or mitigated by obtaining a Certificate of Relief from Disabilities (CRD). See Practice Advisory on this topic, on LASNet.

LAS Employment Law Contact		
Karen Cacace	212 577 3363	kcacace@legal-aid.org

DRIVING PRIVILEGES

Practice Note on DWI cases: no attempt is made here to describe all of the program, suspension, fines, and fees associated with a DWI arrest or plea]. All DWI convictions lead to a suspension or revocation of driver's licenses.

VTL Violations

A client's license may ALSO be suspended or revoked for MANY convictions



Practice Tips

Even minor drug convictions require suspension of 6 months - and client must affirmatively move for reinstatement by going to DMV and paying the \$25 fee. Counsel clients to do this after a plea to a PL220 offense. Note: This also applies to Y.O. adjudications. Note: This can be waived in any case if the court finds there are "compelling circumstances warranting an exception" to the suspension rules at issue, as in a citizenship application.

Rules vary based on the state of license. You should investigate the driving consequences of any drug or car related crime in the state of license.

SORA/DNA REGISTRY

Will my client have to register under SORA?

DCJS requires registration for any sex-related felony and certain misdemeanors, for example:

P.L. §130.20 [sex misconduct], §130.52 [forcible touching or §130.55 [sex abuse 3] if V < 18 or D has certain priors], §130.60, §130.05 if V < 17 & D not parent] and §230.04 [patronizing 3 if patronized person is < 17]

Will my client have to contribute to a DNA database?

Your client will be required to provide a DNA sample if convicted of a "designated offense" under Executive Law 995(7). All Penal Law felonies and many misdemeanors are included. See also "DNA Databank Chart," previously distributed. Client will also be required to pay a \$50 DNA Databank fee, even if his DNA profile is already in the Databank. If DNA sample is demanded when offense is not a designated offense contact Bob Newman.

Bob Newman	212-577-3354	Rnewman@legal-aid.org
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PAROLE REVOCATION



Practice Tips

Your client may suffer drastic - and worse - consequences in a related Parole Revocation matter if you are not careful. The Parole Revocation proceedings also can be an excellent source of discovery for you, if you work with the PRDU attorney.

Steps To Take When Your Client May Be Facing A Parole Violation:

1. Find out at arraignment if your client is on parole or post-release supervision. If they are, we will probably represent them. Call 212-577-3500 to find out whether a PRDU attorney has been assigned, and the name and number of that attorney. Someone is typically assigned within 24 hours. Or you can use LASnet.
2. Advise your client not to waive their preliminary hearing, which can be a good source of discovery for you and PRDU.
3. Get the name and telephone number of your client's Parole Officer (your client will likely have it on them) and call them [after obtaining consent from your client] within 24 hours
4. Be aware that any plea to a misdemeanor and many pleas to a violation may result in your client's parole being revoked. Try to: a) delay any plea in Criminal Court until you have had an opportunity to confer with your client's parole attorney; and b) make any plea in Criminal Court conditional so that it can be withdrawn if it is later used as the basis for a parole violation.
5. If a conditional plea is not possible, be aware that a plea to any type of violent behavior or attempted violent behavior (including a plea to 240.26, Harassment -- a violation, not a misdemeanor) can subject your client to over a year in prison as a result of a parole violation.

6. If a misdemeanor sentence includes any jail time, request that the judge order the sentence to run "concurrent with parole time owed." Some judges will say they lack the power to do so; others will want to wait (unnecessarily) until the parole violation is disposed of. Under *People v. Dupree*, 91 A.D.2d 1071 (2d Dept. 1983) they do have the power to run any new definite sentence concurrent with any previously imposed felony sentence.

PARENT AND CHILD

The intersection of Family Law (abuse/neglect; JD; PINS; custody, visitation, orders of protection, divorce, support) and Criminal Law is complicated. When in doubt, consult with your CDD IDV attorneys, the JRP office in your boro or a Family Law attorney in Civil office in your boro. Contact information is on LASnet.

Will my client have to pay Child Support While Incarcerated?

- Child Support – client may petition for a downward modification while incarcerated.
- DSS/HRA suspends payment of child support by inmates if the child is on public assistance

Will my client lose Parental Rights While Incarcerate?

- Abandonment: failure to maintain contact with the child for a period of 6 or more months
- Termination of Parental Rights proceedings may be implemented, especially if there is a pending neglect or abuse case. Right to **appointed** counsel in Family Court. (but not LAS)
- Incarceration may cause loss of housing which could then be used to support neglect or termination of parental rights petition.
- Rights to visit with children. Consult LAS PRP and JRP attys.

Will my client's Child Support Payments jeopardize the client's Driving Privileges?

- Failure to pay child support can result in suspension of driving privileges. Advise clients.

LIFT Hotline: A resource This organization has staff at Family Courts and a hotline to provide free information to pro se people, esp. parents who have issues around custody, visitation, child support. www.liftonline.org. And they accept collect calls from NYS jail or prison. 212-343-1122

PUBLIC BENEFITS

Will my client lose Social Security/Disability Benefits?

- Active warrant for felony or VOP are ineligible for SSI/D
- Non-NY residents may lose eligibility for life for felony drug offenses

Will my client lose eligibility for Public Assistance?

- Outstanding warrant for felony or violation of probation or parole are ineligible for TANF (Temporary Assistance for Needy Families), food stamps and SSI. .
- Non-NY residents may lose eligibility for life for felony drug offences

Will my client lose eligibility for Veteran's Benefits?

- outstanding warrant for felony or violation of probation or parole are ineligible for Veteran's benefits.

Public benefits will be suspended during incarceration. Non-NY residents may lose eligibility for life for felony drug offences



Practice Tip: The LAS' Civil Practice has attorneys who are expert in public benefits law (disability, SSI, welfare, food stamps). There are neighborhood offices in each boro. Consult them! See LASnet for contact info.

MONETARY LIABILITY

Fines, Fees, Surcharges



Practice Tip: Counsel your client about the effect of having fees, fines, and surcharges reduced to a judgment, e.g., judgments can affect credit scores, ability to rent apts, employability, and future wages through garnishment. Furthermore, the DOC & DOCS may take their cut from Inmate Accounts or commissary. Note: Sometimes you can get the sentencing judge to defer payment or entry of judgment until the end of incarceration, but most surcharges cannot be waived.

- Likewise, if restitution goes unpaid, it can be reduced to a judgment. This, too, can lead to garnishment and other severe consequences.

Will a Guilty Plea leave my client Vulnerable to Civil Liability?

- Where a victim can claim a loss, an admission or conviction can lead to subsequent civil liability. LAS would generally not be representing client in that.

Will my client have to Forfeit any property?

- Money and items seized from client may be seized and subject to forfeiture
- NYPD may seek forfeiture even if the DA agrees not to. See "How to Get My Stuff Back" on LASnet
- Vehicle Forfeiture [Krimstock] - contact Tom O'Brien in Special Lit, 212-577-3551 and practical materials on LASnet

Getting my client's property back?

- You should learn if client's property was vouchered as evidence or can be reclaimed. If an item was vouchered as "evidence," it can be released pending trial only by special arrangement with the assigned D.A.

OTHER SERIOUS CONSEQUENCES

Voting Rights/Jury Duty

- Felonies: Cannot vote while serving sentence or is on parole
- Misdemeanors: Vote anytime
- Detainees: Can vote by absentee ballot from jail
- Persons with felony convictions may never serve on jury duty

Preserving Right to Sue for Civil Rights Violations

- Convictions, violations, and even ACD's will extinguish "malicious prosecution" claims, and can impair subsequent civil right claims against the police, esp. in state court. A client considering a civil suit may need to consult a civil atty before agreeing to a criminal adjudication



Practice Tip: Impt! - Referrals only to non-profits, such as: Legal Referral Service, NYC Bar/ NY County Lawyers, (212) 626 7373 / 7374(Spanish) ; National Lawyers Guild, National Police Accountability Project (NPAP), 212-679-6018, www.nlg-npap.org; Center for Constitutional Rights, 212-614-6464.

Will my client lose a Firearms License?

- Watch: felonies & DV convictions
- See Penal Law Article 400 if client has a gun license he's worried about losing.

In general think strategically



Practice Tip: strongly consider seeking a Certificate of Relief from Civil Disabilities Bill Gibney Practice Advisory on LASnet, 8/31/11

Enhanced Sentencing!



Practice Tip: Obviously, taking a plea in this case may have potential charging and sentencing implications for future cases that may arise. It may be wise to counsel some clients accordingly.

- Many Penal Law crimes have enhanced sentencing or charging implications where the person has been convicted of that crime in the past (DWI, auto-stripping, etc)
- In some cases, a single conviction of anything can provide a prosecutor with the ability to "bump-up" a new case to a felony (e.g., possession of a gravity knife). Be alert to the possibility of a C.P.L.§ 170.20 filing.
- Even a YO can trigger enhanced sentencing in some contexts (e.g., in federal court sentencing) – Don't "burn" your one free misdemeanor YO before exploring alternatives.
- Prior felony convictions obviously elevate future charging and sentencing consequences.

CONFLICTS OF INTEREST?

The scope of Legal Aid's practice - in Criminal, Family and civil courts - carries the on-going possibility of conflicts of interest. There is an LAS conflicts policy to guide you: what to do, whether a conflict can be waived, and which interest takes priority.



Practice Tips

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JRP Conflict? - Katharine Hussung (khussung@legal-aid.org, 212.577.3690) and cc **Renee Wyatt** (rwyatt@legal-aid.org)

The Federal Firearm Laws and Their Effect on Possession of Rifles and Shotguns for Use For Lawful Sporting and Hunting Purposes.

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One of the most frequently asked questions that I receive concerns what effect a past conviction has upon an individual's right to possess rifles and/or shotguns solely for hunting or lawful sporting purposes. As you can imagine, the number of questions along this line of inquiry increases dramatically in the fall of the year as deer hunting season approaches. The answer is somewhat complicated, but simply put, the federal firearm statutes do prohibit an individual with certain types of prior criminal convictions from possessing firearms or ammunition for any purpose. In order for such an individual to legally possess firearms or ammunition, under federal law, such an individual must have had his right to possess firearms restored.

The applicable federal statute is fairly straightforward. Title 18, United States Code, Section 922 (g) (1) states in its relevant part:

(g) It shall be unlawful for any person-(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year..

to... possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This is commonly known as the "felon in possession" statute. Of note is the fact that the federal law, unlike the state, makes possession of firearms and ammunition by a felon a criminal offense. This statute has three elements:

1. The weapon must be a firearm as defined under federal law or ammunition as defined under federal law.

Initially, it is important to note the difference between the definition of the term "firearm" under New York State law as opposed to federal criminal statutes. Under New York State law the term "firearm" refers only to handguns, that is , revolvers or pistols, illegally shortened rifles or shotguns, and semiautomatic assault rifles. More to the point, rifles and shotguns are not considered firearms under New York State law.

term exceeding one year. It is not necessary that the individual actually received a sentence of imprisonment for a term greater than one year. It is sufficient if the crime for which he/she was convicted could have resulted in a sentence of imprisonment greater than one year. In New York State, crimes punishable by a term of imprisonment greater than one year are considered felonies. Therefore, an individual convicted of a New York State felony, even if he/she received only a sentence of probation, would still be subject to this federal statute and would be prohibited from possessing any firearms (including rifles and shotguns) or ammunition.

Moreover, the term "in any court" means exactly what it says. Any such conviction in any state court or foreign court would qualify under this statute and subject the individual to prohibition from possessing any firearm or ammunition. The age or date of such conviction is irrelevant. Any such conviction whether it occurred thirty days or thirty years ago would subject the individual to this statute.

There exists however, several means and remedies to restore a prohibited person's right to possess firearms and ammunition. These means and remedies vary from state to state, and indeed from country to country. I shall confirm the present discussion to only those remedies available in New York State.

What constitutes a crime that will trigger the prohibition of 18 U.S.C. § 922 (g) (1) is determined by "the law of the jurisdiction in which the proceedings were held" (18 U.S.C. § 921 (a) (20)). Therefore, the law of the country or state where the conviction occurred will control whether or not an individual is prohibited from possessing firearms or whether an individual has had his/her rights to possess firearms restored. For purposes of this discussion, simply put, if New York has restored an individual's "full right" to possess all types of firearms, then he/she is no longer prohibited by federal statutes from possessing firearms and ammunition. I emphasize the term "full right" to possess all types of firearms in New York State, I mean the right to possess both long guns, rifles and shotguns in New York and the right to apply for a New York State permit to possess had guns.

Although there are other means in New York State of restoring an individual's right to own and possess firearms (e.g., gubernatorial pardon, presidential pardon) the vast majority of such restorations occur when the prohibited individual receives a Certificate of Relief from Disabilities. Certificates of Relief from Disabilities in New York state are classified into three categories and are identified as type "A", Type "B", or Type "C."

A Type "A" Certificate of Relief from Disabilities can be issued by any competent court of the State of New York. Type "A" Certificates are issued by the court at the time of sentencing of an applicant/defendant. Type "A" Certificates immediately restore an applicant's /defendant's "full right" to possess firearms in New York State. A type "A" Certificate restores this right to the applicant at the time of its issuance by the sentencing court, that is, the day of sentencing of the applicant/defendant. Because a Type "A" Certificate restores the applicant's/defendant. Because a Type "A" Certificate restores the applicant's/defendant's "full right" to possess firearms in New York State, it also restores the individual's federal right to possess firearms and ammunition.

any applicant who, upon conviction of a felony, received a sentence of one year incarceration or less and if sentenced to a period of incarceration, served that period in a local institution, e.g., a county jail. Any applicant who was sentenced to a period of incarceration of greater than one year, or who served a period of incarceration in an institution under the jurisdiction of the State Department of Correctional Services (state time) can only receive a Certificate of relief from disabilities from the New York state Board of Parole. Such Certificate would be a Type "C" Certificate.

Finally, any individual who has been convicted more than one time of a felony offense is not eligible to receive a Certificate of Relief from disabilities under New York State law. In summary then:

Type "A" Certificates of Relief from disabilities:

Are issued by courts of New York State at the time of sentencing and,

Restores the "full right" to possess all types of firearms in New York State and therefore also restores the right to possess firearms and ammunition under federal law to the individual.

In Type "B" Certificates of Relief from Disabilities:

Are issued by New York State courts at some time after the sentencing of an applicant, and,

Restores the "full right" to possess all types of firearms in New York State and therefore also restores the right to possess firearms and ammunition under federal law to the individual.

Type "C" Certificates of Relief from Disabilities:

Are issued by New York State courts if the applicant did not serve a period of "state time" incarceration:

Are issued by the New York State Board of Parole if the applicant did serve a period of "state time" incarceration;

Must specify what privilege is being restored; and only restores the right to possess firearms and ammunition under federal law if it restores the "full right" to possess all types of firearms in New York State, that is, if it restores the applicant's privilege to possess long guns and to apply for a New York State Pistol Permit (the right to possess handguns in New York).

It is obvious that the restoration of federal firearm and ammunition privileges is a complex legal issue and procedure. While such Certificates of Relief from Disabilities are often granted to applicants, the process can be long and complicated and almost invariably requires the services of a competent attorney.

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Article

RIGHTS RESTORATION AND THE ENTANGLEMENT OF US CRIMINAL
AND CIVIL LAW: A STUDY OF NEW YORK'S "CERTIFICATES OF RELIEF"

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Despite burgeoning interest in prisoner re-entry and the "collateral consequences" of criminal convictions, we know little about the practical operation of policies governing the rights and privileges of people with criminal convictions. This study examines New York's Certificates of Relief from Civil Disabilities to explore the workings of the US carceral state at the intersection of criminal and civil law. These certificates remove some legal restrictions accompanying convictions, particularly licensure barriers, and are easier to achieve than pardons; other states have used New York's policy as a model. Interviews with judges and probation officers reveal deep variations in how they understand and award certificates. In some cases, differences stem from informal local agreements, particularly concerning firearms in rural communities; in others, from discretionary judgments in a context of legal ambiguity. These practices demonstrate how specific legal, organizational, and cultural factors contribute to complexity and variation in the US carceral state.

I. INTRODUCTION

"Collateral consequences" policies are legal rules restricting the rights and privileges of people with criminal convictions.¹ As these policies appear to have increased over the last thirty years in state and federal law, and as the use of background checks has expanded, there has been growing awareness among scholars, advocates, and lawmakers of the importance of such restrictions within the US *6 "carceral state" (Gottschalk 2006, xi) and of the need for a better understanding of the practices by which collateral sanctions are imposed, interpreted, and, in some cases, relieved.

This article gauges such practices by focusing on a rights-restoration measure available to New Yorkers with criminal convictions. The Certificate of Relief from Civil Disabilities, or COR, is one of two certificates established under New York law to offer a measure of rights restoration. (The other, the Certificate of Good Conduct, differs in important respects and is not a focus of this article.²) State statutes and administrative documents establish the legal framework by which CORs operate; these legal texts and the history of certificate law have been exhaustively analyzed by Radice (2012). However, text and legislative history alone deliver a picture that is not only incomplete, but is also in some ways at odds with the practices of key legal interpreters. That is among the conclusions of this study, which draws from interviews with twenty-one New York county and city court judges and with probation officials in twenty-three counties, chosen from regions across the state, with further context provided by interviews with numerous people working in various state and nongovernmental positions related to criminal justice practices in New York.

These interviews reveal a legal landscape of diversity and disagreement. These differences arise, most fundamentally, from the entanglement of criminal and civil law in the collateral consequences ecosystem;³ in that setting, specific legal, organizational, and cultural factors lead to significant variation in how probation officers and judges implement certificates law. CORs were enacted to address barriers located outside the criminal law field proper—but with implementation led by criminal justice

As might be expected given their sustained postsentence interactions with defendants, probation officers' responses to this question were richer and more varied; space allows only a brief summary here. Of twenty-three probation officers interviewed, nine said they did not know enough about the COR's effects in the employment field to venture an answer. Often, their responses were skeptical, as with the rural officer who said, "I don't know that it helps actually get jobs--again, it just restores the right to have it." Seven others, however, offered some kind of tentative positive answer, such as, "I believe it does ... but it's not the panacea people think." Seven others, meanwhile, gave strong positive answers, sometimes including illustrative anecdotes from their work. A New York City probation officer who handled most COR applications in his borough quickly answered in the affirmative when asked if CORs help people obtain jobs: "Yes they do. I get calls and cards ... 'I'm working, thanks to you,' they'll say." A Hudson Valley probation officer described successful placements at a national retailer and a home care agency, both, in the officer's view, assisted by the COR. And an urban upstate county supervisor described in great detail where the COR *27 figures in the complicated state Department of Health sequence for applicants with criminal backgrounds.³¹

Among respondents giving positive answers, however, at least three went out of their way to note that private employers "have no idea" what the COR is, as one urban upstate probation officer specializing in offender workforce development put it. Private employers "typically don't know what they are," said another veteran urban upstate probation director. "Employers don't understand Certificates," said a small rural county probation officer bluntly. Meanwhile, three probation officers volunteered varied opinions about whether applicants should tell potential employers about the COR. "I would very much encourage them to talk about it [with employers]," said one rural officer, "because they would still have to answer 'yes' to the question [about having been convicted of a crime]. So we would say yes, explain that to them, show that to them--and tell them if they wanted to, the employer could give us a call." But two other rural probation officers disagreed. "It doesn't help--it just causes attention [to the conviction]," said one. "I think it goes the other way," replied another, when asked if displaying the COR to a potential employer would help someone land a job. "You show the employer the Certificate, and they show you the door."

G. The COR's Effect: Firearms

As we have seen, applicants' desires to own firearms for hunting permeate certificates practice in rural counties, and affect how probation officers and judges respond to COR applications generally. That the prospect of an offender carrying a gun should influence discretionary understandings of COR applicant merit is understandable. Beyond those judgments, however, interviews revealed unexpected disagreement on the question of whether the COR *actually restores* a person's legal right to bear arms, as a matter of law. Among thirteen upstate judges to whom this question was posed directly, ten said the COR does restore gun rights (at least to bear "long guns," such as shotguns and rifles for hunting), two said no, and one gave an ambivalent answer. Of twenty probation officers asked directly, seven offered a clear yes and three a clear no; ten gave positive responses, but displayed acute awareness of ongoing disagreement over the COR's legal impact. Intriguingly, many interviewees revealed explicitly the importance of the local legal community in interpreting this federal constitutional right.

In part, this uncertainty rests on the nature of federal firearms law. While national statutory law *removes* gun rights from people convicted of felonies, state laws *restore* those rights: if a person "has had civil rights restored" under state law, *28 whether through a pardon, a rights-restoration action specific to firearms, or another legal procedure, his or her felony conviction is no longer disqualifying, for federal purposes. (Some misdemeanors--particularly crimes of domestic violence--also bring gun rights revocation under federal law: see 18 U.S.C. § 922[g].) This hybrid revocation-restoration legal system is reflected in federal statutes, recent US Supreme Court decisions, and regulatory practices at the Bureau of Alcohol, Tobacco, and Firearms (ATF) and the FBI's National Crime Information System (NICS).³² Although the ATF has statutory authority to conduct its own rights-restoration investigations, Congress has not appropriated funds for any such operations since 1992, effectively making it illegal for ATF staff to engage in them.³³ The result is that the federal bureaucrats implementing background check law must engage in ongoing evaluation of any rights-restoration procedures offered by each individual state (author's telephone interview, FBI NICS official [name withheld], August 2, 2013).³⁴ Meanwhile, many states mirror the federal ban in their own criminal codes. Ignorance of how federal and state laws interact to define the firearms rights of people with criminal convictions is widespread, and reaches the highest levels of the US legal system.³⁵

Only three probation officers essentially shared the New York DOCCS position, which is that while the Certificate of Good Conduct *does* restore firearms rights, a COR does *not* do so (author's interview, New York DOCCS official, September 25, 2012). "You got the state and the federal--the state grants [the certificate], but you still got the federal ban," explained one rural upstate probation officer. "No--you'd have to apply to the federal government," said an urban upstate county officer. A third also said no, but acknowledged "a lot of debate right now" over this question, and explained frankly the ultimate importance of local interpretation:

*29 We have some people walking around with just CORs, for guns. I got talking to the public defender about that, and they said, "you know what, that's going to be hassled out in court"--but they didn't think the judge is going to take a bite out of them [for having a firearm with a COR].

Indeed, the largest group of probation officers--ten of those responding to this question--said that while they believed the COR does restore firearms rights, they were aware of legal ambiguity and uncertainty on this question. "There's a lot of banter going back and forth" among probation directors, said a rural county probation officer. "I think there's actually some discrepancy or disagreement--the ATF gets involved, somehow," said another. "We believe so," said another. "Some judges say it does, but others are not sure a Certificate gets weapons rights back. Our view is, 'Get a Certificate and hope for the best'." "We'll tell them to have the Certificate on them, when they're hunting," explained this rural upstate county probation officer. "We'll say, 'This is good for New York--don't go anywhere else. And best stay in the county!'"

"The feds say, 'If you get a Certificate, you're good with us,'" explained one rural probation director, referring to ATF procedures. Those offering emphatic "yes" answers were just as likely to describe local interpretation of a blended federal-state legal regime. "It works--you can hunt, and get a pistol permit, if you have the right language for the sheriff," said one rural upstate probation director, explaining that his office had learned that he needs to put "some specific language in there" on the COR application. "I asked the sheriff, 'where'd they hear that, from ATF?' 'Yes,' he says." Another, after noting ambiguity in the law, said this:

My view is, if our judge issues a Certificate of Relief, I don't think a D.A. is going to go down that road [to prosecute for criminal possession], knowing the judge said it was OK.

Here, the legality of firearms possession--that is, the status of an individual's federal constitutional right--is effectively defined by the county *probation officer's* sense of the county *prosecutor's* understanding of what the county *judge* believes the law means.

Some judges explained that they usually reject COR applications because they do not think people with criminal convictions should have guns and they believe the certificate would restore firearms eligibility. One upstate county court judge explained carefully that CORs do restore firearms rights under federal law--but only to own long guns (i.e., not pistols, which are licensed separately under state law), and only as long as no limitations or restrictions are written onto the COR granting form. "I trust the judgment of my probation department on this," explained the judge. Several emphasized uncertainty. "There's lack of--let's say, lack of universal agreement on the Certificate of Relief for purposes of state and federal firearms law," said one urban upstate county court judge. "I don't think I've ever issued a COR that a person requested to go hunting without telling them that if they *30 have a firearm, it's still a federal crime."³⁶ Another urban upstate county judge was even more explicit, saying of hunters applying for the COR: "I'll give it to them, but I'll tell them there's no guarantee it'll enable them to hunt."

Documents some respondents offered as their interpretive guides deepened the complexity. These included a New York DCJS document that describes the interaction of federal and state rights-restoration law in considerable detail, and concludes that a person with a COR "would qualify for an exemption" from the federal ban.³⁷ One probation officer shared a copy of the document distributed to offenders in his county, describing the necessity of securing a New York COR *and* a federal "Relief

from Disabilities” for firearms rights, and providing them the ATF address to write to. (This is the inoperative ATF procedure noted above.) Two probation officers referred to a 2012 memorandum from the State Probation Director's office, interpreting a 2000 state appellate court decision as ruling that only a Certificate of Good Conduct restores firearms rights in New York (Robert Maccarone, DCJS Office of Probation and Correctional Alternatives, State Director's Memorandum #2012-3, February 7, 2012; copy on file with the author). Another provided a memo written in 2002 by an Assistant US Attorney for the Western District of New York, which concludes that an “A” type COR restores the “full right to possess firearms” in New York (see Maigret 2002). And one judge displayed a pamphlet on collateral consequences and rights restoration in New York written by Federal District Judge Harold Baer, Jr. (2011), which concludes that a COR does *not* restore gun rights: only those convicted of “lower level, nonviolent felonies” (Baer 2011, 7) can have their rights restored via the Certificate of Good Conduct, while violent offenders have *no* rights-restoration options.

Ultimately, it is not clear that there *is* a “black-letter law” answer to the question of whether a COR restores firearms rights. In this context of blended but ambiguous federal and state authority, the law consists of the practices and shared understandings of local legal interpreters, all the way down. Academics and reformers scrutinizing collateral penalties that disadvantage people with criminal justice records have rarely focused on gun restrictions. This study suggests that has been a mistake: in New York, and likely in rural areas across the country, many people with criminal convictions experience the loss of firearms rights as the most serious collateral sanction of all. With the US Supreme Court defining the ability to bear arms as a fundamental right, federal statutes withdrawing gun rights and state laws restoring them, some states dividing long-gun and handgun rights, and local probation officers, judges, and sheriffs collaborating in deciding whose rights to restore, this is a field rich for study.

*31 CONCLUSION

The legislative history of CORs' enactment and expansion evinces an intention to make CORs available to very broad classes of offenders--or, at a minimum, to make eligible people aware of this remedy for some of their civil law disabilities. Access to the certificate was placed within the criminal justice system, however, and criminal justice actors employ the logics and tools of their routine practices in interpreting relevant texts and carrying out this duty. Meanwhile, different COR practices often stem from informal understandings among system actors attuned to local conditions--chief among them the status of firearms ownership and the importance of hunting in a given place. This interpretive range extends well beyond differences over apprising defendants of the COR's availability, and disagreements over which applicants should be awarded CORs: it effectively constructs the certificate holder's legal status. In some locales, possession of a certificate is encouraged as a way to facilitate rehabilitation, while in others it rewards rehabilitation's achievement; in some places, legal interpreters conclude that a person bearing a certificate has regained firearms rights, while others maintain that the COR does not restore them.

Scholars have documented differences between rural and urban courts, particularly in sentencing (Hagan 1977; Austin 1981; Myers and Talarico 1986). Such research usually builds on Weberian theories predicated on the assumption that urbanization leads to bureaucratization and, in turn, to diminished discretionary decision making and greater reliance on formal legal considerations. Fragmentary evidence of rural-urban variation in COR awarding standards has emerged in this study. For example, some urban interpreters were more likely to be disposed toward recommending and granting CORs, but this was by no means universally true. Strong support for early COR grants by the leadership of New York City Probation, together with the extensive involvement of nongovernmental organizations in supporting COR applications in New York City and some upstate cities, suggests a kind of Weberian bureaucracy development sequence. But overall, this behavior seemed less influenced by bureaucratization than by the types of rights and privileges urban and rural COR applicants were seeking, and how judges understood the importance of those rights and the effects on public safety of their exercise.

Such variation creates interpretive challenges. An official's understandings of the legal efficacy of a certificate will often play a role in how that official understands the COR's relationship to a person's rehabilitation, and may affect whether a probation officer, for example, will inform a person under his or her supervision about the client's eligibility to apply. While useful, a quantitative tally of applications, grants, and denials might not by itself be revealing: an upstate judge who rejects a certificate application five years after a sentence because he knows granting it would enable the person before him to purchase a firearm

CERTIFICATES OF RELIEF FROM DISABILITIES

AND CERTIFICATES OF GOOD CONDUCT

LICENSURE AND EMPLOYMENT OF OFFENDERS

(See Articles 23 and 23-A of the Correction Law, §§700-706 and §§750-755)

1. What is the purpose of a Certificate of Relief from Disabilities and/or a Certificate of Good Conduct?

Laws governing Certificates of Relief from Disabilities and Certificates of Good Conduct were enacted “to reduce the automatic rejection and community isolation that often accompany conviction of crimes” and “contribute to the complete rehabilitation of first offenders and their successful return to responsible lives in the community.” Additionally, Correction Law §753(1)(a) recognizes that it is the public policy of New York State to “encourage the licensure and employment of persons previously convicted of one or more criminal offenses.” Correction Law §753(2) further establishes that with respect to a “public agency” or “private employer”, a certificate “shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.” Such certificates are consistent with 2006 statutory change to the general purposes of the Penal Law (PL), specifically PL §1.05(6), which adds the concept of reentry and reintegration by referring to “the promotion of ... successful and productive reentry and reintegration into society...” of offenders.

2. Who is eligible for a Certificate of Relief from Disabilities?

Correction Law §700 establishes that a person is eligible to receive a Certificate of Relief from Disabilities if he/she has been convicted of a crime or of an offense, but has not been convicted of more than one felony. A “felony” means a conviction of a felony in this state or of an offense in any other jurisdiction for which a sentence to a term of imprisonment in excess of one year, or a sentence of death, was authorized. Two or more convictions of felonies charged in separate counts of one indictment or information or two or more convictions of felonies charged in two or more indictments or information’s, filed in the same court prior to judgment under any of them, shall be considered only one conviction. Additionally, a plea or verdict of guilty upon which a sentence or the execution of a sentence has been suspended or upon which a sentence of probation, conditional discharge or unconditional discharge has been imposed, shall be considered a conviction.

3. Does an individual adjudicated a youthful offender incur any civil disabilities resulting in a need to secure a Certificate of Relief from Disabilities?

No. Criminal Procedure Law §720.35 (1) states “a youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority”. Therefore, no certificate is necessary.

(See People v. Doe (52 Misc. 2d 656, 276 N.Y.S.2d 437), wherein the District Court of Nassau County held that Correction Law Article 23 is not applicable to adjudication as a youthful offender.)

4. What can a Certificate of Relief from Disabilities do and not do?

In general, Correction Law §701 provides that a certificate may relieve an eligible offender of any forfeiture or disability, or remove any bar to employment, automatically imposed by law by reason of conviction of the crime or the offense. A conviction for a crime specified in a Certificate of Relief from Disabilities shall not cause automatic forfeiture of any license, permit, employment or franchise, including the right to register for or vote at an election, or automatic forfeiture of any other right or privilege, held by the eligible offender and covered by the certificate. However, a certificate cannot overcome automatic forfeiture resulting from convictions for violations of Public Health Law §2806(5) or Vehicle and Traffic Law (VTL) §1193(2) (b). These sections of law relate to revocation of a hospital operating certificate and suspension of a New York State Driver’s License, respectively. Further, a conviction for a second or subsequent violation of any subdivision of VTL §1192 within the preceding 10 years imposes a disability to apply for or receive an operator’s license during the period provided in such law. A certificate also does not permit the convicted person to retain or be eligible for public office, nor does it void the conviction as if it were a pardon (see Correction Law §§701 and 706).

A certificate cannot in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege. (see Correction Law §701(3)) However, Correction Law Article 23-A establishes parameters to safeguard against unfair discrimination against persons previously convicted of one or more criminal offenses by a “public agency” or “private employer”. Correction Law §752 establishes that no applicant for any “license” or “employment”, to which the provisions of this article are applicable, can be denied a license or employment by reason of the applicant’s previous criminal conviction or by reason of a finding of lack of “good moral character” when such finding is based upon the applicant’s criminal conviction of one or more criminal offenses, unless:

- (1) there is a “direct relationship” between one or more of the previous criminal offenses and the specific license or employment sought; or
- (2) the issuance of the license or granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Correction Law §753(2) establishes that in making a determination pursuant to Correction Law §752, a public agency or private employer must give consideration to a certificate of relief from disabilities or certificate of good conduct issued to an applicant and the certificate “shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”

With respect to Article 23-A, the following terms are of interest:

- “Public agency” means “the state or any local subdivision thereof, or any state or local department, agency, board, or commission.”
- “Private employer” means “any person, company, corporation, labor organization or association which employs ten or more persons.”
- “License” means “any certificate, license, permit or grant of permission required by the laws of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business, or profession. Provided however, that “license” shall not, for purposes of this article, include any license or permit to own, possess, carry, or fire any explosive, pistol, handgun, rifle, shotgun, or other firearm.”
- “Employment” means “any occupation, vocation, or employment, or any form of vocational or educational training. Provided, however, that “employment” shall not... include ‘membership in any law enforcement agency.’ ”
- “Direct relationship” means “that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.”

For further details as to applicability, unfair discrimination, factors to be considered, denial of license or employment, and enforcement, see Correction Law Article 23-A.

5. Who may grant such certificates and when may they be granted?

Correction Law §702 establishes that any court which imposed a revocable sentence or imposed a sentence upon a defendant, other than one resulting in commitment to an institution under the jurisdiction of the New York State Department of Correctional Services, may grant a certificate to an eligible offender.

A court may grant this certificate at the time of sentencing or any time thereafter. If granted at the time sentence is pronounced, it may grant relief from forfeitures and/or disabilities; if granted later, it can only apply to disabilities. DPCA’s Investigations and Report Rule, specifically 9 NYCRR §350.7(b)(6) establishes that where it is considered appropriate, the pre-sentence report shall specify reasons consistent with law as to granting of a certificate of relief from disabilities at the time of sentencing in accordance with other Rule provisions. For additional information see Rule §350.8.

Correction Law §703 provides that the State Board of Parole has the power to issue a Certificate of Relief from Disabilities to any eligible offender who is serving or has served time in a New York State correctional institution or who resides within this state and whose judgment of conviction was rendered by a court in any other jurisdiction (e.g. federal court or an out-of-state court). The Board of Parole typically entertains granting such certificates at the time an inmate is being considered for parole.

6. Where does a probationer, whose case has been transferred from one jurisdiction (i.e. county/New York City) to another jurisdiction, apply for a Certificate of Relief from Disabilities? Does he/she apply to the original sentencing court or to the court of equal jurisdiction in the receiving county/New York City?

Unless the sentencing court indicates otherwise at the time of transfer, a probationer seeking a Certificate of Relief from Disabilities should be directed to apply to the court to which his/her case was transferred. Where there is a complete transfer, the appropriate court in the receiving jurisdiction must make this determination (see CPL§410.80 and Correction Law §702).

7. What criteria are to be considered by the court or the Board of Parole when issuing a Certificate of Relief from Disabilities?

Correction Law §§702(2) and 703(3) states that the court or the Board of Parole, whichever is applicable, must be satisfied that the person to be granted relief is an eligible offender, as defined by Correction Law §700, that the relief to be granted is consistent with the rehabilitation of the eligible offender and that the relief to be granted by the certificate is consistent with the public interest.

8. What is a Certificate of Good Conduct and who has the power to issue such certificates?

A Certificate of Good Conduct is available to those individuals convicted of more than one crime (see Correction Law §§703-a and 703-b).

The State Board of Parole or any three members thereof, by unanimous vote, have the exclusive power to issue a certificate of good conduct to any person previously convicted of a crime either in this state or in any other jurisdiction. The minimum period of good conduct, which is based upon the most serious crime of which the individual has been convicted of, is as follows:

Misdemeanor	-	one year
C, D, E Felony	-	three years
A, B Felony	-	five years

This minimum period is measured either from the date of payment of any fine, the suspension of a sentence, or from the date of his/her unrevoked release from custody by parole, commutation or termination of his/her sentence. Criminal acts committed outside the state shall be classified as acts committed within the state based upon the maximum sentence that could have been imposed due to the conviction pursuant to the law of the foreign jurisdiction.

9. What criteria must be satisfied in order for the Board to issue a Certificate of Good Conduct?

The Board must be satisfied that the applicant has conducted himself in a manner warranting such issuance for a minimum period (see above) and that the relief to be granted is consistent with the rehabilitation of the applicant and public safety. Further, the Board must be satisfied that the applicant has demonstrated that there exists specific facts and circumstances and specific sections of New York State law that have an adverse impact on the applicant and warrant application for relief to be made in New York State.

10. What does a Certificate of Good Conduct do?

A Certificate of Good Conduct has a similar effect as a Certificate of Relief from Disabilities. It may be issued to remove all legal bars or disabilities or to remove only specific bars or disabilities. In addition, a Certificate of Good Conduct may restore the right of an individual to apply for public office.

11. Are Certificates of Relief from Disabilities or Certificates of Good Conduct permanent or temporary when issued? Can new certificates be granted to enlarge relief?

Whether these certificates are permanent or temporary depends upon the applicant's circumstances. Certificates of Relief from Disabilities and Certificates of Good Conduct are considered temporary. They continue until such time as either the court's authority to revoke the sentence has expired or is terminated or the individual is discharged from the board's supervision. While temporary, a court may revoke a certificate of relief from disabilities for violation of the conditions of the sentence and must revoke the certificate if the court revokes the sentence and commits the person to a state correctional institution. Similarly, while temporary, the Board of Parole may revoke either certificate for violation of the conditions of parole or release. In all cases, revocation must be upon notice and after an opportunity to be heard. If not revoked, certificates become permanent upon expiration or termination of the court's authority to revoke the sentence or the Board's jurisdiction over the offender (see Correction Law §§702(4), 703(4), and 703-b (5)).

A court or the Board, whichever is applicable, also may subsequently issue a new Certificate of Relief from Disabilities or Certificate of Good Conduct enlarging the relief previously granted (see Correction Law §§702(5), 703(2), and 703-b(4)).

12. Can a New York State court grant a Certificate of Relief from Disabilities to an individual convicted of a felony in another state, who later relocates and is transferred to New York State for supervision?

No. However, Correction Law §703(1)(b) states the Board of Parole shall have the power to issue a Certificate of Relief from Disabilities to any eligible offender who resides within the state while convicted by a court in another jurisdiction.

13. Can a court request an investigation before issuing a Certificate of Relief from Disabilities?

Yes. Correction Law §702(3) states that a “court may for the purpose of determining whether such certificate shall be issued, request its probation service to conduct an investigation of the applicant...” Further, DPCA’s Investigations and Report Rule, specifically 9 NYCRR §350.8, establishes rules for certificate of relief from disabilities investigations and reports. See also response to question 4 with respect to pre-sentence investigations.

14. Does obtaining a certificate of relief from disabilities allow a convicted felon not otherwise permitted to vote, to register/re-register and vote? Does a probationer need a certificate to vote?

Yes, securing a certificate would permit a convicted felon who has lost voting privileges to register/re-register and vote. Only a convicted felon who is incarcerated or under parole supervision needs to secure a State certificate in order to restore voting privileges (see Election Law §5-106(2) of the Election Law and Correction Law § 701(2)).

With respect to probationers, a convicted felon sentenced to a straight probation sentence would not lose his/her right to vote. Any felony probationer also sentenced to up to six months’ imprisonment would be able to register and vote upon release. Any felony probationer also sentenced to a term of intermittent imprisonment would be able to register and vote upon final completion of the term (see New York State Board of Election Formal Opinion #6, 1983).

15. Is it necessary for an offender to secure a state and federal Certificate of Relief from Disabilities or a Certificate of Good Conduct in order to possess a firearm, rifle, or shotgun?

Whether a State certificate is necessary depends upon an offender’s criminal history and status. As to a Federal certificate, since October 1992, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) annual budget appropriation has prohibited the expenditure of any federal funds to investigate or act upon any Federal firearms disability applications submitted by any individual. This limitation on the permitted use of funds has continued over the years. However, it is always subject to change and it is recommended that periodic checks with regional ATF offices occur.

It is a crime in New York State (Criminal Possession of a Weapon in the Fourth Degree) for an offender convicted of a felony or serious offense, to possess a rifle or shotgun and any such conviction automatically excludes an individual from securing a firearms license (see Penal Law (PL) §§ 265.01(4) and 400.00(1)(c)). Exempted from prosecution is an individual who has been issued a Certificate of Good Conduct permitting possession (see PL§265.20(5)). After review of pertinent case law and written communication between the NYS Division of Criminal Justice Services and the federal ATF, it has been determined that

an individual who has received a Certificate of Relief from Disabilities under Correction Law §701 permitting possession of any such firearms, will qualify for an exemption under PL§265.20(5). The individual would still need to secure a license to legally possess such weapons and other criteria must be met (see PL§400.00).

In general, the Federal Gun Control Act of 1968 (GCA) prohibits certain categories of persons to ship, transport, receive, or possess firearms (see 18 U.S.C. §922(g)). Among categories of persons barred are any of the following individuals:

- (1) those convicted of a crime which may be punishable by imprisonment for a term exceeding one year
- (2) an unlawful user of or addicted to any controlled substance
- (3) those subject to a court order restraining the person from harassing, stalking or threatening an intimate partner or child of the intimate partner
- (4) an illegal alien
- (5) one discharged from the military under dishonorable conditions
- (6) those convicted in any court of a qualifying misdemeanor crime of domestic violence (MCDV)

The definition of MCDV includes any offense classified as a “misdemeanor” under Federal or State law. This federal prohibition is applicable to federal, state, and local governmental employees in both their official and private capacities and federal violations are punishable by up to 10 years imprisonment (see 18 U.S.C. §§921(a) (33), 922(g) (9), 924(a) (2), 925(a) (1); and 27 C.F.R. §§178.11 and 178.32). Additionally, under the GCA, a person is not considered convicted if he/she has been pardoned, had his civil rights restored, or the conviction was expunged or set aside, unless the pardon, expungement, or restoration expressly provides that the person may not ship, transport, possess, or receive firearms.

Noteworthy, a state Certificate of Relief from Disabilities or Certificate of Good Conduct may only remove New York State’s statutory bar to apply for and receive a license to possess a firearm imposed upon those convicted of a felony or serious offense. It is the position of the ATF that **unless** an individual has had his or her rights fully restored, then there still exists a Federal disability or bar in this area.

According to the ATF, a person’s civil rights have not been fully restored unless, under State law, that person is eligible to hold public office, register to vote at a general election and serve on a jury in a court of that state. As to ability to hold public office, a Certificate of Relief from Disabilities cannot restore eligibility for public office (see Correction Law §701(1)). However, a Certificate of Good Conduct granted by the New York State Board of Parole can restore a person’s eligibility to hold public office. A person who has been sentenced to a state correctional institution loses his/her right to hold public office (see Civil Rights Law §79(1)). If he/she completes his/her maximum sentence of imprisonment or is discharged from parole, then by operation of New York law, this person may again lawfully run for public office and a certificate would not be needed to restore this right. Further, a person’s right to hold public office is not forfeited upon conviction of a felony if the person

is given a probation sentence or not sentenced to a state correctional facility. However, if a person is holding a public office and is convicted of a felony while holding such office, the person would have to vacate that office.

As to right to serve on a jury, a convicted felon loses the right to serve on a jury (see Judiciary Law §510). This right is not automatically restored under New York law upon a person's completion of his/her criminal sentence, including probation or maximum term of imprisonment. The right to vote was discussed in question number 14, *infra*.

Federal authorities do not require that these aforementioned State certificates specifically mention an offender's ability to possess firearms. Presently, where either box (a) or (b) is checked by the court or Board of Parole on the signed certificate form (see DPCA-53 (04/04)), no Federal barrier exists and an individual may legally possess a firearm. However, as many members of the judiciary may still be under the impression that a Federal certificate would be necessary to overcome a Federal restriction, it is advisable that any investigation report familiarize the court in this area. Some courts may wish to expressly restrict permission for a firearms license where it is determined to be appropriate.

Lastly, it should be noted that the term "firearm" is defined in PL§265.00(3) to include any pistol or revolver and virtually all shotguns. However, federal law defines firearm more broadly to refer to all handguns and long guns.

NOTE: There are 3 boxes associated with a Certificate of Relief from Disabilities. Specifically, box (a) relieves the holder of all forfeitures, and of all disabilities and bars to employment, excluding the right to be eligible for public office, by virtue of the fact that the certificate is issued at the time of sentence. Box (b) relieves the holder of all disabilities and bars to employment, excluding the right to be eligible for public office. Box (c) relieves the holder of the forfeitures, disabilities or bars to employment enumerated in the certificate.

16. Where may forms or applications for Certificates of Relief from Disabilities and Certificates of Good Conduct be obtained?

Correction Law §705(1) states that such forms relating to Certificates of Relief from Disabilities shall be distributed by the State Director of Probation and Correctional Alternatives and is attached and forms relating to Certificates of Good Conduct shall be distributed by the Chairman of the Board of Parole.

17. Can an offender obtain a copy of a Certificate of Relief from Disabilities Investigation Report?

Last year, effective June 7, 2006, Correction Law §702(6) was amended governing certificates of relief from disabilities issued by courts. It now establishes that upon the court's receipt of a certificate of relief from disabilities investigation report from a probation department, the court shall provide a copy of the report, or direct that such report be provided to the applicant's attorney, or the applicant, if he/she has no attorney.

18. Can an individual receiving a certificate of relief from disabilities deny ever having been convicted of a crime?

No. A certificate of relief from disabilities does not authorize an individual with a criminal record to deny his/her conviction. For example, a job applicant cannot deny on an employment application that he/she has ever been convicted of a crime (see 1981 Op. Atty.Gen. (Inf.) 281).

The Theory, Development and Brainstorming of Your Case

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Brainstorming the Facts, Developing a Case Theory, and Creating a Story for an Effective Presentation at Trial

Far too often we equate good lawyering with the skill one appears to bring to the courtroom. We see a lawyer conduct a scathing cross-examination and believe that we too can be a great lawyer if we learn to cross-examine witnesses well. We see an attorney deliver a riveting closing argument and assume that if we could only develop similar oratory skills we also would be that caliber of attorney. What we do not see in the courtroom is the preparation that makes such effective performance possible. The effortlessness with which the presentation of a skilled attorney seems to flow can make it appear that it is all about ability and not about the work behind the scenes.

Ability is surely important. That is why the best lawyers never stop learning new ways to conduct voir-dire, deliver riveting opening statements, present evidence on direct examination, challenge witnesses on cross examination, and persuade jurors during closing argument. However, ability alone will not make for the most effective courtroom presentation in the same way that a great actor can't star in a winning production without a good script and a capable director. As trial lawyers we must be able to write the script, direct the presentation, and act in the performance. This article will deal with the first two skills we must develop as trial lawyers: how we creatively write the script and thoughtfully direct the presentation. Only after we have done those two things can we actually deliver an award-winning performance.

The performance begins the moment the jury lays eyes on us, i.e. during voir-dire³⁷. It continues as we present our client's case during opening statement, cross-examine witnesses, present evidence in our case, and persuade with closing argument. However, each of these acts must be guided by a coherent theme. Everything we do in the courtroom must be thoughtfully and deliberately designed to present a story we developed before we ever met the first juror. How do we develop a persuasive story, you ask? Read on.

The first thing we have to do when we get a new case is to brainstorm the facts. We must consider all of the facts in the case without regard to their source. Remaining neutral about the source of the facts is important lest we pre-judge the quality of the evidence before we've sufficiently done our homework. We should then consider which of the facts are likely harmful to our client and which are likely helpful. We shall then consider all of the ways we may potentially keep harmful facts out of evidence. We must also anticipate any objections to facts we find helpful and every response to such objections. The final step in the brainstorming process is to think of all the questions the jury may have about the evidence as we understand it. For questions about facts we don't like, consider answers the prosecution might come up with. For questions about facts that we do like, be creative about how we might provide answers.

After we have done this brainstorming exercise we must develop a case theory. The first step in this process is to identify all possible defense theories. This requires creativity! Then consider how each witness and every piece of evidence fits into this defense theory. Once you have developed a strategy for all of the evidence as it relates to a defense theory you have a case theory. Choose one. This case theory will drive everything you do at trial.

Finally, once we have settled on a case theory, we must think about the most effective way to tell the story so that the jury agrees with our case theory. We need a theme that will be

³⁷ In cases for which we will have bench trials the performance actually begins the first time we appear before the judge who will ultimately be the fact-finder and continues throughout the pre-trial process as we continue to appear before that judge and file written advocacy pieces for that judge's review. In short, every time we have any contact with the fact-finder we are performing towards a carefully thought-out end.

consistent throughout our story. We must think about the relevant characters and evidence and what the story will be with respect to each. We must think about how to tell the story of each character and piece of evidence so that it most effectively fits into the theme. Only then are we ready to begin the presentation.

A. BRAINSTORMING THE FACTS

As mentioned above, in this model brainstorming the facts involves three components. I call these components fact-gathering, evidence blocking³⁸, and why-storming³⁹. Each will now be described in detail.

1. Gathering the Facts / "Fact-gathering": a source-neutral consideration of any potentially important facts

One of the differences between good defense lawyers and most prosecutors is the ability of the former to think outside the box. Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete they have usually settled on a suspect, a motive, and other critical details of the offense. They assume they know the truth about what actually happened. The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of viewing the evidence collected with a critical eye, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory but, to an objective observer, has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution theory ultimately is right or wrong, this mid-set taints the ability to critically think about the case.

Good defense attorneys don't do this. We understand that the "truth" is something we will almost certainly never know and that, more importantly, will not be accurately represented by the evidence that makes it into the trial. We understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. We know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the presentation of both sides. We are also aware that how jurors perceive the evidence is a function of the jurors themselves and the views they bring to their job.

Most of all, good defense attorneys recognize that jurors tend not to buy any one witness's story. They listen to testimony, evaluate evidence, and ultimately weigh all of the record to come up with their own idea about what happened. Because jurors are open to considering alternate theories of the case, so must we be.

Therefore, the most important aspect of fact-gathering is to do so without a bias for or against any source of information. We will certainly think about these biases as we develop our case theory but at this point this mind-set can hamper our ability to consider all of the important facts and how they can ultimately fit into our case theory. For example, I have supervised countless young lawyers who have come to me with a new case. They often begin by reading a

³⁸ Evidence blocking is a phrase coined by Jonathan Stern, an outstanding trial lawyer, while he was a trial lawyer with the Public Defender Service for the District of Columbia.

³⁹ Why-storming is an exercise that was the brain child of Jeff Sherr, the Training Director for the Kentucky Department of Public Advocacy.

version of events as recorded on a police report. The lawyer will then fall into the "prosecutor trap," assuming much, if not all, of this account is given in the case. He will begin thinking of his theory assuming he must accept what a police officer claimed to have seen, an assertion about the conclusion of a fingerprint test, or an allegedly unbiased witness' statement about what happened. Conversely, the young lawyer will quickly gloss over a potentially helpful statement the client made to him or account provided by the client's family member. He automatically assumes that client statements are self-serving or that information from a family member is unreliable and dismisses it off-hand. In this way the inexperienced lawyer risks limiting his ability to consider alternate theories of the case much in the same way that many prosecutors do. DO NOT assume a police officer's account is historically accurate or that your client's mother is willing to lie for her son.

At this stage in the case, the defense attorney must consider all potentially important information without regard to its source. The facts we gather come from any number of sources including, but certainly not limited to: our clients, information provided by the prosecutor during discovery, investigation, police reports, court records, motions filed by the prosecution, testimony at pre-trial proceedings, etc., etc., etc. We must be willing to consider all of the facts that may be available for presentation to the jury⁴⁰. Step one is to catalogue all potentially important facts without regard to their source. At a later time we will consider issues of admissibility of the facts we've gathered and potential biases of the sources of this information. These exercises are discussed as evidence-blocking and why-storming.

2. Analyzing the Facts / "Evidence-blocking": thinking about how to keep bad facts out of evidence and how to get good facts admitted

A basic tenet of evidence-blocking is the idea that any fact the state wishes to use to build its case against our client is a fact we would rather not have in the case. Often we convince ourselves that a fact is useful to us only because we have already accepted that it will be a part of the case and have therefore rationalized how it might be turned to our advantage. In order to do the exercise of evidence-blocking we must not assume that any of the facts we have gathered thus far are admissible or inadmissible. We must look at how the case would look both with and without each fact and then decide if the fact is harmful or helpful. For those facts that we deem harmful we must consider how we can keep them out of the case. For every fact that we deem helpful we must consider how we can fend off any prosecution challenges to that piece of evidence. It may be that we ultimately conclude that there are harmful facts beyond our control. At that point we may decide how to embrace them by incorporating them into our case theory. However, we are not at that stage yet!

At this point we have considered all potentially important facts in a source-neutral manner. Our next task is to consider which of these facts are potentially harmful and which are potentially helpful⁴¹. For each fact, consider how your case would look if that fact were not available. Unless you are confident that the fact is one you want before the jury, consider all

⁴⁰ Obviously, there are some facts available to us at the outset of the case and many others that we gather as the case progresses. Therefore, the model set forth in this paper is not static. We must go through this exercise every time we learn new information during investigation, through discovery, through our motions practice, during client interviews, or from any other source. Any time we develop new facts in the case we should brainstorm those facts as discussed in this paper, evaluate how that brainstorming session impacts our case theory, and ultimately the story we will tell at trial.

⁴¹ The harmfulness or helpfulness of some facts may depend on the Case theory we ultimately choose. For these facts analyze them as both harmful and helpful facts so you may consider the impact under more than one theory.

possible ways to keep it out of evidence. This requires that we consider all suppression issues, evidentiary issues, and violations of any statute or rule. Consider questions such as:

- a. Was the evidence the product of an illegal search or seizure?
- b. Is the evidence a statement that may be involuntary or the product of a Miranda violation?
- c. For each identification, was it the product of a constitutional violation or is it otherwise unreliable?
- d. Is the evidence relevant?
- e. Is the evidence hearsay?
- f. Is the evidence more prejudicial than probative?
- g. Is there a privilege that pertains to any of the witnesses?
- h. Is there a violation of the discovery statute?
- i. Etc., etc., etc. . .

This is certainly not an exhaustive list but rather a mere sampling of some of the questions we must consider with respect to each piece of evidence we wish to keep out of evidence.

The flip-side of the evidence blocking coin is that we identify any potential problems we may have getting helpful facts admitted. Consider possible objections the state might make to our efforts to admit evidence we like. Think of how you will respond to these objections to maximize your chances of getting your evidence admitted.

Once you have gone through this exercise you will have a much better sense of the facts that may be most harmful to your client and your chances of keeping those facts out of evidence and those that may be most helpful and your chances of getting those facts into evidence. Now that you have considered issues relating to admissibility, you should consider the weight the jury will likely give these facts, and what you can do to effect that determination. This exercise is called why-storming.

3. Questioning the Facts / "Why-storming": identifying areas where the jury might question the quality of the evidence presented and considering how you can impact that calculation

We have now identified all potentially important facts in the case, considered which may be harmful and which may be helpful, and analyzed admissibility issues for each fact. We now have a good sense of the facts with which we will have to work to develop a Case theory. We know the bad facts with which we will be stuck. We know some good facts we will be able to develop in our case. We now get to the point where we are ready to consider the quality of each of these facts. We must now consider the questions the jury may have about the facts. How these questions are answered will determine the weight the jury will give each fact and, therefore, the version of events it will ultimately accept. This is the time to consider the reliability of the source of each fact, seeming contradictions between facts, and questions that may be left unanswered by the facts gathered. This is the exercise we call why-storming.

For this exercise you must cease being an advocate. You must try to place yourself in the shoes of the juror. For this reason it is useful to do this exercise with colleagues who may not share your biases.

Simply think of as many questions as you can about the case given the facts that are available. Why would a police officer say he recovered drugs from your clients pants if that didn't really happen? Why did the complainant in a rape case wait a week before telling anyone she was raped? If there was allegedly a robbery at gunpoint, why wasn't a gun ever recovered?

The number of questions you come up with can be limitless. Try to come up with as many as you can. Chances are the jury will have many of the same questions that you come up with. Your ability to provide answers to these questions, or leave the jury without answers⁴², will determine the outcome of the case.

Think of ways to answer these questions that most help your client or to exploit questions about the state's case that will be unanswerable. By understanding the questions that jurors may have you will have an advantage as you prepare your case for trial.

B. DEVELOPING A CASE THEORY

You have now identified all of the potentially important facts in your case. You have considered which may be helpful and which are potentially the most harmful. You have considered issues of admissibility and have a good sense of your chances for keeping certain evidence out of the case. Finally, you have thought about questions the jury may have about the evidence and how you might address these concerns or use them to your advantage. You are now ready to develop a case theory.

When we say "case theory" we are talking about something different than a one or two word statement of what the defense is. Your case theory is the structure around which the story you will tell be developed. The case theory gives your story shape. The case theory provides the theme, sets out the characters, and provides the emotion necessary to move the jury. The case theory begins with the defense. It then includes your strategy for how each witness and every important piece of evidence will logically lead the jury to agree with the defense. It is an explication of how all of the components of the case fit together to lead the jury to the conclusion you are seeking. The case theory includes three components: a legal component, a factual component, and an emotional component.

There are defenses to various crimes under the law that can generally be described in one or two words. The defense tells us something about the legal rationale as to why a defendant is not guilty. Common examples include: mis-identification (generally connotes something unintentional), fabrication (intentional), alibi (can go along with mis-identification or fabrication), self-defense, consent, entrapment, innocent presence, etc. The defense gives us a very general idea of why we believe the jury should find our client not guilty. It serves as the legal component of the larger case theory. However, it tells us nothing about tactical decisions we will make in order to get there. The case theory is more expansive. It begins with the defense but also includes the strategies you will employ to deal with each witness or piece of evidence in the case. The case theory will answer many of the questions we came up with in the why-storming exercise. This is done by developing the factual and emotional components of the case theory.

We start by considering all possible defenses. Most cases lend themselves to several possible defenses. Be creative! Do not rule any out at this point! Consider the following categories of defenses:

1. The state will not be able to prove all of the elements of the crime as defined by statute. Sometimes keeping the state from proving an element of the crime leads to an outright acquittal (the story accompanying this defense is that a crime was never committed) and other times it might lead to a conviction on a lesser-included-offense (the story accompanying this defense is that while my client did

⁴² Remember that unanswered questions in the case can provide reasons to doubt. Providing the jury with unanswered questions that leave holes in the prosecution's case can be just as valuable as providing answers that you believe to be helpful.

something wrong, it wasn't what the state says happened). An example of the former is a consent defense in a rape case where the state is unable to prove the element that the intercourse was against the will of the complainant. An example of the latter is a defense to a first degree murder charge that the client acted in the heat of passion with adequate provocation. Here we are conceding a manslaughter but attacking the state's effort to prove premeditation and deliberation.

2. The state may prove that a crime was committed but will not be able to prove that my client was the person who committed the crime. This is a mis-identification defense with the eyewitness falsely pointing the finger at your client either because of an innocent mistake or a deliberate fabrication.
3. The state may prove the elements of the offense but my client was justified. These are the justification defenses we all learned in law school (self-defense, defense of others, duress, etc.)
4. My client may have committed the crime but there is a valid excuse. These are the excuses defenses we all learned in law school (insanity, necessity, etc.)
5. My client may have committed the crime but should not be held accountable. This final category is not really a legal defense. It is an appeal to the jury to give your client a pass. This is what is known as jury nullification. You will likely not be able to argue this explicitly and almost certainly will not get a jury instruction for this category. It is a strategy of last resort.

Once you have creatively thought of all possible defenses you must begin to develop a case theory for each. To do this, consider the facts you believe will be part of the case based on your analysis from the Brain-storming section above. Think about how each of these facts might be used to further your defense. Which of these facts can you embrace? Also consider which are most problematic given the particular defense. These will likely be facts you will have to take on. Also consider the questions you believe the jury will have about these facts given this particular defense. Based on the facts that will be part of the case, and the questions you believe will most impact the jury, you must now begin to develop a strategy for dealing with each witness and every piece of evidence in the case. The strategies you choose to deal with each witness and each piece of evidence will become part of a cohesive case theory.

For example, suppose you represent Andy who is alleged to have robbed Bob of \$20.00. The day after the robbery Andy was arrested and held at the jail. The following day Charlie was arrested in an unrelated matter and placed in the same cell with Andy. Charlie now claims Andy confessed to him that he robbed Bob, consistent with the state's theory. Suppose two of the defenses you are considering are: 1) fabrication (no robbery occurred) and 2) mis-identification.

For your fabrication defense you have facts that support the following case theory. Bob gave Andy the \$20.00 Bob's mother gave him for groceries in exchange for cocaine. When Bob's mother found out he didn't buy groceries she was furious. When she confronted Bob, Bob lied and said he was robbed. Bob identified Andy as the perpetrator. Charlie made up the confession in hopes of getting a deal from the prosecutor.

For your mis-identification defense you have facts that support the following case theory. Bob was actually robbed of \$20.00. However, he wrongly picked Andy's photo out of an array. Charlie made up the confession in hopes of getting a deal from the prosecutor.

This is obviously an overly simplified example to demonstrate a point. There will be many more facts filling out each case theory. There will be many questions, some for which you may have answers and others for which you may not. Note that you may have a similar strategy for one witness in different case theories (Charlie) but very different strategies for another (Bob).

You may come up with questions during your why-storming session that will help you choose a defense. One question might be, "how certain was Bob during his identification of Andy?" If you and your investigator get a statement from Bob, in which he says he was not certain at all, this will impact your choice of defense theories and your strategy for dealing with Bob at trial.

You may have facts that support more than one defense. Suppose in the above example you have information from your client that he, in fact, sold Bob \$20.00 worth of cocaine the day before his arrest. Suppose you also have as facts in the case that Bob gave a description of his assailant that didn't come close to matching Andy and that Bob was never certain of his identification in the photo array. The legwork you did while brainstorming the facts will help you decide which of these facts have fewer admissibility problems and which will give the jury less concern. This will help you identify the better defense from which you will develop your case theory.

In addition to the factual component of the defense theory you will have to develop the emotional component. What are the emotional themes that will be required to move the jury to adopt your theory of the case? How do you want the jury to feel viscerally about the characters and important events in your case theory? These emotional themes will also be a critical component of your case theory.

In short, your case theory begins with a defense. It then embraces all of the strategic decisions you make with respect to each piece of evidence in the case. For each possible defense you identify, you must ask yourself what your game plan will be with respect to each witness and every piece of evidence in the case so that these tactical choices best work together to promote the defense theory. You will then have at least one case theory for each defense you have identified⁴³. Your case theory will be a story about all of the evidence and how it leads to the conclusion identified by your defense. Choose the case theory that you believe will have the best chance of success at trial⁴⁴.

C. Creating a Story for an Effective Presentation at Trial

Developing a case theory is akin to writing the script for a play. Once you have the script you need a good director to guide the actors. The director is responsible for determining the most effective way to get the story across to the audience. Similarly, you must fill the shoes of the director before you are ready to perform.

We all know the power of storytelling. The way a story is presented affects the level of interest the audience will sustain and the impact the story will have on its listeners. Word choice, voice inflection, body language, and the passion of the actor all have as much to do with the impact of story as the script itself.

⁴³ You may have more than one strategy for dealing with a given witness or piece of evidence using the same defense. For example, you may have an assault case in which you are considering a self-defense defense. One of the witnesses may be the complainant's girlfriend. She says she saw your client start the fight. One strategy for dealing with her may be to say she is making that up to support her boyfriend. Another may be to try to establish that she didn't see the beginning of the fight and by the time she looked her boyfriend had already thrown a punch. Therefore, you may be considering two case theories under a self-defense defense. You will have to choose one.

⁴⁴ One school of thought is to choose the case theory that allows you to minimize the amount of disputed evidence in the case. For example, if your client is charged with murder, and three witnesses who know your client claim to have seen your client running from the scene with a gun, you may choose to pursue a self-defense defense rather than a mis-identification defense. The self-defense defense allows you to embrace the three witnesses whereas the mis-identification defense would require that you take on those three witnesses.

As you develop a story to effectively convey your case theory think of the characters involved and how you plan to develop each. Consider how the various pieces of evidence fit into your story. Be thoughtful about the emotional themes you need to convey. Most importantly . . . DO NOT THINK LIKE A LAWYER!

You have to relate your story to regular people. Therefore, you must shift from lawyer mode to regular person mode. Don't talk in legalese. Be mindful of how you carry yourself. Figure out the best way to relate to your audience.

As an exercise, consider each character and every important piece of evidence that will play a role in your case. Starting with the first character, think of all of the questions you have come up with that relate to that character. Imagine you are talking to your family over dinner, chatting with friends at a diner, or speaking to a stranger in a bar. Taking each question, one at a time, explain the answer that best fits with your case theory. Do this for every question that relates to that character. When you are finished, go on to the next character. Do this for every character and each important piece of evidence in your case. Focus on your voice, body language, and word choice.

For example, in the above case involving your client Andy, assume you settled on a case theory that embraces the fabrication defense. An important component of that theory is that Bob's mother was angry when Bob returned without any groceries. This gives Bob the motive to make up a story. Therefore, your ability to convey mother's anger is critical to your success in convincing the jury of your case theory. If you were telling a friend about your case theory and she asked you, "why was Bob's mother upset?" You could simply say, "Bob's mother was upset because she gave Bob \$20.00 for groceries and when he came home he had neither the groceries nor the \$20.00." However, that is pretty dull and doesn't stir up the emotion you need the jury to feel if they are to believe that mother's anger caused Bob to make up this lie. Instead consider a story like the following:

Mrs. Davis (Bob's mother) has been on a fixed income since losing her job to downsizing at a large department store. Mrs. Davis scrimps and saves to make sure she takes care of her family. She is a very proud woman and she takes great pride in her ability to hold her family together during this time of crisis. Mrs. Davis raised her four children to be honest and hard working. Trust and a good work ethic are values she holds dearly. This is the Mrs. Davis who gave her son, Bob, \$20.00 to buy groceries for dinner on the evening of June 1st. That \$20.00 was for a special dinner she was going to prepare for her four children. She worked especially hard to save that money, but it was worth it . . . it was her youngest daughter's sixth birthday. Mrs. Davis planned a special dinner. Bob knew how excited his mother was to prepare this special event for his little sister, so when he returned empty-handed, it was no surprise that his mother was furious. He had betrayed her trust. He had failed his loving mother. He had taken food from the mouths of his younger siblings. . . .

Throw in appropriate body language and voice inflection and you begin to paint a picture that explains why Bob might make up a story about being robbed. The jury needs to understand Mrs. Davis' character. They need to feel Bob's disappointment at letting his family down.

Just as in a good novel, a soap-opera, or a movie, the overall work may contain many storylines. Each of the stories within the greater production is well thought out and developed. However, in the best works, all of the storylines are bound together by a unifying theme working towards a common end. So too are great trials.

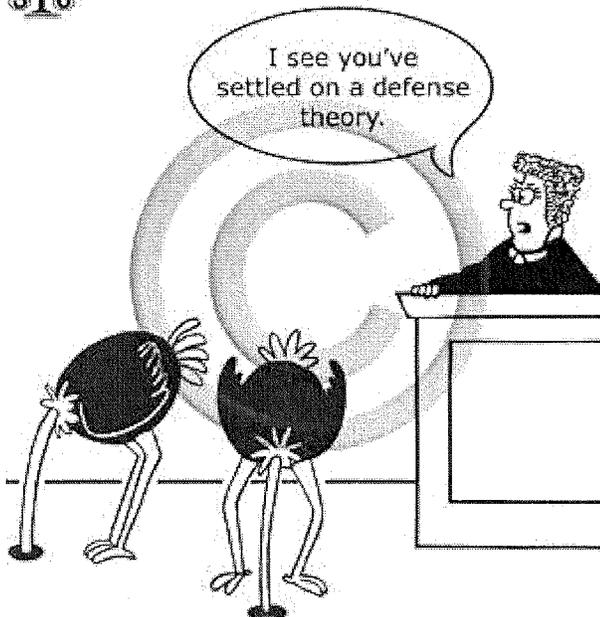
Once you create the stories that answer the questions you've come up with during why-storming and explain how the various pieces of evidence fit into your case theory, you are ready to think about the overall presentation.

D. Conclusion

Effective trial presentation requires a lot of thought and creativity on the front end. You must have a coherent model that will enable you to take many random facts and turn them into a cohesive story for presentation at trial. One such model is outlined in this paper. Below you will find a condensed outline of the steps in this model:

Article Overview: Outline

- I. Brainstorming the facts
 - a. Gathering the Facts / "Fact-gathering"
 - i. Consider ALL potentially important facts
 - ii. Be source-neutral
 - b. Analyzing the Facts / "Evidence-blocking"
 - i. Identify which facts are harmful and which are helpful
 - ii. Consider ways to keep harmful facts out
 - iii. Consider ways to get helpful facts admitted
 - c. Questioning the Facts / "Why-storming"
 - i. Think of questions the jury may have about the facts
 - ii. For questions about harmful facts think of how the prosecution may deal with those questions and what you can do to keep them from being satisfactorily answered
 - iii. For questions about helpful facts think of how you might answer those questions to the jury's satisfaction
- II. Developing a case theory
 - a. Identify all possible defenses (legal component)
 - b. For each defense consider your strategy for each witness and important piece of evidence in the case (factual and emotional components)
 - c. Choose the case theory that most plausible given the facts of your case (see section below – Developing a Theory of the Case)
- III. Creating a story for an effective presentation at trial – for each witness and important piece of evidence, come up with a compelling story that supports your case theory



SUPREME COURT—COUNTY OF ALBANY

FILE NO. [REDACTED]

THE PEOPLE OF THE STATE OF NEW YORK

September 17, [REDACTED]

-against-

AUGUST TERM

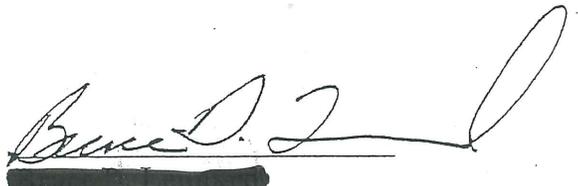
VICTOR [REDACTED]

Defendant,

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIRST COUNT

Attempted Murder in the Second Degree, in violation of Section 110.00 of the Penal Law of the State of New York, as defined in Section 125.25(1) of the Penal Law, a Class B Felony, in that the defendant, on or about the 23rd day of August, [REDACTED], at approximately 11:35 A.M., at or near [REDACTED] Elk Street, in the City of Albany, County of Albany, State of New York, did, with intent to commit a crime, engage in conduct which tended to effect the commission of such crime, to wit: at the aforesaid date, time and place, the defendant did attempt to commit the crime of Murder in the Second Degree when, with intent to cause the death of J. [REDACTED] A. [REDACTED], he stabbed J. [REDACTED] A. [REDACTED] in the victim's left side three times with a knife, breaking one of the victim's ribs.



[REDACTED]
Assistant District Attorney
Albany County

SUPREME COURT—COUNTY OF ALBANY

FILE NO. [REDACTED]

THE PEOPLE OF THE STATE OF NEW YORK

September 17, [REDACTED]

-against-

AUGUST TERM

VICTOR [REDACTED]

Defendant,

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SECOND COUNT

Assault in the Second Degree, in violation of Section 120.05(2) of the Penal Law of the State of New York, a Class D Felony, in that, on or about the 23rd day of August, [REDACTED] at approximately 11:35 A.M., at or near [REDACTED] Elk Street, in the City of Albany, County of Albany, State of New York, the defendant did, with intent to cause physical injury to another person, cause such injury to such person by means of a deadly weapon or dangerous instrument, **to wit:** at the aforesaid date, time and place, the defendant did, with intent to cause physical injury to J [REDACTED] A [REDACTED], cause such injury to J [REDACTED] A [REDACTED] by stabbing him in the left side three times with a knife, a dangerous instrument, breaking one of the victim's ribs.

[REDACTED]
Assistant District Attorney
Albany County

SUPREME COURT—COUNTY OF ALBANY

FILE NO. [REDACTED]

THE PEOPLE OF THE STATE OF NEW YORK

September 17, [REDACTED]

-against-

AUGUST TERM

VICTOR [REDACTED]

Defendant,

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

THIRD COUNT

Criminal Possession of a Weapon in the Third Degree, in violation of Section 265.02(1) of the Penal Law of the State of New York, a Class D Felony, in that, on or about the 23rd day of August, [REDACTED], at approximately 11:35 A.M., at or near [REDACTED] Elk Street, in the City of Albany, County of Albany, State of New York, the defendant, having previously been convicted of any crime, did possess any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another, **to wit:** at the aforesaid date, time and place, the defendant, having previously been convicted of Assault in the Third Degree, in violation of Section 120.00 of the Penal Law of the State of New York, did possess a knife, a dangerous instrument, with intent to use the same unlawfully against J [REDACTED] A [REDACTED].

[REDACTED]
Assistant District Attorney
Albany County

1. Agency ALBANY POLICE DEPT.		2. Division/Precinct CSTA		New York State INCIDENT REPORT		3. ORI NY0010100		4. <input checked="" type="checkbox"/> Original <input type="checkbox"/> Supp		5. Case No.		6. Incident No.	
7. Report Day Sat		8. Date 8 23		9. Report Time 13:53		10. Day Sat		11. Date 8 23		12. Time 11:35		13. Day	
16. Incident Type ASSAULT 2ND		17. Business Name		18. Weapon(s) KNIFE/CUTTING INSTRUMENT		A. 11		19. Incident Address (Street No., Street Name, Bldg No., Apt. No.) ELK ST (1FO)		20. City, State, ZIP ALBANY, NEW YORK 12206		21. Location Code 0101	
22. OFF. NO.		LAW		SECTION		SUB		CL		CAT		DEG	
1		PL		12005021		F2				C		ASLT W/INT CAUSE PH INJ W/WEAP	
2												23. No. of Victims 1	
3												24. No. of Suspects 1	

INCIDENT

25. Person Type: CO = Complainant OT = Other PI = Person Interviewed PR = Person Reporting WI = Witness NI = Not Interviewed VI = Victim		26. Victim also complainant Yes	
TYPE/NO		NAME (LAST, FIRST, MIDDLE, TITLE)	
VI 1		A. [REDACTED] J.	
WI 1		CHRISTOPH [REDACTED]	
OT 1		DORIS [REDACTED]	
PI 1		HOGAN DR.	
Date of Birth		STREET-NO., STREET NAME, BLDG-NO, APT. NO., CITY, STATE, ZIP	
[REDACTED]		ELK ST 2ND FL ALBANY NY 12206	
43 NEW SCOTLAND AV ALBANY NY 12208		Telephone No.	

ASSOCIATED PERSONS

27. Date of Birth		28. Age		29. Sex		30. Race		31. Ethnic		32. Handicap		33. Residence Status	
07/03/1976		32		Male		White		Hispanic		No		Resident	

VICTIM

34. Type/No		35. Name (Last, First, Middle)		36. Alias/Nickname/Maiden Name (Last, First, Middle)		37. Apparent Condition	
S 1		VICTOR [REDACTED]				1	

SUSPECT

38. Address (Street No., Street Name, Bldg. No., Apt. No., City, State, ZIP)		39. Phone Number		40. Social Security No.	

SUSPECT

41. Date of Birth		42. Age		43. Sex		44. Race		45. Ethnic		46. Skin		47. Occupation	
11/03/1973		34		Male		White		Hispanic		Medium		0	
48. Height		49. Weight		50. Hair		51. Eyes		52. Glasses		53. Build		54. Employer/School	
				Black						Medium			

SUSPECT

55. Scars/Marks/Tattoos (Describe)		57. Misc (sw: fitted baseball) has (backwards), no shirt, blue jeans	
TAT on chest and body			

MISSING/ARRESTED PERSON

58. Victim or Suspect No.	Property Status	Property Type	Quantity/Measure	Make or Drug Type	Model	Serial No.	Description	Value

PROPERTY

59. Vehicle Status		60. License Plate No		61. State		62. Exp. Yr.		63. Plate Type		64. Value	
										0.00	
65. Veh. Yr.		66. Make		67. Model		68. Style		69. VIN.			
70. Color(s)		71. Towed By:		72. Vehicle Notes							
		To:									

VEHICLE

73. ON THE ABOVE DATE, TIME, AND LOCATION S INTENTIONALLY CAUSED PHYSICAL INJURY TO V BY STABBING V IN THE LEFT SIDE OF V'S CHEST THREE TIMES WITH A KNIFE (A DEADLY WEAPON). SAID ACTIONS OF S DID CAUSE V TO SUFFER SEVERAL LACERATIONS, A BROKEN RIB, BLEEDING, SWELLING, AND CAUSED V SUBSTANTIAL PAIN. V STATES SAID INCIDENT OCCURRED IN FRONT OF ELK ST WHERE V AND WI, V'S BROTHER, WERE PICKING UP W'S CHILDREN. V STATES WI, OT 1, EX-GIRLFRIEND OF WI AND S WERE ARGUING AND DOES NOT KNOW WHY S WOULD ATTACK HIM. V AND OT LEFT THE SCENE OF SAID INCIDENT IN W'S VEHICLE BECAUSE V STATES HE WAS AFRAID THAT HE WOULD BE ATTACKED AGAIN. V THEREFORE FLAGGED DOWN THE UNDERSIGNED OFFICER AT CENTRAL AV AND N LAKE AV TO RECEIVE HELP. AFD RESPONDED. V WAS TRANSPORTED TO ALBANY MEDICAL CENTER VIA MOHAWK AMBULANCE WHERE HE WAS TREATED BY PI. PI STATES V'S INJURIES ARE NOT LIFE THREATENING. SGT PICKEL RESPONDED.	
---	--

NARRATIVE

74. Inquiries (Check all that apply) <input type="checkbox"/> DMV <input type="checkbox"/> Want/Warrant <input type="checkbox"/> Scofflaw <input type="checkbox"/> Crim. History <input type="checkbox"/> Stolen Property <input type="checkbox"/> Other		75. NYS PIN Message No.		76. Complainant Signature	
77. Reporting Officer Signature (Include Rank) SHANE, MARISSA		78. ID No. 2488		79. Supervisor's Signature (Include Rank) PICKEL, JOSEPH	
81. Status 21 INVESTIGATION PENDING		82. Status Date 08 23		83. Notified/TOT	
84. 1 Page of 1 Pages		80. ID No. SGT 1842		84. 1 Page of 1 Pages	

ALBANY POLICE DEPARTMENT

STATE OF NEW YORK)
COUNTY OF ALBANY) S.S.
CITY OF ALBANY)

Incident # [REDACTED]

Date Aug 23RD

Time 12:30 pm

Name [REDACTED] Date of Birth 07/03/1976

Residence [REDACTED]

being duly sworn, deposes and says:

I Am At the Albany Medical Center Hospital
Emergency Room speaking with Detective Martin about
how I was stabbed today while on Elk St. in
Albany. I was with my brother, Chris [REDACTED] we were
going to his BABY's Mother's house on Elk St. to pick up
my nephews so we could go to Grafham Park. we pulled
up to the house and my brother got out and was talking
to his ex-girlfriend, Doris. While they were talking, Doris's
new boyfriend, a Hispanic male about 35 years old
wearing a fitted cap, jeans and an shirt came down
the street and started to yell at my brother. I got out
and told him to stop yelling at my brother. This male then went
back into the house. I walked across the street and was
waiting for my brother on the sidewalk. This male then came
running out of the house, ran past my brother and came up
to me swinging. I saw a knife in his hand and felt

NOTICE: False statements made herein are punishable as a class "A" misdemeanor, pursuant to section 210.45 of the Penal Law of the State of New York.

[Signature]
Witness

[Signature]
Signed

Subscribed and sworn to before me, this

_____ day of _____, 19__

[Signature]
Witness

Statement of [REDACTED], continued. Page 2 of 2

head in my side. This male then ran back inside
 the store house he came out from. This is the same
 house that my brother's girlfriend lives in. I looked
 down and saw that I was bleeding from my
 side. I called 911 and told my brother to drive me to the
 hospital. On the way, we saw a police car and pulled over
 at Central Ave and North Lake. Det. Martin and Det. Olsen showed
 me six pictures. I saw the man who stabbed me was
 picture number 2. Det. Olsen told me his name is
 Victor [REDACTED]. Det. Martin reads this statement out loud to
 me, and I swear it is the truth.

[Signature]
 Witness

[Signature]
 Signed

[Signature]
 Witness

Subscribed and sworn to before me, this _____ day of _____, 19____

Commissioner of Deeds

ALBANY POLICE DEPARTMENT
INVESTIGATION REPORT

OF A

GENERAL INCIDENT
 OTHER (Specify)

CRIME REPORT

APD 6 1/80

1. VICTIM'S NAME (LAST, FIRST, MIDDLE) A [REDACTED], J [REDACTED]	2. ADDRESS (APT. #) [REDACTED]	3. PHONE [REDACTED]	4. INCIDENT NUMBER [REDACTED]
5. FIRM NAME (IF BUSINESS)	6. ADDRESS [REDACTED]	7. PHONE [REDACTED]	8. ORIGINATING UNIT 108

9. DAY-DATE-TIME OF OCCURRENCE 8/23/ SAT 1140	10. DAY-DATE-TIME ORIGINAL REPORT SAT 8/23/ 1140	11. MULTIPLE CLEAR-UP <input type="checkbox"/> YES <input type="checkbox"/> NO
--	---	---

12. OFFENSE/CHARGE FROM ORIGINAL	13. CLASSIFICATION AFTER INVESTIGATION
----------------------------------	--

14. I.D. RESPONDED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	15. DATE-TIME INVESTIGATION ASSIGNED	16. BY
---	--------------------------------------	--------

17. SOLVABILITY FACTORS FOR INVESTIGATION

18. NARRATIVE: DO NOT REPEAT THE RESULTS OF THE PRELIMINARY INVESTIGATION. REPORT ALL ACTIONS TAKEN AND ALL DEVELOPMENTS IN THE CASE SINCE THE LAST REPORT

BLOCK NO.

On 8/23/ @ 1210 hrs. Reporting officer and SGT. Mahoney searched the residence of Doris R. [REDACTED]. Ms. R. [REDACTED] gave written permission to search her residence @ [REDACTED] E/K ST. Her boyfriend, Victor [REDACTED] is a suspect in a stabbing and resides w/ Doris R. [REDACTED] at [REDACTED] address. Ms. R. [REDACTED] stated that Victor [REDACTED] had an argument w/ her ex boyfriend, above VI, earlier this morning. She further stated that Victor [REDACTED] then went to the store to get her cigarettes and she hasn't seen him since, and above VI returned to her residence while Victor [REDACTED] was at the store. No evidence was found at time of search.

19. SOLVABILITY FACTORS	20. INVESTIGATIVE STATUS
ELIMINATED BY INVESTIGATION	CONTINUANCE OF: <input type="checkbox"/> FIELD <input type="checkbox"/> OFFICE
DEVELOPED BY INVESTIGATION	CHANGED TO: <input type="checkbox"/> FIELD <input type="checkbox"/> OFFICE
REMAINING FOR INVESTIGATION	CLOSED: <input type="checkbox"/>

21. FURTHER INVESTIGATION TO BE CONDUCTED BY	22. ESTIMATED HOURS FOR COMPLETION	<input type="checkbox"/> POLICE NO. <input type="checkbox"/> ADDED INFO <input type="checkbox"/> FOLLOW-UP 31 CLASSIFICATION
23. DATE SUBMITTED 8/23/ [REDACTED]	24. REPORTING OFFICERS [REDACTED]	
26. PAGE 1 OF 1	27. SUPERVISOR REVIEWING [REDACTED]	28. COPIES TO

ALBANY POLICE DEPARTMENT CONTINUATION/SUPPLEMENTAL REPORT

- SIR
- DIR
- INVEST. REPORT
- PROPERTY REPORT
- VEHICLE REPORT
- POLICE INFO
- F.O.A.

4. Incident #
08-296957

4a. Class/Review

1. DAY-DATE-TIME OF INCIDENT 2. DATE-TIME OF THIS REPORT
 Sat 08/23/ [redacted] 11:30 Sat 08/23/ [redacted] 14:30

RE: Stabbing @ [redacted] Elk St.
 Victim: A [redacted] J [redacted]

In the course of the investigation of the above-mentioned stabbing incident, this reporting officer interviewed a witness by the name of Christopher [redacted] Dob [redacted] Mr. R [redacted] is the brother of the above named victim and was with his brother at the time of the stabbing. During his interview, Mr. R [redacted] stated that he went to his baby's mothers, Doris R [redacted] to pick up his two children for a visit. He stated that when he rang the doorbell his son, Chris, answered the door and informed him that they were not ready to go. While waiting for his children, Mr. R [redacted] stated that he realized that he forgot to tell his son to bring a bathing suit with him because he was going to take his kid to Grafton Lake. Upon ringing the doorbell a second time, Mr. R [redacted] stated that Doris's current boyfriend; Victor [redacted] became verbally abusive with him. He stated that they exchanged words and then just before Victor went back into the house, his brother yelled to him to not let that man yell at him that way. Mr. R [redacted] continued on that Victor stayed inside the house for about 2 minutes. Suddenly, he stated that Victor came out of the house, ran past him and started to swing at his brother. He stated that they fought for a couple of seconds before he heard his brother yell out that he got stabbed. Upon hearing this, Mr. R [redacted] stated that he ran over to his brother to try to get Victor off of him but as he approached Victor, Victor took off running and went back inside the house. When he checked on his brother, R [redacted] stated that his brother pulled his shirt up and he saw a stab wound to the left side of his abdomen. He continued on saying that they got in the car to go to the hospital but as they were driving his brother started to say how he could not breathe. Mr. R [redacted] stated that he then saw a cop car and stopped it. He stated that he then told the female officer everything that had just happened.

I, then presented Mr. R [redacted] a photo array consisting of six color photos. One photo was of Mr. [redacted] and the other five were of males that matched the physical criteria of Mr. [redacted]. Det. Oisen prepared said photo array. Upon viewing this photo array, Mr. R [redacted] was able to positively identify the male in photo number 6 as the male that he knows as Victor [redacted] as well as the same male that stabbed his brother. Mr. R [redacted] gave a sworn written statement detailing all of the above-mentioned information. By the time of this report, Mr. [redacted] was still outstanding.

Investigation to continue...

5. REPORTING OFFICERS VanAmburgh D181/1915	SHIELD/PIN 	6. TELETYPE SENT No	7. MESSAGE NUMBER	12. INCIDENT # [redacted]
8. SUPERVISOR REVIEWING 		9. <input checked="" type="checkbox"/> APPROVED <input type="checkbox"/> REJECTED		13. DATE/TIME 08/23/[redacted]
10. PAGE 1 OF 1		11. COPIES TO		14. DIVISION CIU - 401
				15. UCR DISPOSITION

ALBANY POLICE DEPARTMENT

STATE OF NEW YORK

COUNTY OF ALBANY

CITY OF ALBANY

}SS

Incident #

Date August 26th

Time Started 0935am

Time Finished 10:25 *(Handwritten)*

I, Victor have been advised of the following rights by Detective Martin
of the Albany Police Department at 0930am am/pm on the 26th day of August 20

- (1) That I have a right to remain silent;
- (2) That anything I say can and will be used against me in a court of Law;
- (3) That I have a right to talk to a lawyer and to have him with me while I am being questioned;
- (4) That if I can not afford a lawyer, one will be appointed to represent me before any questioning, if I want one.

I understand that these are my rights under the law and I understand what they mean. Having these rights in mind, I wish to make the following statement. This statement is of my own free will and I have not been threatened or promised anything and I have not been offered any hope of reward or leniency.

Name Victor Date of Birth 11/03/1973

Residence Elk St., Albany N.Y.

Being duly sworn deposes and says:

I am at the Albany Police Department, talking to Detective Martin about a fight that I got into over the weekend in front of my house. I live at Elk St., on the second floor. I have lived there for about two years, with my girlfriend Doris. I have a child with Doris, Yandell who is almost two years old. Doris has two other children by her ex-husband Chris. Chris comes to my house every now and gain to pick up his kids Christopher and Romeo. On Saturday, Chris came over to pick up his kids, but the kids weren't ready to go. Doris was talking to him from inside this house, telling him to wait from the window. Chris started to ring the bell, so I yelled down for him to wait. Chris said to me "who you talkin to like that". I went downstairs and told him I was talking to him, he said "relax", I told him to "relax". I told him "I am tired of your problems already!" Chris then turned around and left. I went back upstairs and asked Doris if she wanted anything at the store. She told me to get her cigarettes, so I walked up to the store on Quail St. When I came back down Elk St., I saw Chris in front of my house talking to Doris, who was in the window. Chris looked at me and said "There he go right there!" After he said that, I noticed a black car on the opposite side of the street, with its trunk open. I saw a guy by the car, he was about six feet tall with tattoos, heavy set. After Chris said that, they both came at me. The guy I didn't know came at me saying "I got this one for you!" They both came at me and started grabbing me and swinging at me. One of them had a knife and had it in his hand. I took the knife and I put my head down and started swinging the knife to defend myself. I dropped the knife and started running. I ran into my house and ran out the back and went to Clinton Ave. I had my friend bring me to a safe place. Doris told me that the Detectives wanted to talk to me. I wanted to explain what happened, so I came to the Police Station today. I can read and write english and I swear this statement is the truth.

-----END OF STATEMENT-----

[Signature]
Witness

[Signature]
Signed

Subscribed and sworn to before me, this
Day of _____, 20____

_____ less

_____ of _____

Commissioner of Deeds

JOHN R. PROBST INVESTIGATIONS, INC.

Liability Claims
Disability Claims
Compensation Claims
Motor Vehicle Claims
Fire and Arson Claims

352 Loudon Road
Loudonville, New York 12211
(518) 463-2668
Fax (518) 463-8803
page1@prodigy.net

Plant Security
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Pre-Employment Investigations
Criminal and Civil Investigations

Specializing in Insurance Company and Attorney Services

November 11, [REDACTED]

Mathew Alpern, Esq.
Albany County Alternative
Public Defenders Office
112 State Street
Albany, New York 12207

Re: People against Victor [REDACTED]

Dear Mr. Alpern,

As per your request, we opened a file in regard to the above captioned matter. You requested that we interview Doris [REDACTED] regarding the alleged incident of August 23, [REDACTED] near [REDACTED] Elk Street, Albany, New York. You advised that Ms. R [REDACTED] would have the names of possible witnesses to the incident.

DORIS [REDACTED]

We contacted Ms. R [REDACTED] and made arrangements to meet with her at her Elk Street residence on November 1, [REDACTED]. The parents of the defendant were present during that interview. Ms. R [REDACTED] advised that on August 23, [REDACTED], her ex-husband, Chris [REDACTED] rang her doorbell. He was there to pick up the children for the weekend. She sent her young son Romeo, downstairs to tell his father that it would be a few minutes. Doris indicated that she was ironing some clothes for the children to take with them. Romeo returned but had left the front door open. The defendant was in the living room when Chris [REDACTED] again rang the doorbell. She said that he laid his finger on the bell rudely. Victor yelled down to R [REDACTED] that the children were not ready and he would have to wait. R [REDACTED] yelled back to Victor and said, "who the fuck you talking to." Victor then said, "I'm talking to you." Then, Chris [REDACTED] told Victor to relax. The defendant then said, "you relax, this is my house." Doris advised that Chris [REDACTED] was in the hallway during that exchange. She finished ironing the boy's clothes and got them ready to go. Doris advised that she and Victor were going to go to some outdoor activity on that date. Victor advised that he was going to the store and she asked him to get her a pack of cigarettes. Victor left but soon returned and advised that Chris [REDACTED] was gone. It was at that time that the couple decided that they would just bring the boys to their outing. Victor left to go to the store. A short time later, she heard her dog barking and she looked out her

Page 1 of 4

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NOV 12 2008

second floor window and saw Chris [REDACTED] standing in front of her house. His brother, John [REDACTED], whom she knew as "Essense", but now goes by "J [REDACTED] A [REDACTED]", was across the street and at the rear of the car with the trunk open. Chris [REDACTED] yelled up to her and said, "where is your man?" Doris knew that Chris [REDACTED] wanted Victor to come downstairs. Then J [REDACTED] said, "don't worry, I got your back." It was at that time that Doris told Chris [REDACTED], "don't come here to cause trouble or you both can just leave." Then they saw Victor walking down the middle of the road from Quail Street. She heard J [REDACTED] ask Chris [REDACTED], "is that him?" She saw Chris [REDACTED] and J [REDACTED] A [REDACTED] walk toward Victor who was in the middle of the street near [REDACTED] Elk Street. The two men immediately swung at Victor and Doris yelled, "no, no." She left the window at that time and took her boys into a bedroom. The boys were crying and she began to cry, as well. A few minutes later, she came out of the bedroom and everyone was gone. The music was blaring and she never heard or saw Victor come into the house after the incident. She called her mother to come and get the children. The police soon arrived and questioned Doris about the incident and looked around for Victor. The police, according to Doris, were rude to her. She said that they barged into her house and started to look around. She did not want to talk with them until her children were gone. Her mother came and took the children to her house. The police then asked Doris to sign a paper so that they could search further and she complied with their request. She said that the police had a dog with them but they did not bring the dog upstairs. She indicated that she told the police that she did not think Victor could fit in there.

Ms. R [REDACTED] advised that Chris [REDACTED] was supposed to come on Friday at 4pm to pick up the children. She then advised that there was an active order of protection, which stipulated that Chris [REDACTED] pick up the children on Friday afternoon at 4pm at curbside. The order also stipulates that he bring the children back at 4pm on Sunday afternoon and drop them off at curbside. Doris indicated that Chris [REDACTED] picked up and dropped off the children when it suited him and he did not follow the rules. Additionally, she advised that her ex-husband, Chris [REDACTED] is a violent person who frequently beat her while they were together. She said that he has violated the order of protection before but he was never arrested. She advised that the defendant, Victor [REDACTED] is five foot eleven inches tall and weights approximately one hundred and seventy five pounds. She said that her ex-husband, Chris [REDACTED] weights about two hundred pounds and his brother weights about three hundred pounds.

Ms. R [REDACTED] provided us with the names of two neighbors whom apparently witnessed the incident. She advised that Henry who resides at [REDACTED] Elk Street and Miss Ruth who resides at [REDACTED] Elk Street might also be a witness, as well.

HENRY [REDACTED]

On November 1, [REDACTED], we met with Henry [REDACTED] at [REDACTED] Elk Street, Albany, New York. He was very cooperative and he advised that he was a witness. Mr. E [REDACTED] lives directly next door to the defendant's residence. His house is located on the right side of number [REDACTED] Elk Street. He was at home at the time of the incident and initially heard voices. He went to his window but only saw one man, Chris [REDACTED]. He saw that man get into his vehicle and drive off. A short time later, the same vehicle was parked adjacent to [REDACTED] Elk Street. Chris [REDACTED] and another man got out of the car. Mr. E [REDACTED] advised

that Chris [REDACTED] went to [REDACTED] Elk Street and the other man opened the car trunk and stood at the rear of that vehicle. A short time later, he saw Victor [REDACTED] walking down Elk Street from Quail. He saw the two men walk toward Victor making hand motions and talking Spanish to him. The two men separated and one of them got behind Victor [REDACTED] then both men swung at Victor. The attack occurred in the road adjacent to [REDACTED] Elk Street. Mr. E [REDACTED] immediately left his upstairs window and ran downstairs. As he got outside, he saw J [REDACTED] A [REDACTED], who was described by Mr. E [REDACTED] as being a large framed man weighing about three hundred pounds, scoop up an object off the street. He advised that Mr. P [REDACTED] went into his house. He did not see anything to indicate that anyone was injured, he advised. The two men got into their vehicle and left the site.

Mr. E [REDACTED] advised that he would be willing to testify that the two men attacked Victor [REDACTED]. He never saw Victor [REDACTED] with a knife or any sharp object in his hands and never saw Victor [REDACTED] get aggressive toward the other men. He did see the two men attack Victor [REDACTED] and he observed that the bigger man scooped an object from the street, which may have been a knife.

As you requested, we did not obtain a signed statement from Henry E [REDACTED].

RUTH [REDACTED]

We were contacted by Doris [REDACTED] and she provided us with contact number for Ruth [REDACTED] who resides at [REDACTED] Elk Street, Albany, New York. On November 6, [REDACTED], we met with Ruth [REDACTED] at her residence. At that time, Ms. G [REDACTED] advised that she arrived home at the tail end of the incident. She just observed the complainant and Chris [REDACTED] getting into the vehicle and leaving the site. She did not see Victor [REDACTED] at all. Ms. G [REDACTED] indicated that some neighbors were outside including Henry E [REDACTED]. She also indicated Robin [REDACTED], who resides at [REDACTED] Elk Street was outside and may have seen the incident. Ms. G [REDACTED] spoke very highly of the defendant. She said that he is an excellent caregiver to Doris and the children. Additionally, she advised that she has seen Chris [REDACTED] often come to the residence at [REDACTED] Elk Street. Although she did not have very much information regarding Chris [REDACTED], Ms. G [REDACTED] said, "he was always pestering Doris." She advised that Chris [REDACTED] showed up whenever he felt like it and wanted Doris to cater to him.

ROBIN [REDACTED]

While in the neighborhood, we went to [REDACTED] Elk Street and left a note for Robin [REDACTED]. We will continue with our efforts to interview Ms. I [REDACTED] to see if she in fact is a witness.

CONCLUSIONS

We have conducted interviews as you requested but we did not obtain any signed statements.

MURDER SECOND DEGREE
(A-I Felony)
(Intentional Homicide)
PENAL LAW 125.25(1)
(Committed on or after Sept. 1, 1967)

The _____ count is Murder in the Second Degree.

Under our law, a person is guilty of Murder in the Second Degree when, with intent to cause the death of another person, he or she causes the death of such person [*or* of a third person].

The term "intent" used in this definition has its own special meaning in our law. I will now give you the meaning of that term.¹

INTENT means conscious objective or purpose.² Thus, a person acts with intent to cause the death of another when that person's conscious objective or purpose is to cause the death of another.

[NOTE: In a case of "transferred intent," add the following paragraph:

Under our law, it is not required that the person who dies be the same person whose death was intended to be caused.]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), caused the death

¹If causation, "death," or "person" is in issue, see Additional Charges at the end of this article.

²See Penal Law § 15.05(1). If necessary, an expanded definition of "intent" is available in the section on Instructions of General Applicability under Culpable Mental States.

of (specify); and

2. That the defendant did so with the intent to cause the death of (specify).

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Murder in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Murder in the Second Degree as charged in the _____ count.

[NOTE: If either of the affirmative defenses -- Extreme Emotional Disturbance (§ 125.25(1)(a)) or Aiding a Suicide (§ 125.25(1)(b)) -- applies, omit the final two paragraphs of the above charge, and substitute one of the charges at the end of this article.]

**ASSAULT SECOND DEGREE
(D Felony)
(Physical Injury; Intent; Weapon)
PENAL LAW 120.05(2)
(Committed on or after Nov. 1, 1995)¹**

The _____ count is Assault in the Second Degree.

Under our law, a person is guilty of Assault in the Second Degree when, with intent to cause physical injury to another person, he or she causes such injury to that person [or to a third person] by means of a deadly weapon [or a dangerous instrument].

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "physical injury," "intent," and "deadly weapon" [or "dangerous instrument"].

PHYSICAL INJURY means impairment of physical condition or substantial pain.²

INTENT means conscious objective or purpose. Thus, a person acts with intent to cause physical injury to another when that person's conscious objective or purpose is to cause physical injury to another.³

[NOTE: In a case of "transferred intent," add the following paragraph:

Under our law, it is not required that the person who is injured be the same person who was intended to be injured.]

¹ November 1, 1995, was the effective date of an amendment to the definition of "deadly weapon" [Penal Law § 10.00(12)] to add a "metal knuckle knife." Excluding that change, this charge is applicable to crimes committed on or after November 1, 1986.

² Penal Law § 10.00(9); See *People v. Chiddick*, 8 NY3d 445 (2007).

³ See Penal Law § 15.05(1).

DEADLY WEAPON means:

any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.

[or a switchblade knife defined as any knife having a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.]

[or a gravity knife defined as any knife having a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.]

[or a pilum ballistic knife defined as any knife having a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.]

[or a dagger]

[or a billy]

[or a blackjack]

[or metal knuckles]

[or a metal knuckle knife].⁴

[DANGEROUS INSTRUMENT means any instrument, article or substance (including a vehicle) which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury,⁵ that is, serious and protracted disfigurement, protracted impairment of health or protracted loss

⁴ Penal Law § 10.00(12); See Penal Law § 265.00 for the definitions of "switchblade knife," "gravity knife," "pilum ballistic knife."

⁵ Penal Law § 10.00(13).

or impairment of the function of any bodily organ.⁶ Under that definition, death or other serious physical injury need not, in fact, be caused.]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), caused physical injury to (specify) by means of a deadly weapon [or dangerous instrument]; and
2. That the defendant did so with the intent to cause physical injury to (specify).

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Assault in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Assault in the Second Degree as charged in the _____ count.

⁶ Penal Law § 10.00(10).

**JUSTIFICATION:
USE OF DEADLY PHYSICAL FORCE
IN DEFENSE OF A PERSON**

**PENAL LAW 35.15
(Effective Sept. 1, 1980)**

NOTE: This charge should precede the reading of the elements of the charged crime, and then, the final element of the crime charged should read as follows:

*"and, #. That the defendant was not justified."*¹

[With respect to count(s) (*specify*),] [T]he defendant has raised the defense of justification, also known as self defense. The defendant, however, is not required to prove that he was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.

I will now explain our law's definition of the defense of justification as it applies to this case.

Under our law, a person may use deadly physical force upon another individual when, and to the extent that, he/she reasonably believes it to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of [unlawful²] deadly physical force by such individual.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: "deadly physical force" and "reasonably believes."

DEADLY PHYSICAL FORCE means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.³

[Serious physical injury means impairment of a person's physical condition which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.⁴]

The determination of whether a person REASONABLY BELIEVES deadly physical force to be necessary to defend himself/herself [or someone else] from what he/she reasonably believes to be the use or imminent use of deadly physical force by another individual requires the application of a two-part test.⁵ That test applies to this case in the following way:

First, the defendant must have actually believed that (*specify*) was using or was about to use deadly physical force against him/her [or someone else], and that the defendant's own use of deadly physical force was necessary to defend himself/herself from it; and

Second, a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have had those same beliefs.

Thus, under our law of justification, it is not sufficient that the defendant honestly believed in his own mind that he was faced with defending himself/herself [or someone else] against the use or imminent use of deadly physical force. An honest belief, no matter how genuine or sincere, may yet be unreasonable.

To have been justified in the use of deadly physical force, the defendant must have honestly believed that it was necessary to defend himself/herself [or someone else] from what he/she honestly believed to be the use or imminent use of such force by (*specify*), and a "reasonable person" in the defendant's position, knowing what the defendant knew and being in the same circumstances, would have believed that too.

On the question of whether the defendant did reasonably believe that deadly physical force was necessary to defend

himself/herself [or someone else] from what he/she reasonably believed to be the use or imminent use of such force by (*specify*), it does not matter that the defendant was or may have been mistaken in his/her belief; provided that such belief was both honestly held and reasonable.

[Add if there was evidence of a party's reputation for violence:

Now, you have heard testimony that (*specify*) had a reputation for violence and engaged in violent acts. Normally, the law does not permit such testimony. The reason is that every person, regardless of that person's relative worth to the community, has the right to live undisturbed by an unlawful assault. The character of (*specify*) is thus not in issue.

What is in issue, however, is whether the defendant did "reasonably believe" that the deadly physical force he/she used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" to be the use or imminent use of such force by (*specify*).

In assessing that issue, you may consider whether the defendant knew that (*specify*) had a reputation for violence or had engaged in violent acts. If so, you may then consider to what extent, if any, that knowledge contributed to a "reasonable belief" that the deadly physical force the defendant used was necessary to defend himself/herself [or someone else] from what he/she "reasonably believed" was the use or imminent use of such force by (*specify*).⁶

Further, provided the defendant believed (*specify*) had such reputation or engaged in such acts, it does not matter whether that belief was correct.]

Add as applicable:

Notwithstanding the rules I have just explained, the defendant would not be justified in using deadly physical force under the following circumstances:

Select appropriate alternative(s):

(1) The defendant would not be justified if he/she was the initial aggressor;

[Add if applicable:

except, that the defendant's use of deadly physical force would nevertheless be justified if he/she had withdrawn from the encounter and effectively communicated such withdrawal to (*specify*) but (*specify*) persisted in continuing the incident by the use or threatened imminent use of (unlawful⁷) deadly physical force.]

"Initial aggressor" means the person who first attacks or threatens to attack; that is, the first person who uses or threatens the imminent use of offensive physical force. The actual striking of the first blow or inflicting of the first wound, however, does not necessarily determine who was the initial aggressor.

A person who reasonably believes that another is about to use deadly physical force upon him/her need not wait until he/she is struck or wounded. He/she may, in such circumstances, be the first to use deadly physical force, so long as he/she reasonably believed it was about to be used against him/her. He/she is then not considered to be the "initial aggressor," even though he/she strikes the first blow or inflicts the first wound. Arguing, using abusive language, calling a person names, or the like, unaccompanied by physical threats or acts, does not make a person an initial aggressor and does not justify physical force.

[A person cannot be considered the initial aggressor simply because he/she has a reputation for violence or has previously engaged in violent acts.⁸]

(2) The defendant would not be justified if he/she knew that he/she could with complete safety to himself/herself and others avoid the necessity of using deadly physical force by retreating.

[The defendant, however, would not be required to retreat if

the defendant was in his/her dwelling and was not the initial aggressor.⁹

The term, "dwelling," encompasses a house, an apartment or a part of a structure where the defendant lives and where others are ordinarily excluded. (The determination of whether a particular location is part of a defendant's dwelling depends on the extent to which the defendant [and persons actually sharing living quarters with the defendant] exercise(s) exclusive possession and control over the area in question.)¹⁰]

(3) The defendant would not be justified if (*specify's*) conduct was provoked by the defendant himself/herself with intent to cause physical injury to (*specify*).

(4) The defendant would not be justified if the deadly physical force involved was the product of a combat by agreement not specifically authorized by law.

The People are required to prove beyond a reasonable doubt that the defendant was not justified. It is thus an element of [each] count [*specify*] that the defendant was not justified. As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of [all] count(s) [*specify*].¹¹

1. See *People v. McManus*, 67 N.Y.2d 541, 549 (1986); *People v. Higgins*, 188 A.D.2d 839, 840 (3d Dept. 1992).
2. If the lawfulness of this deadly physical force is in issue, then include the word "unlawful," which appears in the statute [Penal Law § 35.15(1)], and explain how it applies to the case.
3. Penal Law § 10.00(11).
4. See Penal Law § 10.00(9)&(10).
5. *People v. Goetz*, 68 N.Y.2d 96 (1986)
6. *People v. Miller*, 39 N.Y.2d 543, 550-51 (1976).
7. If the lawfulness of this deadly physical force is in issue, then include the word "unlawful," which appears in the statute [Penal Law § 35.15(1)(b)], and explain how it applies to the case.
8. While evidence of the defendant's knowledge of the victim's reputation for violence or specific acts of violence is admissible to show that the defendant's fears were reasonable, the evidence is not admissible "to show that the deceased was the aggressor, for if competent for that purpose, similar evidence could be given as to the reputation of the defendant as bearing on the probability that he was the aggressor." *People v. Rodawald*, 177 N.Y. 408, 423 (1904). See Prince, Richardson On Evidence, § 4-409, p172 (11th ed. Farrell).
9. Penal Law § 35.15(2)(a). That statute also provides an exception to the duty to retreat for a police officer or peace officer, or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to Penal Law § 35.30.
10. *People v. Hernandez*, 98 N.Y.2d 175 (2002).
11. *People v. Roberts*, 280 A.D.2d 415 (1st Dept. 2001); *People v. Higgins*, 188 A.D.2d 839, 840-841 (3d Dept. 1992); *People v. Castro*, 131 A.D.2d 771, 773 (2d Dept. 1987).

Communication and Beyond
*What You Need to Know to Avoid the Grievance
Committee*

Patrick J. Marthage, Esq.
Chief Appellate Counsel
Oneida County Public Defender, Criminal Division

2016 Criminal Law Academy
Mohawk Valley Community College
Friday, October 7, 2016

Communication and Beyond:

How to Enhance Your Relationship with Your Client and (Hopefully) Avoid the Grievance Committee**

Patrick J. Marthage, Esq.

Chief Appellate Counsel

Oneida County Public Defender, Criminal Division

*****Prior results do not guarantee future success***

I. NOT COMINGLING CLIENT FUNDS IS EASY. THE REST OFTEN IS NOT.

II. COMMUNICATION IS KEY

A. Respond to all letters (emails) from your client as promptly as possible. They can be as short as one or two sentences.

B. Return all telephone calls as promptly as possible.

C. Set up an office appointment or jail/prison visit with your client as soon as possible.

D. BEFORE telling the client **your** take on his situation, LET THE CLIENT VENT.

E. Listen to the client. S/he often has ideas or insight into his/her situation we haven't considered.

F. Determine at your **first** meeting with your client:

- i. where your client was born,
- ii. whether s/he is a veteran of the US military,
- iii. if client has drug/alcohol/mental health issues
- iv. if client has any issues which are relevant to and may prove helpful in his defense.

III. APPEALS

A. File a Notice of Appeal

Failure to file a Notice of Appeal can be avoided by:

i: Always giving client a **Notice of Right to Appeal Form (22NYCRR 1022.11[a]) (A-1)** and keeping a completed copy for your file

ii: Always filing a Notice of Appeal even if client indicates on Notice of Right to Appeal Form s/he does not wish to appeal, **if a client is:**

- (a)** sentenced to three or more years of incarceration
- (b)** not a U. S citizen or
- (c)** “difficult”

iii: When in doubt, file the Notice of Appeal **(A-2)**

Caution: A Motion to file a Late Notice of Appeal (CPL 460.30) must be made to the appropriate Appellate Division (or County Court if appealing from a local court sentence) and cannot be made after one year and thirty days from date of sentencing.

B. File an Affidavit of Errors When Required

Be sure to comply with the Court of Appeals ruling of June 23, 2016 in *People v. Smith* holding that an **affidavit of errors** (CPL 460.10) is a jurisdictional prerequisite for the taking of an appeal from a local criminal court where there is no court stenographer.

C. Preserve the Record On Appeal

Always preserve the record on appeal by making **specific objections** during trial as well as **specific Trial Order of Dismissal(TOD) Motions** at the conclusion of the People's case (and **again** after the defense rests) focusing on the **elements of the charge** which you believe the prosecution did not prove.

Merely stating to the Court that the People have not made a *prima facie* case and sitting down is not enough!

Although the Appellate Divisions can choose whether or not they wish to decide an unpreserved issue in the interest of justice, they often choose not to.

Even more frightening, the Court of Appeals can **only** determine issues if they are preserved.

D. Make Your Client Aware of the Risks of Appeal

Although trial counsel has no duty to inform his/her client of the risk of appeal (discussing the risks of going to trial are more than enough!), appellate counsel does.

i: What happens after reversal and a new trial ordered?

All counts of the original indictment are restored except those upon which the defendant was acquitted and those dismissed upon appeal or post-judgment order (CPL 470.55[1]).

ii: It's even worse for pleas since upon reversal, the criminal action is restored to its pre-pleading status and all counts of the original indictment are restored except those dismissed upon appeal or post-judgment order **AND** if plea satisfied one or more accusatories then pending in the same court, those charges are restored as well even if the order of reversal dismissed the entire accusatory underlying the judgment reversed. (CPL 470.55[2])

BE CAREFUL WHAT YOU WISH FOR!

Feel free to contact me with questions:

Patrick J. Marthage
Office of the Public Defender-Criminal
321 Main Street
Utica, New York 13501

315-798-5870

pmarthage@ocgov.net

**Oneida County Public Defender
Criminal Division**

NOTICE OF RIGHT TO APPEAL
22 NYCRR 1022.11(a)

1. You have a right to appeal from your conviction.
2. If you want to appeal, a Notice of Appeal must be filed with the County Clerk and served upon the District Attorney within thirty (30) days of the date of sentence.
3. If you want to appeal, check the first box in the form below, sign the form and return it to me, and I will file and serve the Notice of Appeal for you.
4. If you cannot afford to pay for an attorney, you may apply to the Appellate Division, Fourth Department, 50 East Avenue, Suite 200, Rochester, New York 14604, to have an attorney assigned to carry forward your appeal and to have a transcript furnished to your attorney free of charge.
5. I UNDERSTAND THAT, IF I AM NOT A U.S. CITIZEN, MY PLEA OF GUILTY MAY HAVE AN EFFECT UPON MY IMMIGRATION STATUS, INCLUDING A LIKELIHOOD OR CERTAINTY OF DEPORTATION, AND THAT I AM SECURE IN THIS KNOWLEDGE AT THE TIME OF MY GUILTY PLEA.

Attorney: _____

**Oneida County Public Defender
Criminal Division
250 Boehlert Center
321 Main Street
Utica, New York 13501
(315) 798-5870**

To: (Client) _____

Indictment No.: _____

Date of Sentence: _____

Place a check in one of the boxes below, sign and give this form to me or mail it to me at the above address.

Unless you let me know that you want to appeal, I do not have to file and serve the Notice of Appeal.

Remember that the Notice of Appeal must be served and filed within 30 days from the date of sentence.

I want to appeal.

I do not want to appeal.

Signature: _____

Date: _____

I gave this notice to the defendant at the time of sentencing.

Dated: _____

Defense Counsel: _____

State of New York
County of Oneida

County Court

People of the State of New York,

-against-

Testing Test,

Defendant.

NOTICE OF APPEAL

Indictment No.
116-200
CR Number
16-222

PLEASE TAKE NOTICE, that the above-named defendant hereby appeals to the Appellate Division of the Supreme Court, Fourth Judicial Department, from a judgment of the Oneida County Court, County of Oneida, entered on September 28, 2016, convicting the defendant of Grand Larceny in the Fourth Degree, an E class Felony, in violation of Section 155.30, subdivision 1, of the Penal Law of the State of New York, and any other charge of which the defendant was convicted on September 28, 2016, not specifically enumerated herein, and from each and every part thereof, and from each and every intermediate order therein made.

Dated: Utica, New York
October 3, 2016

Yours, Etc.,
Frank J. Nebush, Jr., Esq.
*Oneida County Public Defender-Criminal Division
Attorney for the Defendant
250 Boehlert Center at Union Station
321 Main Street
Utica, New York 13501
Telephone: (315) 798-5870*

TO: Sandra DePerno
Oneida County Clerk

Hon. Scott D. McNamara
Oneida County District Attorney

State of New York
County of Oneida

People of the State of New York,

-against-

Testing Test,

Appellant.

**Affirmation of Personal Service
(Appeal)**

Indictment No. 116-200
CR No. 16-222

State of New York)
County of Oneida) ss.:

I, Patrick J. Marthage, Esq., an attorney duly admitted to practice in the Courts of the State of New York, the attorney for the above-named defendant, affirm, under penalties of perjury and pursuant to Rule 2106 of the Civil Practice Law and Rules, that the following facts are true:

1. I am over the age of eighteen (18) years and I am not a party to this action.
2. On the ____ day of _____, 2016, I personally served upon Hon. Scott D.

McNamara, Esq., Oneida County District Attorney, a copy of the Notice of Appeal in the above-entitled matter, by delivering to and leaving with him, this document at his office at 235 Elizabeth Street, Utica, New York 13501.

Dated: Utica, New York
October 3, 2016

Patrick J. Marthage, Esq.
Chief Appellate Counsel