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# CRIMINAL LAW UPDATE

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## cases

Scientific methods for corroborating or enhancing witness testimony took it on the chin last month in two Supreme Court decisions. The right of a defendant to corroborate his testimony in a non-jury setting by use of a lie detector test was disallowed in *State v. Domicz, NJ* (9/20/06). "Polygraph schmolygraph" said Justice Albin, normally a strong defender of defendants' rights. Noting that almost all jurisdictions exclude polygraphs, he pointed out that studies fail to show a consensus concerning the reliability of polygraph evidence. The demise of the polygraph in *Domicz* is particularly troubling because it is often the sole method of corroboration that a defendant has in an environment where the state has both the power of the blue uniform and the ability to plan for as many police officer witnesses at the scene as may be helpful to its case. "We are confident that our judges are capable of making credibility decisions in the traditional way..." reads the decision. In point of fact that is simply not so, as many judges frequently note, sometimes from the bench and more often in chambers, that they just have no idea as to who is telling the truth. Couple that with the fact that when a police officer is involved, he enters the courtroom with an almost irrebuttable presumption of credibility. The polygraph is one of very few tools that a defendant can use to level the playing field. In *Domicz* the police painted a picture of a professional and polite conversation with the defendant, who then immediately and dutifully consented to a search of his home, admitting

to a virtual marijuana plantation in his basement, an offense so serious it resulted in a 10-year prison sentence. Domicz, understandably, told a markedly different story of a warrantless, non-consensual search initiated after he was handcuffed and intimidated. The polygraph which he passed with flying colors was his only hope to force a second, realistic look at the evidence. *Fat chance, sucker*. Given that polygraphs are utilized by the state frequently in investigation, the argument by the prosecution to disallow them seems disingenuous and contradictory.

In second case, *State v. Moore*, 188 NJ 182 (8/21/06), Chief Justice Poritz led a nearly unanimous court in ruling that hypnotically refreshed testimony of witnesses is *per se* inadmissible in a criminal trial, but stopped short of applying that same rule to the defendant. In *Moore*, the court traced recent scientific and case law developments in hypnotically refreshed testimony since its landmark decision in *State v. Hurd*, 85 NJ 133, was issued 26 years ago. The Court found that recent studies have not supported the benefits of hypnotically refreshed testimony, and indeed have raised red flags as to the dangers of not just false memories, but an unjustified witness confidence in their original recollections. Such witnesses appear more confident of their testimony than is justified, and that sense of confidence has an impact on juries judging credibility. Even the original expert proponent relied upon in *Hurd* one-quarter century ago has changed his opinion 180° and now finds the dangers to outweigh the potential benefits. Excepted from this rule, however, is the hypnotically

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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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refreshed testimony of the defendant, with our Supreme Court continuing to grant defendants greater protection than the federal constitution or our sister states.

**A**ny DWI, indeed, *any* title 39 offense, involving serious bodily injury (as defined in *NJSA 2C:11-1*) or death (doesn't "serious bodily injury" logically subsume "death?") will have exclusive jurisdiction in the Superior Court until and unless the Superior Court returns jurisdiction to the municipal court. Presumably this way, even if a municipal court accidentally entertains a guilty plea which might otherwise invoke double jeopardy on more serious charges (see *In re Seelig*, 180 NJ 234 (2004)), the plea would be void *ab initio* due to the lack of jurisdiction. *NJSA 2B:12-17.2*.

**E**very criminal defendant must now be advised at sentencing as to his right to appeal, and must sign a form acknowledging receiving that notice. This is required because, oh, defendants never have other inmates urging them to appeal, and they never think of blaming the judge (or their attorney) for their conviction. Much as with guilty plea forms, defense attorneys are required to review the appeal rights' form with their clients, to explain the nature of an appeal, that they have a right to appeal both the conviction and/or sentence, and if indigent that counsel will be appointed to handle the appeal. The attorney must ensure that the defendant understands his appeal rights and both the attorney and client must initial and sign the new form which is found now in every courtroom. This provides a strong motive to win the case: one less form to fill out. *R. 2:4-1(a)* *R. 2:4-4(a)*, *R. 3:21-4(h)*. *State v. Molina*, 187 NJ 531 (7/12/06).

## Criminal Motion Seminar

Thursday November 9<sup>th</sup>

**John A. Conte, JSC, Retired**

4:30 p.m.-6:45 pm.

Judge Moses' Courtroom

Refreshments

*All participants to receive a copy of the Judge's voluminous motion book.*

BCBA Members: \$40

Non-members, door registrants:\$50

*Contact BCBA to reserve:  
201-488-0032*

### **miscellaneous**

**J**udge John A. Conte, *Ret.*, will receive the President's Award, given by Don Bosco Prep School, on October 25, 2006 at the Westmount Country Club in West Paterson. Tickets are \$150.00, and can be purchased by calling 201-327-2049. All funds will be used to enhance the school's programs.

**C**hanges. The Bergen County Prosecutor's Office has announced three new special squad chiefs. Ralph Lilore has been named Chief of the Money Laundering and Insurance Fraud Squad; James W. Donohue is now Chief of the Special Investigation Squad; Liliana Silebi, has been named Chief of the Child Abuse and Sex Crimes Unit; and Danielle R. Grootenboer is now Chief of the Narcotics Squad. Joining the legal staff is Yomara Castro, A.P., who is assigned to the Appellate Section.

**T**he Associated Press reported on September 22<sup>nd</sup> that NBA star Gilbert Arenas, charged with resisting arrest in Miami, would have his charges dismissed in return for a \$250 payment to the police department's Assistance Trust Fund. The fee schedule for rapes, robberies and murders was not reported.

**T**he reason we all work so hard in representing our innocent clients?

Because our system, the greatest and fairest legal system in history, is fallible. It relies on human judgment, and is plagued by human imperfections. While the system sets free far more guilty people than it convicts innocent ones, those rare failures haunt us, drive us and motivate us. Clients often remark that since they are innocent, they have nothing to fear. Not so. *The dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, by which all experience refutes.* John Stuart Mill. Translation: *that truth will always trump lies, that right will prevail over wrong, is just one of those comfortable fallacies that people mouth, but which our life experiences show to be false.* And hence we labor mightily on behalf of our client, fearful of the consequences to both our client and justice herself if we do not.

**P**olice are often the subject of baseless allegations by people who simply resent getting caught. But it can also be rightfully asked, *“Who will protect the public when the police violate the law?”* (William) Ramsey Clark, former U.S. Attorney General.