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Message from the President

Hon. Kathleen B. Hogan, Warren County District Attorney



When the Legislature reconvened for special session, it passed two significant pieces of legislation that have already been signed into law by Governor Paterson.

End of Sentence Loophole for Violent Felons:

The first closes the loophole in Penal Law Section 70.25 that allowed some violent criminals to receive credit for time served on a prior offense. This was highlighted by the case of Stanley Washington.

Washington had a long history of violence, with a prior conviction for beating and sodomizing a young woman. He served 14 years in state prison for that crime and was paroled in 1992. While on parole for that crime, he brutally beat a 39-year-old Rochester woman to death in 1998. The sentencing judge imposed a 25 years to life sentence on Washington, stating that the defendant deserved the maximum sentence. However, because the judge did not specify that the sentence should be consecutive to the previous sentence on which he was paroled, Washington received a credit of 14 years on his new sentence. This legislation eliminates that illogical and unfair loophole that gave murderers benefits that were not intended, and they certainly did not deserve. In addition, the legislation ensures that all inmates are required to serve half of their sentence in order to be considered for medical parole.

DWI with a Child in the Car:

Leandra's Law makes it a felony to drive drunk or impaired by drugs with a child in the car. The law was introduced following the death of 11-year-old Leandra Rosado. Leandra, along with six other children between the ages of 11 and 14, was a passenger in a vehicle driven by a drunk driver that overturned on the Henry Hudson Parkway. The law also mandates the installation of ignition interlock devices in all DWI cases.

District attorneys around the state worked hard to support the passage of this legislation. These new laws will better ensure that justice is done. This is a great win for the people of the State of New York and the victims district attorneys seek to protect.

Spotlight On: Videotaping Interrogations in Broome County



Broome County District Attorney Gerald Mollen has been at the forefront of videotaping interrogations in New York State. The county began taping suspect interviews in 1993, and today, all major felony cases are taped from start to finish.

With over 200,000 residents, and encompassing the city of Binghamton, Broome County is a mid-sized upstate county. Police make between 1,500 and 1,700 felony arrests annually.

As DA Mollen testified before the New York State Bar Association's Task Force on Wrongful Convictions, "In our experience, covert, start-to-finish taping is the best way both to capture the dynamics of the interview process and to effectively present the evidence to triers-of-fact." Interview rooms at every police agency in the county are equipped with cameras that record the entirety of the interview process. Videotaped interrogations are just one tool to ensure the integrity of the interview process and to present an accurate picture of the crime, in the suspect's own words, to the judge and jury. As Broome County's experiences have shown, videotaped interviews can eliminate or abbreviate

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pre-trial hearings and garner high-quality guilty pleas.

Broome County is one of the 29 counties across the state currently videotaping police interrogations or establishing pilot programs to do so. Implementing videotaping of interrogations is a costly proposition that is much more complicated than going to the store and buying a video camera. Beyond the initial cost of the equipment, ongoing funding must be available for transcription, storage, and redaction services. Those counties that are videotaping interrogations have benefited from funding; many more counties are currently seeking funding to begin their own programs.

DAASNY encourages the expanded funding of pilot programs. Targeted resources should be used in the development of best practices so that each jurisdiction can develop a program that suits their unique needs.

Broome County District Attorney's Website:
<http://www.gobroomecounty.com/da/>

Spotlight On: Rockland County District Attorney Thomas Zugibe's Community Prosecution Program



Community prosecution is the interweaving of prosecutors, police, and the community to prevent crime. Rockland County District Attorney Thomas Zugibe implemented Intelligence Led Policing through Community Policing, Community Prosecution, and Community Partnerships (IL3CP) in 2008.

Rockland County is a diverse suburb north of New York City with approximately 300,000 residents.

The foundation of community prosecution in Rockland County is the integration of assistant district attorneys with law enforcement and community residents. Assistants are assigned to specific towns and villages and work out of the local police agency in addition to their work at the DA's office and the courtroom. By attending local community meetings, such as neighborhood watch groups, civic associations, and religious groups, attorneys build relationships with residents and identify concerns. Assistants then work with law enforcement and the community to analyze these problems and formulate solutions that will improve public safety. This intelligence led approach translates to gaining knowledge and developing actionable intelligence in order to police and prosecute smarter.

Community prosecution in Rockland County has led to a number of new initiatives that include:

- **Code 6** – All assistant district attorneys and law enforcement agencies are given a "hot sheet" of the few criminals that cause a disproportionately large amount of crimes. By identifying and highlighting these problem offenders, upon repeat offense they will be given the sentences they deserve.
- **ComPros Sessions** – Rockland has been divided into four quadrants. Every Thursday DA Zugibe meets with senior assistants, directors of the Rockland County Intelligence Center and the Rockland County Narcotics Task Force, the assigned prosecutors, and area law enforcement agencies to identify and problem-solve concerns using gathered intelligence.
- **High School Intervention and Diversion Program** – Sixteen to twenty-one-year-old high school students who are charged with non-violent, low-level crimes are court-ordered to meet with a school administrator and a parent. The student must follow all requirements including school attendance and grades and the charges will be adjourned in contemplation of dismissal.
- **Special Victims Center** – The Spirit of Rockland Special Victims Center was developed by DA Zugibe with the support of local unions, businesses, agencies, and residents. It will house a multidisciplinary team from county departments, advocacy agencies, and law enforcement to respond to the needs of special victims.

Rockland County District Attorney's Website: <http://rocklandcountyda.com/>

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Introducing Michael DeMartino, Special Assistant to the DAASNY President



DAASNY welcomes Mike DeMartino as the Special Assistant to the President. He will be assisting President Kathleen Hogan in coordinating and expanding DAASNY's efforts.

A native of Albany, he is a graduate of the University of Rochester (1995) and Albany Law School (2001). Prior to accepting this position, he was Senior Counsel to Senator Charles J. Fuschillo, Jr. for two years and Counsel to the Appointments Secretary to Governor George E. Pataki for nearly three years.

He also worked for the New York State Assembly and the New York State United Teachers. In addition to his public service career, he is a Lieutenant in the United States Navy Reserve and very active in many civic organizations. He currently lives in Colonie, New York with his wife Wendy and four children.

His primary duties at DAASNY are to assist President Hogan in the day-to-day operations of DAASNY and act as a conduit for gathering and disseminating useful information. Moreover, he is tasked with supporting the association's various committees in coordinating their efforts.

Mike may be reached at the DAASNY Office by phone at (518) 447-2496, fax (518) 477-2495 or by e-mail at: michael.demartino@daasny.org.

Recent Court Decisions of Note

[Morrie Kleinbart, Appeals Bureau Chief, Richmond County District Attorney's Office](#)

[People v. Michael J. Brown](#) – Following a 1993 rape, a rape kit was prepared at the hospital at which the victim was treated and sent to the Office of the Chief Medical Examiner (OCME). Because of a backlog, DNA testing was not performed until 2002, after funding became available, by a fully accredited subcontracting laboratory. The laboratory isolated a male DNA specimen and produced a DNA report containing machine generated raw data, graphs, and charts of the specimen's DNA characteristics.

Ultimately, this DNA profile was matched to the defendant, who was charged with and tried for the rape. At trial, over defendant's objection on Confrontation Clause and business record foundation grounds, the DNA report resulting from the rape kit testing was introduced through a criminalist at the Medical Examiner's Office, and not through anyone from the subcontractor. The Court of Appeals affirmed. In brief, the Court ruled that the DNA raw data was not testimonial because it consisted of merely machine-generated graphs, charts and numerical data. There were no conclusions, interpretations or comparisons apparent in the report since the technicians' use of the typing machine would not have entailed any such subjective analysis. The Court also rejected the foundation argument pointing to *People v Cratsley*, 86 N.Y.2d 81, 89 (1995), which held that, under limited circumstances, a witness who is familiar with the practices of a company that produced the records at issue, and who generally relies upon such records, may have the requisite knowledge to meet the CPLR requirements for the admission of a business record, provided that the witness can also attest that (1) the record was made in the regular course of business; (2) it was the regular course of business to make such record; and (3) the record was made contemporaneously with the relevant event, thereby assuring its reliability.

[Warney v. Monroe County](#) – After a state motion court denied an application for DNA testing under CPL Section 440.30(1-a) and during the pendency of an application for leave to appeal from that order as well as a federal habeas corpus petition, defendant District Attorney submitted the material at issue for DNA testing. The test confirmed what had always been understood – that none of the blood evidence recovered at the scene of the murder – was plaintiff's. That DNA profile was compared to the CODIS index which identified its source, an individual in prison for another murder. Fingerprints found at the murder scene turned out to belong to this individual as well. During an interview with the source of the DNA, that person admitted having committed the murder and exculpated the plaintiff. Within days, defendant District Attorney moved for vacatur of plaintiff's conviction.

Plaintiff alleged that during the course of this re-examination of his guilt, 72

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days elapsed from the date defendant prosecutors learned of the result of the DNA testing and the date plaintiff's counsel was informed. The failure to make timely disclosure was alleged to have violated plaintiff's right to due process. Defendant District Attorneys moved to dismiss all counts against them on grounds of absolute prosecutorial immunity. This was denied on the theory that defendant District Attorneys were engaged in investigation, not advocacy, and qualified immunity was denied them as well.

The Second Circuit reversed. The court held that absolute immunity shielded work performed during a postconviction collateral attack, at least insofar as the challenged actions were part of the prosecutor's role as an advocate for the state. The prosecutors' actions were integral to the overarching advocacy function of dealing with posttrial initiatives challenging an underlying criminal conviction. The disclosure decision was advocacy notwithstanding that the evidence would have likely terminated the ongoing postconviction proceedings in favor of plaintiff.

Of particular significance is the court's recognition that the advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. Note, however, that the court left open whether absolute immunity extends to prosecutorial conduct regarding DNA evidence, occurring after a prisoner's appeals and collateral attacks have been exhausted. I would observe that the court did note that the availability of absolute immunity in this context will likely encourage prosecutors in the future to seek exculpatory information post-trial, suggesting that it might reach the same conclusion even if no post-judgment proceeding were actually pending.
