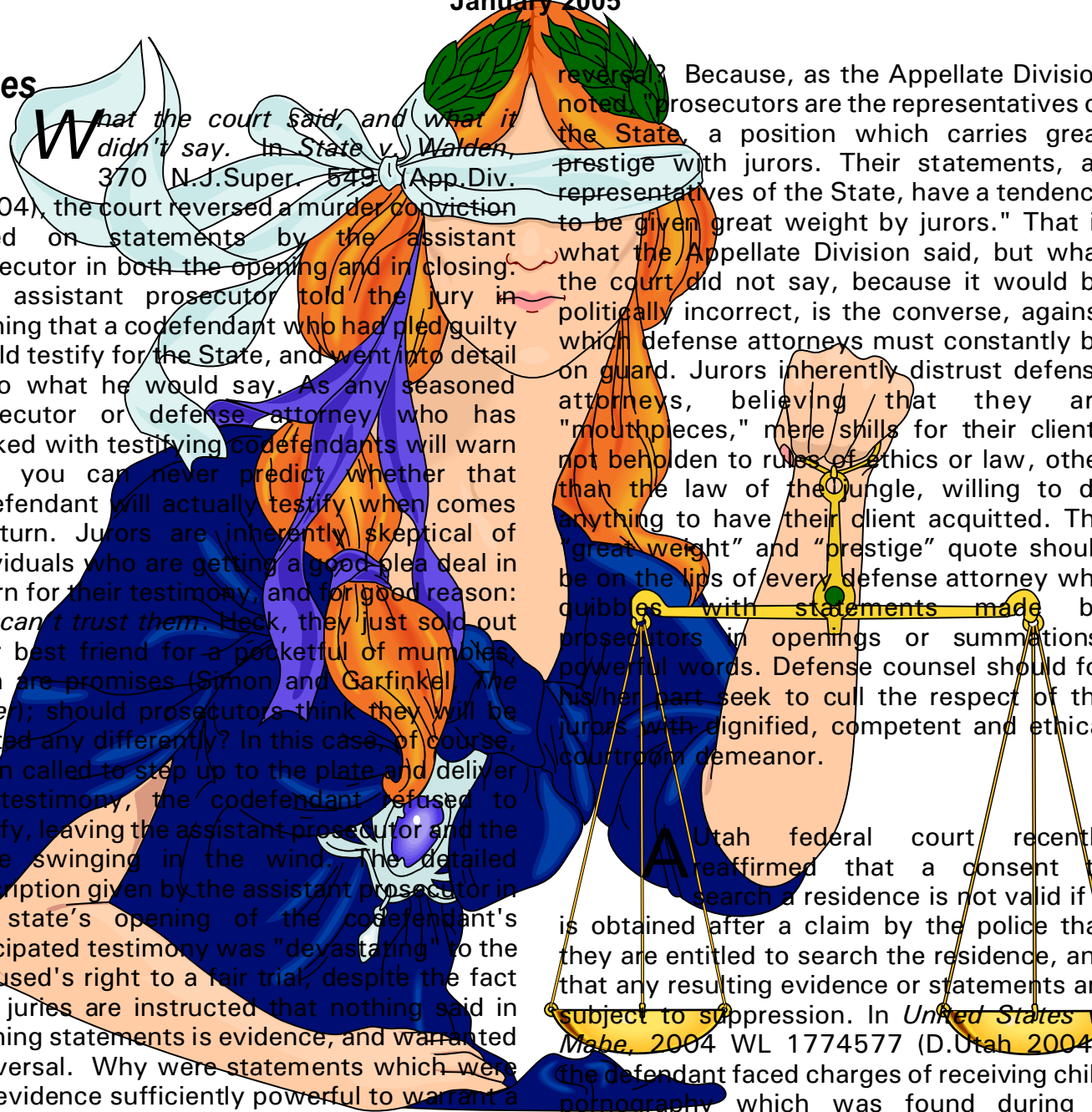

CRIMINAL LAW UPDATE

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cases



What the court said, and what it didn't say. In *State v. Walden*, 370 N.J.Super. 549 (App.Div. 7/6/04), the court reversed a murder conviction based on statements by the assistant prosecutor in both the opening and in closing. The assistant prosecutor told the jury in opening that a codefendant who had pled guilty would testify for the State, and went into detail as to what he would say. As any seasoned prosecutor or defense attorney who has worked with testifying codefendants will warn you, you can never predict whether that codefendant will actually testify when comes his turn. Jurors are inherently skeptical of individuals who are getting a good plea deal in return for their testimony, and for good reason: *you can't trust them*. Heck, they just sold out their best friend for a pocketful of mumbles, such as promises (Simon and Garfunkel *The Boxer*); should prosecutors think they will be treated any differently? In this case, of course, when called to step up to the plate and deliver his testimony, the codefendant refused to testify, leaving the assistant prosecutor and the State swinging in the wind. The detailed description given by the assistant prosecutor in the state's opening of the codefendant's anticipated testimony was "devastating" to the Accused's right to a fair trial, despite the fact that juries are instructed that nothing said in opening statements is evidence, and warranted a reversal. Why were statements which were not evidence sufficiently powerful to warrant a

reversal? Because, as the Appellate Division noted, prosecutors are the representatives of the State, a position which carries great prestige with jurors. Their statements, as representatives of the State, have a tendency to be given great weight by jurors." That is what the Appellate Division said, but what the court did not say, because it would be politically incorrect, is the converse, against which defense attorneys must constantly be on guard. Jurors inherently distrust defense attorneys, believing that they are "mouthpieces," mere shells for their clients not beholden to rules of ethics or law, other than the law of the jungle, willing to do anything to have their client acquitted. The "great weight" and "prestige" quote should be on the lips of every defense attorney who quibbles with statements made by prosecutors in openings or summations; powerful words. Defense counsel should for his/her part seek to cull the respect of the jurors with dignified, competent and ethical courtroom demeanor.

A Utah federal court recently reaffirmed that a consent to search a residence is not valid if it is obtained after a claim by the police that they are entitled to search the residence, and that any resulting evidence or statements are subject to suppression. In *United States v. Mabe*, 2004 WL 1774577 (D.Utah 2004), the defendant faced charges of receiving child pornography which was found during a

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search of the defendant's apartment. Although the defendant had executed a written form giving the agents his consent to the search, he did so only after the agents falsely represented that they had a warrant and stated that they would search pursuant to the warrant if the defendant did not cooperate. What were they thinking??? Reaffirming the principles established in *Bumper v. North Carolina*, 391 U.S. 543 (1968), the district court held that the agents' conduct was the equivalent of a claim of a right to search the defendant's apartment and the kind of coercion that vitiated the effect of the consent. The court said "nyet" to the arguments that a "totality of the circumstances" test required upholding the consent and that the fact that the agents *did have* probable cause to search the apartment made *Bumper* inapplicable. The court suppressed not only the physical evidence seized from the apartment but also statements made by the defendant at the apartment during the search because those statements were sufficiently connected to the illegal search to be considered a product of that search, but admitted statements made later the same day by the defendant at FBI offices because they were sufficiently attenuated by intervening circumstances, including the giving of Miranda warnings.

miscellaneous, but interesting

The Advisory Committee on Professional Conduct has released Opinion 695. regarding the duty of confidentiality a New Jersey attorney owes to a prospective client. One year ago, the Supreme Court adopted RPC 1.18 providing generally that a lawyer who has had discussions with a prospective client may not reveal or use information acquired during the discussions, even when no client-lawyer relationship ensues. The duty to protect the confidentiality of communications from a prospective client is now considered equal to the duty to protect the communication from a client. This duty precludes even the disclosure of the identity of the person seeking advice and the fact that they contacted an attorney.

In an article entitled *Falling on Deaf Ears* from Legal Affairs Magazine (http://www.legalaffairs.org/issues/November-December-2003/story_solan_nov_dec03.html) by Lawrence M. Solan and Peter M. Tiersma, a University of Illinois study is discussed. In that study, students listened to a person reading a 56-word passage from behind a screen. The next day, when they were asked whether they could pick the reader out of a group of five voices, they did so accurately 83% of the time. Three weeks later, they were only able to do so with 51% accuracy. Five months later it was 13% (when *mere chance* would have suggested 20%). The next time in a trial the victim is asked whether he/she recognizes the voice of the accused, be afraid, *be very afraid*.

When New Jersey was considering revising its criminal laws in the early 1970's, which ultimately resulted in Title 2C being proposed and adopted, a Commission was created to issue a report containing recommendations for the new proposed criminal code. The Commission created commentary as to the changes, and the reasons underlying the suggested changes. Joe Monaghan pointed out this rather interesting comment with respect to the offense of Patronizing a Prostitute (*N.J.S.A. 2C:34-1*): *Patronizing Prostitutes: The individual who patronizes a prostitute is rarely punished in practice although he may be engaging in criminal activity under a variety of laws. Imposition of severe penalties is out of the question, since prosecutors, judges and juries would be likely to regard extramarital intercourse for males as a necessary evil or even as socially beneficial. Accordingly, [this statute] classifies the offense as a Petty Disorderly Persons Offense. Not just understandable or acceptable, but "socially beneficial."* Hmm. So we classify as quasi-criminal conduct that is "socially beneficial?" What's next? Convict Little League coaches? Go after those do-gooders at those damn soup kitchens? *Even the IRS* ran a (legal) brothel in Nevada while collecting overdue back taxes. Interesting.

