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# CRIMINAL LAW UPDATE

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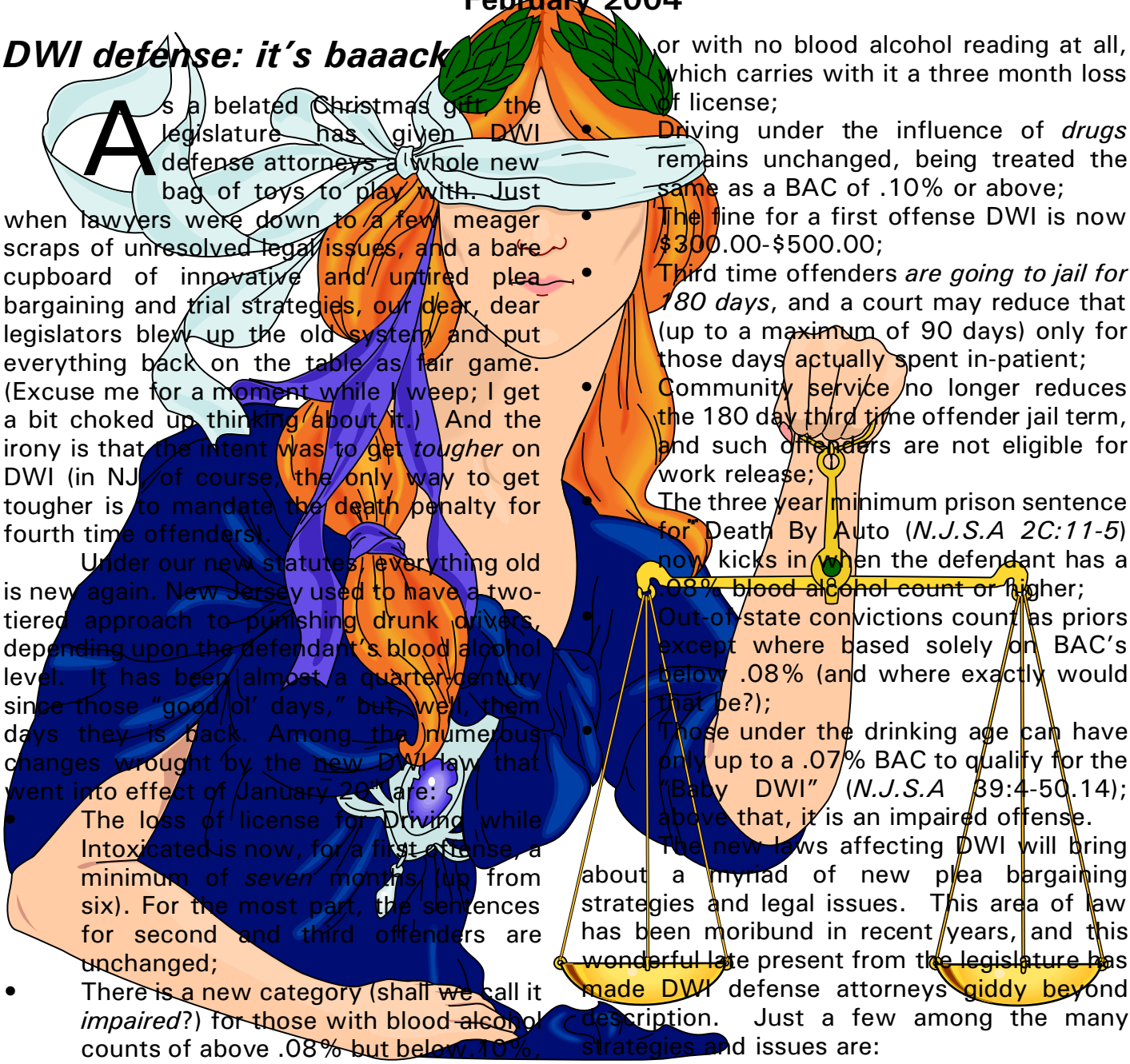
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## DWI defense: it's baaack



**A**s a belated Christmas gift, the legislature has given DWI defense attorneys a whole new bag of toys to play with. Just when lawyers were down to a few meager scraps of unresolved legal issues, and a bare cupboard of innovative and untired plea bargaining and trial strategies, our dear, dear legislators blew up the old system and put everything back on the table as fair game. (Excuse me for a moment while I weep; I get a bit choked up thinking about it.) And the irony is that the intent was to get *tougher* on DWI (in NJ, of course, the only way to get tougher is to mandate the death penalty for fourth time offenders).

Under our new statutes, everything old is new again. New Jersey used to have a two-tiered approach to punishing drunk drivers, depending upon the defendant's blood alcohol level. It has been almost a quarter-century since those "good ol' days," but, well, them days they is back. Among the numerous changes wrought by the new DWI law that went into effect of January 20<sup>th</sup> are:

- The loss of license for Driving while Intoxicated is now, for a first offense, a minimum of *seven months* (up from six). For the most part, the sentences for second and third offenders are unchanged;
- There is a new category (shall we call it *impaired?*) for those with blood alcohol counts of above .08% but below .10%,

or with no blood alcohol reading at all, which carries with it a three month loss of license;

- Driving under the influence of *drugs* remains unchanged, being treated the same as a BAC of .10% or above;

- The fine for a first offense DWI is now \$300.00-\$500.00;

- Third time offenders *are going to jail for 180 days*, and a court may reduce that (up to a maximum of 90 days) only for those days actually spent in-patient;

- Community service no longer reduces the 180 day third time offender jail term, and such offenders are not eligible for work release;

- The three year minimum prison sentence for Death By Auto (*N.J.S.A 2C:11-5*) now kicks in when the defendant has a .08% blood alcohol count or higher;

- Out-of-state convictions count as priors except where based solely on BAC's below .08% (and where exactly would that be?);

- Those under the drinking age can have only up to a .07% BAC to qualify for the "Baby DWI" (*N.J.S.A 39:4-50.14*); above that, it is an impaired offense.

The new laws affecting DWI will bring about a myriad of new plea bargaining strategies and legal issues. This area of law has been moribund in recent years, and this wonderful late present from the legislature has made DWI defense attorneys giddy beyond description. Just a few among the many strategies and issues are:

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- A first-time defendant who knocks out the breathalyzer at trial now faces only a three month loss of license, rather than seven months;
- A defendant who refuses, because his blood alcohol count cannot be determined conclusively to be .10 or higher, actually gains an advantage by pleading to the DWI, if the prosecutor offers to drop the refusal, a somewhat anomalous situation. Prosecutors may now require what defendants used to beg for: pleading guilty to the Refusal, while dropping the DWI (only if done in accordance with the plea bargaining standards for DWI cases); or worse, pleading to *both*.
- Will a defendant with a prior out-of-state DWI conviction of .09% be allowed to argue that it cannot be used to enhance a new DWI conviction since it was incurred at a time when out-of-state convictions with BAC's below .10% were excluded for such purposes;
- Is extrapolation back as a defense, given that *Tischio* and *Lentini* dealt with persons who were above .10% ?
- What if the defendant has a .08% BAC, and the urine test shows the presence of a CDS, either Marijuana, or Percodan? Will he/she be subject to a seven month loss of license, because his driving is impaired *in part* due to CDS, or a three month loss of license because it cannot be shown that it was a CDS alone which brought about the intoxicated state?
- Does the prohibition against work release for third time offenders mean that SLAP, or electronic bracelet programs, are no longer permitted?

All these issues, requiring attorneys to study the statute, and to explore the inter-relationship of the statute with case law and the Constitution, means attorneys will once again be *lawyering*, rather than merely being the cannon fodder that the current DWI case law and statutes make them feel.

## ***new municipal court judges***

1. Hon. George Wolfe- North Arlington;
2. Hon. Gregory Padovano- South Hackensack;
3. Hon. Bruce Safro- River Edge;
4. Hon. Nicholas Nasarenko- Saddle Brook;
5. Hon. Anthony Gallina- Elmwood Park;
6. Hon. Robert Tessaro- add'l judge, Fort Lee.

## ***miscellaneous***

**A**bbreviations in criminal law abound: DNA, CDS, LSD, NERA, PTI and the like. Ideally they should be catchy collections of letters that suggest a meaning such as, for instance, S.O.B.E.R. (*Slow On the Bottle, Enjoy the Road*). Remember the embarrassment years ago of the initial evaluation form for Megan's Law offenders, which was entitled the Sexual Offender Registrant Assessment Scale, or "SORAS?" Ouch. Or L.U.S.T. (Leaking Underground Storage Tank)? But, really, given the truly laudable goal of raising money for bullet proof vests for police officers, couldn't the state have come up with a better acronym for the program (for which there will be a one dollar assessment on all motor vehicle violations occurring after December 21, 2003) than the **Body Armor Replacement Fund**?

### **Criminal Motion Seminar**

**Tuesday, February 3<sup>rd</sup>, 4:30 pm**  
**Room 403, BC Justice Center**

**Lecturer Judge John A. Conte**  
*Receive his 400-page  
 seminar material handbook!*

\$40 BCBA members, \$50 non-members,  
 \$10 extra at door  
 Call 201-488-0032

**O**ne trial strategy: *Get there the fastest with the mostest and keep the scare in 'em.* Lt. Gen. Nathan Bedford Forrest, C.S.A.

