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# CRIMINAL LAW UPDATE

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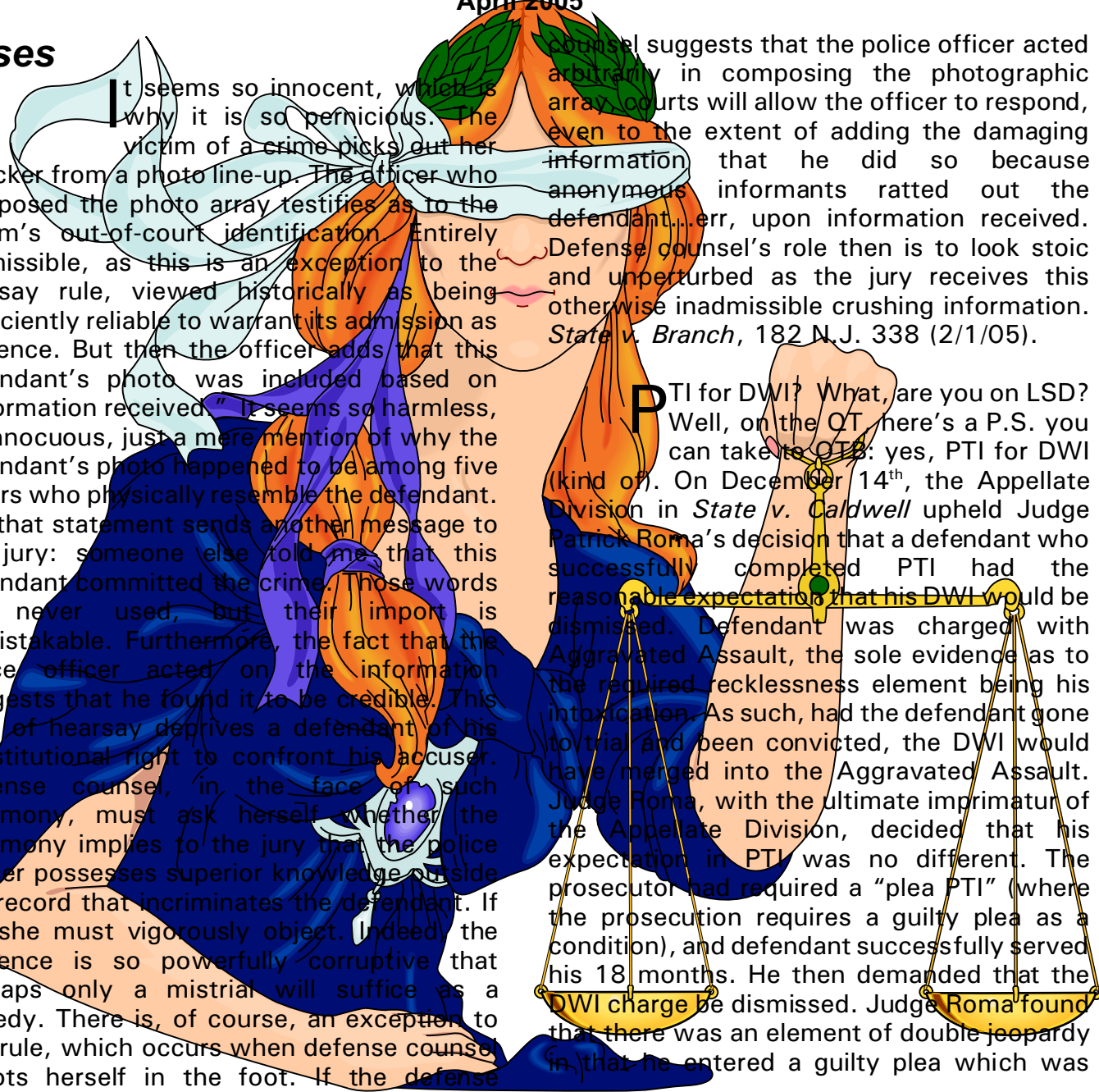
EDITED AND AUTHORED BY JOSEPH P. REM, JR.

ALL COMMENTS AND SUBMISSIONS, 201-488-1234; FAX 487-8030; E-MAIL JREM@REMZELLER.COM

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## cases

A stylized illustration of a woman with a crown of green and orange leaves. She has long, flowing hair in shades of orange and red. She is wearing a blue dress and holding a golden scale of justice. The background is a mix of blue and white, suggesting a sky or a light effect.

It seems so innocent, which is why it is so pernicious. The victim of a crime picks out her attacker from a photo line-up. The officer who composed the photo array testifies as to the victim's out-of-court identification. Entirely permissible, as this is an exception to the hearsay rule, viewed historically as being sufficiently reliable to warrant its admission as evidence. But then the officer adds that this defendant's photo was included based on "information received." It seems so harmless, so innocuous, just a mere mention of why the defendant's photo happened to be among five others who physically resemble the defendant. But that statement sends another message to the jury: someone else told me that this defendant committed the crime. Those words are never used, but their import is unmistakable. Furthermore, the fact that the police officer acted on the information suggests that he found it to be credible. This type of hearsay deprives a defendant of his constitutional right to confront his accuser. Defense counsel, in the face of such testimony, must ask herself whether the testimony implies to the jury that the police officer possesses superior knowledge outside the record that incriminates the defendant. If so, she must vigorously object. Indeed, the evidence is so powerfully corruptive that perhaps only a mistrial will suffice as a remedy. There is, of course, an exception to this rule, which occurs when defense counsel shoots herself in the foot. If the defense

counsel suggests that the police officer acted arbitrarily in composing the photographic array, courts will allow the officer to respond, even to the extent of adding the damaging information that he did so because anonymous informants ratted out the defendant...err, upon information received. Defense counsel's role then is to look stoic and unperturbed as the jury receives this otherwise inadmissible crushing information. *State v. Branch*, 182 N.J. 338 (2/1/05).

**P**TI for DWI? What are you on LSD? Well, on the QT, here's a P.S. you can take to the QT: yes, PTI for DWI (kind of). On December 14<sup>th</sup>, the Appellate Division in *State v. Caldwell* upheld Judge Patrick Roma's decision that a defendant who successfully completed PTI had the reasonable expectation that his DWI would be dismissed. Defendant was charged with Aggravated Assault, the sole evidence as to the required recklessness element being his intoxication. As such, had the defendant gone to trial and been convicted, the DWI would have merged into the Aggravated Assault. Judge Roma, with the ultimate imprimatur of the Appellate Division, decided that his expectation in PTI was no different. The prosecutor had required a "plea PTI" (where the prosecution requires a guilty plea as a condition), and defendant successfully served his 18 months. He then demanded that the DWI charge be dismissed. Judge Roma found that there was an element of double jeopardy in that he entered a guilty plea which was

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## A Publication of the Bergen County Bar Association

*The comments contained in this publication are not necessarily those of the Bergen County Bar Association; if you disagree with them, they are not even necessarily those of the author.*

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accepted, and then served a probation-like term (his 18 month period of PTI supervision). The state can, in the future, avoid such a result by making it clear in the plea that successful completion of the PTI will not result in a dismissal of the DWI.

### ***getting in: where, how and with what***

**W**elcome to the Bergen County Courthouse! Lawyers will now be able to enter the building through the same entrance enjoyed by judges over the years. It is the entrance on Creek Way (don't ask – it is a portion of the parking lot that extends between the two court buildings but apparently pretends to be a street). Attorneys will be allowed to enter there 7:30 a.m. - 10:00 a.m. with a valid identification issued by the Bergen County Sheriff's Department.

**A**ll attorneys will be required, no matter how recently they obtained their attorney's identification card, to get a new attorney identification card which has been signed by Sheriff Leo McGuire. These cards must be obtained by July 1, 2005. In order to assist attorneys, the Bergen County Bar Association has prevailed upon Sheriff McGuire to automatically reprint all attorney identification cards which are still valid as of that date, and have them brought over to the courthouse and kept in the "bubble", the glass walled office immediately to the left when you come in the Court Street entrance. Attorneys will merely need to turn in their old identification card and receive their already printed new identification card, rather than having to go to Bergen County ID Bureau for a new photo and new processing. This will take a while to accomplish, but notice will be given when the new cards are available. For those attorneys who do not yet have a valid Sheriff's card, or whose card has expired, you may go to the Bergen County ID Bureau (a separate building behind the Bergen County Jail on the river) on Tuesday afternoons to be processed and have their new card issued. Bring identification.

**I**f you are going to visit your client at the Bergen County Jail, do not bring

in a briefcase, do not bring in a cell phone. You may bring in a file or a folder.

**J**ust so you are not embarrassed when you enter the courthouse, note that the sheriff has issued a directive specifically banning, among other items, knitting needles, sword canes, swords, and crossbows. Apparently we will not be seeing much of William Tell, Robin Hood, Yancy Derringer or Martha Stewart in the court house this year. What a shame. Especially Robin Hood.

**H**ow many DNA cases proving that innocent men were found guilty—men on *death row*-- do we have to hear about before we accept the horrible reality that the best system of justice that mankind has yet created allows such horrors? *We now know, in a way almost unthinkable even a decade ago that our system of criminal justice, for all its protections, is sufficiently fallible.* --- Judge Jed S. Rakoff, Federal District Court, Manhattan, April 2002. The constitutional guarantees of our Bill of Rights are not hollow words, not protections that merely allow the guilty to go free. They protect the innocent. Proof beyond a reasonable doubt was not arrived at lightly as a standard. All involved in the criminal justice process must remember that the presumption of innocence is to be jealously guarded, because the obviously guilty defendant is sometimes actually innocent. Can you imagine a greater nightmare than being condemned to jail, or death, or even just public reprobation, for a crime you did not commit? Think *L'affaire Dreyfus*. The aphorism that is better to let 100 guilty men go free than to convict one innocent man may not sit well with the public, but it does with attorneys who have had innocent clients convicted. We all know the fragility of our criminal justice system, but it sometimes requires a timely gentle reminder to remember it on a daily basis.

**T**rial law, too. *In baseball, you don't know nothing.* Lawrence Peter Berra (Yogi).

