

# BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to the third edition of *Blackstone's Criminal Practice Bulletin*. The Bulletin is a quarterly newsletter designed to alert practitioners to key developments in criminal law and sentencing, and to place these changes in the context of the main work.

We will publish further bulletins in July and October 2006, and these will be available free of charge to registered users on the *Blackstone's Criminal Practice* website at [www.oup.co.uk/law/practitioner/cws/](http://www.oup.co.uk/law/practitioner/cws/). This website also offers monthly updates to the main work, set out on a chapter-by-chapter basis, as well as links to the full text of available judgements and to relevant legislation. By registering online you can be alerted to the posting of new material on the site and will receive news of all important changes by email.

## CASE DIGEST—IN BRIEF

### GENERAL PRINCIPLES—SELF-DEFENCE

**Rashford** [2005] EWCA Crim 3377

The Court of Appeal held that a defendant need not as a matter of law be deprived of a defence of self-defence merely because it was he who instigated the confrontation at which the need for self-defence allegedly arose. A person who kills in the course of a quarrel which he himself started, by provoking it or by entering into it willingly, might still act in self-defence if his 'victim' then retaliates or counterattacks. The question is whether the retaliation etc. was such that the defendant was entitled at that stage to defend himself. If the violence offered by the victim was so out of proportion to the defendant's initial act as to make the defendant fear he

was in immediate danger from which he had no other means of escape, and if the violence which he then used was no more than appeared necessary to preserve his own life or protect himself from serious injury, he would be entitled to rely on self-defence.

**See *Blackstone's Criminal Practice*: A3.30**

#### Contents

Case Digest—In Brief	1
Sentencing	4
Case Digest—In Detail	6
Legislation	9
Comment and Analysis	11
Publishing News	16

**OFFENCES—ACTUAL BODILY HARM****DPP v Smith (Michael Ross)** [2006] EWHC 94 (Admin)

The Divisional Court held that the cutting of a person's hair may amount to actual bodily harm, even if no pain is caused and even though no living tissue is affected.

See *Blackstone's Criminal Practice*: B2.21

**OFFENCES—INTERCEPTION OF COMMUNICATIONS****Stanford** [2006] EWCA Crim 258

The extent of the defence provided under the RIPA 2000, s. 1(6), was examined in this case. The appellant was charged, *inter alia*, with the unlawful interception of electronic mail communications to a public company, contrary to s. 1(2) of the Act. His defence was that the interceptions had been made at his request by the company's computer system administrator who was excluded from criminal liability because he was a person who had a right to control the operation or use of the system (s. 1(6)(a)) or because he had the express or implied consent of such a person to make the interception (s. 1(6)(b)).

Rejecting this argument, the Court of Appeal held that to 'control' in the context of s. 1(6) meant to 'authorise and forbid'. It did not cover the administrator's mere ability physically to use and operate the system. The objective of s. 1 of the Act was to protect the privacy of private communications. It would undermine that objective if anyone with unrestricted ability to operate and use a telecommunications system were exempt from criminal liability for intercepting communications.

See *Blackstone's Criminal Practice*: B9.88

**OFFENCES—PROCEEDS OF CRIME****Gabriel** [2006] EWCA Crim 229

This case provides important guidance as to the meaning of the term 'criminal property', which is itself of central importance in relation to the money-laundering offences under the Proceeds of Crime Act 2002, ss. 327, 328 and 329 and related

provisions. The Court of Appeal rejected the argument that profits made from trading in legitimate goods, without declaring the profits to the Inland Revenue or (in the case of benefit claimants) to the Department of Work and Pensions, could in any circumstances convert the profits into criminal property.

See *Blackstone's Criminal Practice*: B22.3, B22.5, B22.9 and B22.12

**ROAD TRAFFIC—DANGER TO ROAD USERS****DPP v D** [2006] EWHC 314 (Admin)

The offence of causing anything to be on a road in such circumstances that it would be obvious to the reasonable bystander that to do so would be dangerous, created by the Road Traffic Act 1988, s. 22A(1)(a), was considered by the Divisional Court in this case. It was held that the placing of an item on a road may be dangerous even if a careful and competent motorist would see it in good time. In this case the defendant had moved a 3' x 4' road sign onto the carriageway of a main road (apparently as some kind of prank). That night, a speeding car swerved suddenly off the road just before reaching the sign and both occupants were killed. There was evidence that a vigilant motorist travelling in that direction would easily have seen the sign; the district judge ruled that there was no case to answer under s. 22A(1).

Allowing a prosecution appeal against this ruling, the Divisional Court noted that the back of the sign would not so easily have been visible to a motorist overtaking from the opposite direction, but based its ruling on the wider basis that not all road users drive carefully. David Clarke J said:

The reasonable person does not expect, and cannot be taken to expect, that all motorists will drive carefully and well. The reasonable person is aware, sadly, that many motorists do not. The reasonable person should, in my judgment, realise that an obstruction of this sort could play a part in causing an accident, notwithstanding that the primary cause of such accident would be bad driving on the part of a motorist, whether in the form of excessive speed or failure to keep a proper lookout or following other traffic too closely or a combination of such factors.

See *Blackstone's Criminal Practice*: C3.33

**ROAD TRAFFIC—DRIVING WHILE DISQUALIFIED****Pattison v DPP** [2005] EWHC 2938 (Admin)

The perennial problem of proof of previous disqualification (and in particular the problem of proving that the present defendant is the same person as the defendant who was previously disqualified) was considered by the Divisional Court, which accepted the following propositions.

- (a) As with any other essential element of an offence, the prosecution must prove to the criminal standard that the person accused was a disqualified driver.
- (b) It can be proved by any admissible means, such as an admission (even a non-formal one) by the accused, that he was a disqualified driver.
- (c) If a certificate of conviction is relied upon, pursuant to the PACE 1984, s. 73, then it is an essential element of the prosecution case that the accused is proved to the criminal standard to be the person named on that certificate.
- (d) Three clear ways in which this can be proved are identified in *Derwentside Justices, ex parte Heaviside* [1996] RTR 384.
- (e) There is, however, no prescribed way that this must be proved. It too can be proved by any admissible means.
- (f) An example of such means is a match between the personal details of the accused on the one hand and the personal details recorded on the certificate of conviction on the other hand.
- (g) Even in a case where the personal details such as the name of the accused are not uncommon, a match will be sufficient for a *prima facie* case.
- (h) In the absence of any evidence contradicting this *prima facie* case, the evidence will be sufficient for the court to convict.
- (i) The failure of the accused to give any contradictory evidence in rebuttal will be a matter to take into account. If it is proper and fair to do so and a warning has been given, it can additionally give rise to an adverse inference under the CJPO 1994, s. 35(2).

**See Blackstone's Criminal Practice: C3.39**

**PROCEDURE—POLICE SURVEILLANCE****Rosenberg** [2006] EWCA Crim 6

The prosecution were permitted to introduce, as part of their evidence against R, video-recordings made by R's neighbours, apparently showing R to be engaged in various drug-dealing activities. It was objected that the recordings involved the unauthorised use of covert and intrusive devices and thus infringed the RIPA 2000 and the ECHR, art. 8; and that the evidence in question ought therefore to have been excluded under PACE 1984, s. 78. Dismissing R's appeal, it was held that the surveillance had not been covert because the presence of the camera had been obvious and R had indeed been fully aware of it. Moreover, the surveillance had neither been carried out by the police nor carried out with their encouragement. The police had warned the neighbours that their activities might infringe art. 8, but that did not mean the prosecution could not use evidence obtained by means of that surveillance.

**See Blackstone's Criminal Practice: D1.49 and F2.13**

**PROCEDURE—SITTING IN CAMERA****R v Central Criminal Court, ex parte A and others** [2006] EWCA Crim 4

The Court of Appeal confirmed that, in the case of an appeal against an order made pursuant to the CrimPR 2005, r. 16.10, the court has no discretion under r. 67.2 to hold an oral hearing, and opined that that this lack of discretion involved no conflict with the ECHR.

**See Blackstone's Criminal Practice: D2.50**

**PROCEDURE—DISCLOSURE****DPP v Wood** [2005] EWHC 2986 (Admin)

Material in the hands of the company which manufactures Intoximeter machines used by police forces in drink-driving cases is not 'prosecution material' within the meaning of the CPIA 1996, s. 8(3) and (4) and therefore cannot be the subject of an order for disclosure under s. 8(2).

**See Blackstone's Criminal Practice: D8.6**

**PROCEDURE—TRANSFER TO CROWN COURT****R (Bentham) v Governor of HM Prison Wandsworth** [2006] EWHC 121 (Admin)

It was held that defects in a Notice of Transfer to the Crown Court under the CDA 1998, s. 51(7) do not invalidate the transfer itself. Charges are not to be dismissed because of some technical deficiency in the Notice regardless of an otherwise proper sending, supported by ample supporting material which is available to the judge in the Crown Court. The Court also offers advice on the drafting of the requisite Notice.

See *Blackstone's Criminal Practice*: D9.3

**PROCEDURE—TRIAL JUDGE'S CERTIFICATE****Inskip** [2005] EWCA Crim 3372

The Court of Appeal has warned trial judges against over-readiness to certify a case as fit for consideration on appeal. The court expressed concern as to the fact that the trial judge in this case had granted a certificate to appeal in the case before them. Such a certificate should be granted only in truly exceptional circumstances. The normal rule is

that it is for the Court of Appeal to consider whether a case is suitable for the granting of leave (*Bansal* [1999] Crim LR 484). The mere fact that a judge has had a difficult exercise of his discretion to decide whether or not a case should go to the jury is plainly not sufficient to amount to a ground of appeal.

See *Blackstone's Criminal Practice*: D24.8

**EVIDENCE—HEARSAY****Taylor** (2006) *The Times*, 7 February 2006

The requirement in the CJA 2003, s. 114, that, in determining the admissibility of hearsay evidence, the court or judge 'must have regard to the following factors', should not be taken to mean that a trial judge must embark upon a detailed investigation (perhaps involving the hearing of evidence) in respect of each of the nine factors listed in s. 114(2). There is nothing in the wording of the statute that requires a court or judge to reach a specific conclusion in relation to each listed factor. If it did have that meaning, trials would become greatly elongated. Section 114(2) does, however, require an exercise of judgment in the light of any particular factor identified in accordance with that provision.

See *Blackstone's Criminal Practice*: F16.17

**SENTENCING****Rape of a Child****A** [2005] EWCA Crim 3104

The Court of Appeal considered the appropriate level of sentence in a case where the defendant, aged 15, 'befriended' the complainant, aged 11, over the Internet, arranged to stay at her house and had intercourse with her on four separate occasions with her full cooperation.

The defendant's own youth was clearly a factor in mitigation, but he had been reprimanded not long before for offences of making indecent photographs of children and his conduct towards the complainant and her mother was marked by persistence and deceit. The trial judge stated that the starting

point in this case was ten years' detention. In the light of the defendant's guilty pleas, he was sentenced to seven years' detention under the PCC(S)A 2000, s. 91.

Having considered *Corran* [2005] EWCA Crim 192 and other authorities, the Court of Appeal held that the judge's starting point had been too high, but that in light of the defendant's interest in child pornography and the risk of future offending an extended sentence was required, so the final sentence was an extended sentence of seven years comprising a custodial element of three and half years and an extended licence period of three and a half years. Orders were also made disqualifying him

from working with children and banning him from using Internet chat rooms for a period of ten years.

### Murder: Life Imprisonment

#### **R (on the application of Hammond) v Secretary of State for the Home Department** [2005] UKHL 69

The transitional provisions in the CJA 2003, sch. 22 (and in particular para. 11(1)), were examined and found to be wanting by the House of Lords in this case. Affirming the earlier decision of the Divisional Court ([2004] EWHC 2753 (Admin)), the appellate committee held that para. 11(1), by which an application under para. 3 or a reference under para. 6 is to be determined by a single judge of the High Court without an oral hearing, is (as it stands) incompatible with the ECHR and should be read subject to an implied condition that the judge has a discretion to order an oral hearing, where such a hearing is required to comply with a prisoner's rights under art. 6(1). This discretion may be exercised when, and only when, an oral hearing is necessary to meet the requirement of fairness under the Convention.

### Sexual Offences Prevention Orders

#### **D** [2005] EWCA Crim 2951

The defendant had committed a number of serious sexual offences against his daughter and a sexual offences prevention order was made under the SOA 2003, s. 104, which prohibited him from, *inter alia*, 'approaching, seeking to approach or communicating directly or indirectly with' his daughter or his son L (against whom no such offences had been committed). The Court of Appeal found that the sentencing judge had exercised his powers wrongly in respect of L, but nevertheless held that there was evidence justifying the making of such an order.

The Court went on to hold that the jurisdiction of the family court should in this case be reflected in the order because it was possible that L might one day wish to re-establish contact with the defendant, and would not himself be entitled to seek a variation or discharge of the order under the SOA 2003, s. 108. The original order was accordingly varied so as to provide: 'The [defendant] shall not, *without the order of a judge exercising jurisdiction under the*

*Children Act 1989*, communicate or seek to communicate, whether directly or indirectly, with L whilst he remains under the age of 16 years.'

### Confiscation Orders—Determining Benefit

#### **Bakewell** [2006] EWCA Crim 2, [2006] All ER (D) 04 (Jan)

*Smith (David)* [2002] 1 All ER 366 and *Lazarus* [2004] EWCA Crim 2297, [2005] Crim LR 64 were amongst the authorities considered by the Court of Appeal in this case, in which the prosecution successfully appealed against a confiscation order for £10,000 made against the defendant, and had it raised to a total of £403,959.67.

A huge consignment of cigarettes on which no duty had been paid was found hidden behind a load of tyres in a container imported by the defendant. He pleaded guilty to the importation, but insisted that his share of the proceeds was to have been confined to the tyres themselves, valued at just £10,000. This was the basis of the original confiscation order. But, as the Court of Appeal observed, this order did not address the fact that the defendant was responsible for the importation and storage of the cigarettes, and had derived a pecuniary advantage within the meaning of the subsection immediately upon the importation. Until the duty of £393,959.67 on the cigarettes was paid, he would continue to maintain the pecuniary advantage that he had obtained on the importation. The ultimate fate of the cigarettes was irrelevant, as was the question of how the profits of that crime were eventually to have been divided.

### Hospital and Limitation Directions

#### **Staines** [2006] EWCA Crim 15

The power of Crown Court judges to make 'hybrid' orders under the Mental Health Act 1983, s. 45A was examined by the Court of Appeal in this case. Tomlinson J concluded the judgment of the court with this observation:

We respectfully add our voices to those of their lordships who decided *Drew* in expressing the hope that further thought may be given to exercise of the power under s. 45A(10) of the Mental Health Act so that the additional measure of control afforded by an order under s. 45A may be made more widely available than it is at present.

## CASE DIGEST—IN DETAIL

**Carey**

[2006] EWCA Crim 17

The ruling in this case purports to limit the breadth of constructive or 'unlawful act' manslaughter. The first defendant punched and kicked one of four teenage victims. The second defendant assaulted the deceased by pulling her hair back and punching her in the face. The third defendant assaulted another victim. They then left. The deceased, a girl aged 15, became ill after running home. She died that evening of a heart condition which was congenital and progressive but which had not been diagnosed before her death. The prosecution relied on the affray as constituting the unlawful act and the judge accepted the prosecution submission that, when determining whether the affray had subjected the deceased to the threat of at least some physical harm, it was legitimate to aggregate the violence by the other defendants in order to decide whether the aggregated violence had been a cause of death.

The Court of Appeal held that the charge of manslaughter should have been withdrawn from the jury. It was accepted that a person who inflicts a minor blow from which the victim dies is liable for manslaughter, but the Court felt that to hold the defendants liable for the death of the deceased in this case would extend the law: it would come close to saying that if X commits an unlawful act but for which Y would not have died, X must necessarily be liable for the death of Y.

What is required, said the Court, is that X has committed an unlawful act that was dangerous in the sense that sober and reasonable persons would recognise that the act was such as to subject Y to the risk of physical harm that in turn caused Y's death. Whether an act is dangerous in the relevant sense depends upon what knowledge may be imputable to a reasonable person present at the scene. Knowledge of the victim's attributes may be relevant. Here, no reasonable person would have been aware of the victim's heart condition. This was said to distinguish the instant case from *Dawson* (1985) 81 Cr App R 50, or *Watson* [1989] 1 WLR 684 in which the victim's approximate age and frail state

would have been obvious to any reasonable person. Nor was this a case in which the victim died in the course of fleeing from the defendants' attack or from a threat of further violence (contrast *Roberts* (1971) 56 Cr App R 95). The incident had finished and the defendants had headed off in the opposite direction. The evidence suggested that she was merely upset and trying to hurry home.

The Court held that in some circumstances affray may be a suitable unlawful act but it was not in this instance because a sober and reasonable person would not have appreciated that an apparently healthy person of 15 years would suffer shock as a result of it. The only dangerous act in the relevant sense was the assault by the second defendant. But the deceased's death was not caused by injuries that were a foreseeable result of the assault. Other participants would be guilty of manslaughter if they were liable for the assault as secondary parties but the acts of those who participated in the affray but were not party to the assault did not, in any relevant sense, cause the death.

The judgment also contains observations as to the liability of a defendant who is party to an affray in which further offences (e.g., wounding or manslaughter) are committed by other parties to that affray. His liability for such further offences depends on the general principles of secondary participation. He is not made liable for such offences merely by virtue of the POA 1986, s. 3(2).

See *Blackstone's Criminal Practice: B1.34 and B11.42*

**R (Gillan) v Metropolitan Police Commissioner**

[2006] UKHL 12, (2006) The Times, 9 March 2006

The House of Lords has upheld the powers of stop and search in the Terrorism Act 2000, ss. 44 to 47, and rejected the suggestion that their use amounts to a contravention of the ECHR.

Section 44(2) of the Terrorism Act 2000 provides that an authorisation may be given to stop a pedestrian in a specified area or place if the high-ranking police officer giving it considers that such an authorisation is expedient for the prevention of acts of

terrorism. In this instance the specified area was the Metropolitan Police District. Since s. 44 came into force there had been a succession of authorisations and confirmations. A constable acting under the authorised powers did not need to have reasonable grounds for suspecting the presence of an article to stop and search.

In brief their lordships held:

- The decision-maker need not have reasonable grounds for considering that the powers were necessary or suitable; the word 'expedient' bears a distinct meaning, and safeguards were written into the Act.
- An authorisation might thus be given only if the person giving it considered that the powers would be of significant practical utility in seeking to prevent acts of terrorism.
- Although there had been a succession of authorisations and confirmations, there was no evidence to suggest that these had been the result of a routine bureaucratic exercise. On the evidence they were a reasonable response to a continued threat. They do not contravene the statute.
- The geographical spread of the authorisations was justified on the evidence which was that terrorist targets were spread throughout London and that it would be impracticable to differentiate between some parts of the district and others. The applicants offered no evidence to the contrary.
- There was no contravention of the ECHR, art. 5 (right to liberty and security). Stop and search is a brief procedure. The person searched is not handcuffed, confined or removed to a different place, nor is he confined or kept in custody. There is no deprivation of liberty.
- A superficial search of the person and an opening of bags do not contravene art. 8 (right to private life).
- Stop and search properly exercised does not constitute an interference with the right to free speech and so does not contravene arts. 10 or 11.

The issues of random and of discriminatory search were also considered. A search based on a police officer's trained instinct cannot, according to Lords Brown and Scott, be said to be random. In determining who to search, police officers are entitled to take account of the particular community, if any,

from whom the threat is considered to emanate but, for example, the mere fact that a person is of Asian origin is not, per Lord Hope and Lord Brown, a legitimate reason to stop and search him. A person cannot be profiled simply by reason of his ethnicity. It follows that the power requires the person to have conducted himself in such a way as to arouse suspicion that he may pose a terrorist threat.

See *Blackstone's Criminal Practice*, D1.2 and D1.50

### Crown Prosecution Service v South East Surrey Youth Court

[2005] EWHC 2929 (Admin), 170 JP 65, (2006) The Times, 28 December 2006

The Divisional Court sought to reconcile the conflicting provisions of the MCA 1980, s. 24(1), with those of the CDA 1998, s. 51A (added by the CJA 2003, sch. 3, para. 18), as presently in force.

The anomalies or points of conflict faced by a youth court in deciding whether to send a child or young person to the Crown Court for trial are these:

- the MCA 1980, s. 24(1), requires summary trial of a person under 18 unless the offence is grave and *may* require a sentence of long-term detention. In this case the defendant must be committed for trial. The definition of 'grave offence' in the 1980 Act differs from that of 'a serious offence' under the CJA 2003; *but*
- the CDA 1998, s. 51A (as presently in force), requires a child or young person to be sent to the Crown Court for trial if the offence is of the type specified in the CJA 2003, sch. 15, *and*, if the child or young person is found guilty, it appears that the criteria for an indeterminate sentence under s. 228 would be met.

The CJA 2003, sch. 3, para. 9 (by which the MCA 1980, s. 24(1), will be amended so as to read 'Where a person under the age of 18 years appears or is brought before a magistrates' court on an information charging him with an indictable offence he shall, subject to sections 51 and 51A of the Crime and Disorder Act 1998 and to sections 24A and 24B below, be tried summarily.') has not as yet been implemented; and nor, according to the Divisional Court, is implementation contemplated for many months.

Faced with this conflict, the Court held that a youth court cannot ignore either of these provisions. In considering the applicability of these inconsistent provisions in a particular case, justices should however bear in mind the following:

- The policy of the legislature, which is that those under 18 should, wherever possible, be tried in a youth court because a youth court is best suited to their particular needs.
- The guidance given in *Lang* [2005] EWCA Crim 2864 at [17](iv), which states that if a foreseen specified offence is not serious there will be comparatively few cases in which a risk of serious harm will properly be regarded as significant (and note what is said there about sexual cases).
- In most cases, where a non-serious specified offence is charged an assessment of dangerousness will not be appropriate until after conviction when, if the dangerousness requirements are met, the child or young person can be committed to the Crown Court for trial.
- When a youth under 18 is jointly charged with an adult, an exercise of judgment will be called for by the youth court when assessing the competing presumptions in favour of (a) joint trial of those jointly charged and (b) the trial of juveniles in the youth court. Relevant factors include the age and maturity of the youth, the comparative culpability of each in relation to the offence, the previous convictions of each, and whether the trial can be severed without either injustice or inconvenience to witnesses.

See *Blackstone's Criminal Practice*: D22.3

### **R (Robinson) v Sutton Coldfield Magistrates' Court**

[2006] EWHC 307 (Admin)

The CJA 2003, s. 111(2), requires rules to be made for notice to be given where it is intended to adduce evidence of an accused's bad character. The

CrimPR, part 35, make the necessary provision. It was argued by the defence in this case that a strict approach should be adopted to failures to meet deadlines relating to the giving of notice, and that 'a culture of non-compliance should not be permitted to take root'. It followed that a court should exercise its discretion to extend time under CrimPR, r. 35(8), only in exceptional circumstances, where it has been provided with sufficiently good reasons as to why the prosecution could not comply with the mandatory time-limit.

The Divisional Court agreed that a culture of non-compliance would be unacceptable, but refused to construe the r. 35(8) discretion as narrowly as was suggested. Owen J said:

The first point to be made is that time limits must be observed. The objective of the Criminal Procedure Rules 'to deal with all cases efficiently and expeditiously' depends upon adherence to the timetable set out in the rules. Secondly, Parliament has given the court a discretionary power to shorten a time limit or to extend it even after it has expired: rule 35(8). In the exercise of that discretion the court will take account of all the relevant considerations, including the furtherance of the over-riding objective. I am not persuaded that the discretion should be fettered in the manner for which the claimant contends, namely that the time should only be extended in exceptional circumstances.

He went on to say:

Any application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court unless it clearly sets out the reasons why it is seeking that indulgence. But importantly, I am entirely satisfied that there was no conceivable prejudice to the claimant, bearing in mind that he would have been well aware of the facts of his earlier convictions; secondly, that he was on notice on 14th April that there could be such an application; and thirdly, that there was no application for an adjournment on 16th June from which it is to be inferred that the claimant and his legal advisers did not consider their position to be prejudiced by the short notice.

See *Blackstone's Criminal Practice*: F12.6

## LEGISLATION

**Racial and Religious Hatred Act 2006**

This Act received the Royal Assent on 16 February. The main content of the Act is to be found in the schedule, which, when brought into force, will insert a new series of provisions (ss. 29A to 29N) into the POA 1986. The new offences, which will form part 3A of the 1986 Act, deal with conduct that involves stirring up hatred against people on religious grounds. Religious hatred is defined in s. 29A as hatred against a group of persons defined by reference to religious belief or lack of religious belief.

Sections 29B to 29G create the new offences. These include the use of words or behaviour or display of written material (s. 29B), publishing or distributing written material (s. 29C), the public performance of a play (s. 29D), distributing, showing or playing a recording (s. 29E) and broadcasting or including a programme in a programme service (s. 29F), and possession of threatening material with a view to using it in a way that is intended to stir up religious hatred (s. 29G), but by s. 29J:

Nothing in [part 3A] shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Sections 29H and 29I deal with powers of entry, search and forfeiture. By s. 29L, no proceedings for an offence under part 3A may be instituted in England and Wales except by or with the consent of the Attorney-General.

**Misuse of Drugs (Amendment) (No. 3) Regulations 2005 (SI 2005 No. 3372)**

These Regulations amend part 1 of sch. 4 to the principal regulations, which lists some of the drugs which are subject to the record-keeping, information and destruction requirements imposed by regs. 22, 23, 26 and 27, by inserting Ketamine in the list.

*See Blackstone's Criminal Practice: B20.22*

**Serious Organised Crime and Police Act 2005 (Designated Sites) Order 2005 (SI 2005 No. 3447)**

This Order designates sites for the purpose of the SOCPA 2005, ss. 128 (sites in England and Wales) and 129 (sites in Scotland). Under those sections, a person commits an offence if he enters or is on any designated site as a trespasser (in Scotland, without lawful authority).

*See Blackstone's Criminal Practice: B13.69*

**Serious Organised Crime and Police Act 2005 (Commencement No. 4 and Transitory Provision) Order 2005 (SI 2005 No. 3495)**

This Order brings into force, on 1 January 2006, the following provisions of the 2005 Act: (a) ss. 1(3), 8 to 10, 17, 18, 27, 39, 42, 44(2), 52, 54, 58 (and sch. 3) and 59 (and sch. 4, para. 42), all of which relate to the impending establishment of the Serious Organised Crime Agency; (b) ss. 110 and 111 (powers of arrest) and sch. 7 (powers of arrest: supplementary); (c) ss. 113 and 114(1) to (8) (search warrants); (d) s. 116 (photographing of suspects etc.) to the extent not already in force; (e) s. 118 (impressions of footwear); (f) s. 122(7) (powers of designated and accredited persons) insofar as it relates to fully implementing sch. 8; and a series of specified minor amendments and repeals. It also provides that s. 9(2)(a) of the 2005 Act (which concerns consultation procedures in determining the strategic priorities for the Serious Organised Crime Agency) does not apply during the period from 1 January 2006 to 31 March 2006.

*See Blackstone's Criminal Practice: D1.12, D1.39, F18.27 and F18.32*

**Serious Organised Crime and Police Act 2005 (Amendment) Order 2005 (SI 2005 No. 3496)**

This Order amends provisions of the 2005 Act and provisions of the Police Act 1997 and the PACE 1984 which are prospectively inserted by it. The amendments correct typographical errors and mistakes arising from sloppy drafting of the Act.

**Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005 (SI 2005 No. 3503)**

This Order appoints 1 January 2006 as the date on which revised PACE Codes A to F and new Code G (exercise by police officers of statutory powers of arrest) take effect.

The revised Code A includes changes covering the power to search for a firework, and indication that a person's religion cannot be a reasonable ground to search, a change in respect of recording 'stop-only' encounters and a new annex distinguishing between a constable and a community support officer's powers. The main changes to Code B reflect the changes made by the SOCPA 2005 relating to multiple premises warrants, all premises warrants and warrants permitting multiple entries. The revised Code C includes changes to take account of new powers provided by the SOCPA 2005 to test for drugs and search for drugs using x-rays and ultrasound. Note that Home Office Circular 56/2005 highlights certain minor errors in the published version of the Codes and corrects these.

See *Blackstone's Criminal Practice*: D1.2, D1.20, D1.39, F18.27 and F18.32

**Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006 (SI 2006 No. 308)**

This Order makes amendments to the PCA 2002 and the Money Laundering Regulations 2003. In order to give full effect to EU Directive 2001/97/EC, art. 2(2) of the Order amends s. 330(6)(b), (9A)(a) and (10) (failure to disclose: regulated sector) to extend the persons to whom the defence applies to a 'relevant professional adviser', as defined by s. 330(14), which is inserted by art. 2(5). The amendments made by art. 2(3) and (4) provide a defence for a person who is employed by (or in partnership with) the professional legal adviser or other relevant professional adviser to provide assistance or support. The Money Laundering Regulations 2003 also give effect to that Directive and art. 3 of the Order makes matching amendments to reg. 7 (internal reporting procedures).

See *Blackstone's Criminal Practice*: B22.2 and B22.17

**Criminal Procedure (Amendment) Rules 2006 (SI 2006 No. 353)**

These Rules make the following amendments to the CrimPR 2005.

A new part 15 (preparatory hearings in cases of serious fraud and other complex, serious or lengthy cases in the Crown Court) is substituted for the existing one. The new version makes provision for applications for preparatory hearings on the ground that the prosecutor wants the court to order that the trial be without a jury under the CJA 2003, s. 43 or s. 44. Part 18 (warrants) is substituted so as to simplify the existing rules. Rule 34.1 (hearsay evidence: when this part applies) is amended to confine the application of part 34 to cases where the evidence is admissible because ss. 114(1)(d), 6, 117 and 121 of the CJA 2003 apply. In part 35, two amendments are made: r. 35.2 (introducing evidence of non-defendant's bad character) is amended to provide that an application to introduce the previous convictions of a prosecution witness must be made within 14 days of the date when the prosecutor discloses those convictions and r. 35.6 is amended to extend the time-limit for a defendant's application to exclude evidence of his own bad character from 7 days to 14 days. A new r. 39.2 (appeal against refusal to excuse from jury service or to defer attendance) is added. It incorporates the provisions which were formerly found in r. 25 of the Crown Court Rules 1982. Rule 57.15 (external requests and orders) is added. It applies the rules in parts 57, 59 to 61 and 71 to proceedings under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005. A new r. 65.11 (appeal against order following discharge of jury because of jury tampering) applies part 65 to appeals under s. 47 of the CJA 2003. Part 66 (appeal to the Court of Appeal against ruling adverse to prosecution) is amended to ensure that the Registrar is not required to give or serve notice to a defendant or an interested party in a 'public interest ruling' case, unless a judge or the Court of Appeal otherwise directs. Part 68 (appeal to the Court of Appeal against conviction or sentence) and part 74 (appeal to the House of Lords) are amended so that those parts will apply, where appropriate, to appeals made under the CJA 2003, sch. 2, para. 14. The

opportunity has also been taken to correct some typographical errors in the rules and to bring references to other legislation up to date.

**Anti-social Behaviour Act 2003  
(Commencement No. 6) (England) Order 2006  
(SI 2006 No. 393)**

This Order brings ss. 48 to 52 into force in England on 6 April 2006. These sections relate to graffiti removal notices.

**Serious Organised Crime and Police Act 2005  
(Commencement No. 5 and Transitional and  
Transitory Provisions and Savings) Order 2006  
(SI 2006 No. 378)**

This Order brings into force on various dates, but with full effect on 6 April 2006, those provisions of the Act that deal with the Serious Organised Crime Agency. Relevant transitional, transitory and savings provisions are also made in relation to the Agency. It also brings into force ss. 71 to 75 (offenders assisting investigations and prosecutions) and ss.

76 to 81 (financial reporting orders) on 1 April. The main elements of s. 163 (criminal record certificates) are brought into force on 6 April.

**Disclosure: A Protocol for the Control  
and Management of Unused Material  
in the Crown Court**

A disclosure protocol has been published by the Court Service. It is concerned with the management of issues relating to the disclosure of unused material. The status of the protocol is unclear but clearly it has official backing; it was prepared by a team led by two leading judges. A pdf version of the protocol is available on the Court Service website.

**Management of Terrorism Cases Protocol**

The President of the Queen's Bench Division has issued a protocol which applies to all terrorism cases and is essentially a required procedure for the management of all such cases. A pdf version of the protocol is available on the Court Service website.

COMMENT AND ANALYSIS

**Dangerous Driving and Causing Death  
by Dangerous Driving**

In the widely publicised case of *DPP v Milton* [2006] EWHC 242 (Admin), [2006] All ER (D) 04 (Feb), the Divisional Court (in a judgment given by Hallett LJ) allowed the prosecution's appeal against a district judge's ruling that the respondent, a class 1 police driver, was guilty neither of speeding nor of dangerous driving when he 'familiarised himself' with a powerful new unmarked police car at speeds of up to 149 mph on the M54 and at 91 mph on restricted urban roads with a 30 mph limit.

The court did not go so far as to remit the case with a direction to convict, but merely required it to be reheard on the basis that the district judge had misdirected himself on certain matters and had taken

some irrelevant matters into account. The outcome of the rehearing is by no means a foregone conclusion, however.

Police officers are subject to the same rules of driving as the rest of the population, save that under the RTRA 1988, s. 87, a police vehicle may be driven in excess of speed limits 'if their observance would be likely to hinder the use of that vehicle for the purpose for which it is being used on that occasion'. If a police officer drives dangerously in an emergency he is not exempt from liability under the RTA 1988, ss. 1 or 2 (*Collins* [1997] RTR 439) and for that reason the court rejected the prosecution's primary argument, which was that driving at very high speeds must inevitably amount to dangerous driving. As Hallett LJ explained:

That would mean that any driver of an emergency vehicle, driving at twice the speed limit, whatever the road conditions, however much warning was given to other road users, would be guilty of dangerous driving. That cannot be right.

But although the prosecution failed on this point, other questions remained to be answered. Is an officer using a vehicle on police purposes (so as to be exempt under s. 87 from the duty to comply with speed limits) when practising his skills or familiarising himself with a new car? And did the district judge apply the right principles and take account of the right factors when deciding that the respondent's driving (in which no lights or sirens were used to warn other road users) was not 'dangerous' within the meaning of the Act?

As to the first question, the court's view, however, was that this question arose for consideration only if and when the district judge acquitted the respondent on the principal charge of dangerous driving, and therefore no final answer was forthcoming, but it did at least reject the prosecution's argument that a police officer who drives at such high speeds could only come within the exemption when in hot pursuit of a dangerous criminal. In contrast, the court doubted whether a blanket answer could properly be given in favour of the defence. Hallett LJ said:

Familiarising oneself with a vehicle and honing one's skills does not necessarily involve driving at 90 miles per hour through residential streets, if that is what they were. Nor does it necessarily involve driving at 150 miles per hour.

As to the second and (on the facts) more important question, the court recognised that the test for dangerous driving is said to be a wholly objective one (in the sense that it makes no difference if D is unaware of the danger posed by his driving); but s. 2A requires account to be taken of 'any circumstances shown to have been within the knowledge of the accused'. This personal knowledge test would ordinarily be used against, for example, the driver who knows of but ignores a dangerous concealed junction ahead, or the limitations of his vehicle; but in this case the district judge had applied it in favour of the respondent, by taking into account the respondent's knowledge of his own professional driving skills.

The court held that this was impermissible. Insofar as the district judge imported a subjective element

into the test of dangerous driving to be applied, he was wrong in law to do so. To quote Hallett LJ again:

It matters not whether the respondent intended to drive dangerously, or believed that he could drive at grossly excessive speeds without causing danger to others because of his advanced driving skills. I repeat that the test is, what is the standard judged objectively and what would have been obvious to the independent bystander? As to whether the district judge would have been entitled to impute knowledge of the respondent's driving skills to the independent bystander on the basis of the arguments advanced before us, I can form no concluded view.

With respect, this is a crucial question that deserves a forthright answer; and the answer must surely be the respondent's skill was a highly relevant consideration which any reasonable bystander must be required to take into account. If I were offered a 150 mph ride (on a private race track) I would want to know who the driver was and what experience he had. Knowing a top professional driver was at the wheel, I would probably accept the offer. If my young nephew were to make me a similar offer a few weeks after passing his test, I would consider it to be absurdly dangerous.

But even if the above argument is accepted, the respondent's decision to 'practise' at 90 mph in a built-up area may still be open to attack. Driving at these speeds on public roads without blue lights or sirens, however skilled the driver, amounts, said Hallett LJ, to a *prima facie* case of dangerous driving. The district judge ought to have taken into account the possible effect upon other road users of somebody coming up behind them or across their path at speeds of this kind and with no warning; and he was wrong to hear expert evidence as to why the respondent's driving was not dangerous. As to why expert evidence on that point was inadmissible, the court regrettably gave no reasons, but one matter upon which the judge might well have benefited from expert guidance concerns the nature of advanced driver training, in which drivers learn how to anticipate and guard against such events, so that innocent road users are not so easily surprised or endangered. This, with respect, is not a matter of general public knowledge.

Hallett LJ concluded her judgment with the following observations:

I am conscious of the need to ensure that police officers are properly trained for their own safety and for the safety of the public. In my view, if the position is, as found by the district judge here, there should be a better way. I would invite the Chief Constable of West Mercia Constabulary, and any other Chief Constable whose force may be affected, to instigate a review, if they have not already done so, as to whether or not the situation is as the district judge found here. I would ask them to consider whether advanced police drivers are encouraged to hone their skills in unfamiliar vehicles at grossly excessive speeds on public roads both urban and motorway.

The answer, with respect, is that advanced police drivers must indeed practise at least some of their high speed skills on public roads. If this kind of practice is stopped we will end up with traffic officers who are relatively inexperienced (or at least too often out of practice) when driving at very high speeds. But whether it is right for them to be required to practise without using lights and sirens to warn other road users is perhaps another matter.

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## Mandatory and Minimum Custodial Sentences: How much Room for Discretion?

### Mandatory Life Sentences for Murder

The scheme in the CJA 2003 scheme for setting the minimum term in the case of mandatory life sentences for murder is described at E4. The 'general principles' set out in sch. 21 to the Act replaces previous guidance on the setting of the minimum term in murder cases contained in relevant Practice Directions. Section 269(5) requires the sentencer in a murder case to 'have regard to' the scheme in sch. 21. This clearly means that the sentencer cannot ignore sch. 21, but the Court of Appeal has made it clear, in a series of judgments, that there is room for discretion and the scheme must not be rigidly applied.

In *A-G's Ref (No. 106 of 2004)* [2004] EWCA Crim 2751, *Warsame* [2004] EWCA Crim 2770 and *Reid* [2004] EWCA Crim 2930, the Court of Appeal had said that whilst judges must pay close attention to the scheme of sch. 21 to ensure that the correct starting point had been identified, along with rele-

vant aggravating and mitigating features, there remains 'considerable flexibility'. Even the offence of murder covers a broad spectrum of gravity. Depending on the nature of the killing and the age of the offender, there are four specified starting points: a whole life order, 30 years, 15 years or 12 years. According to the Court of Appeal in *Peters* [2005] EWCA Crim 605, these are 'normal starting points', and a sentencer may start from a different point if he could justify doing so.

Schedule 21, para. 8 says that once the appropriate starting point has been selected, the court should take into account any aggravating or mitigating factors 'to the extent that it has not allowed for them in its choice of starting point'. This is to avoid double counting (see *Richardson* [2005] EWCA Crim 1408). So, if the sentencer has selected the starting point of 30 years because the murder was committed in the course of a robbery (para. 5(2)), the same factor cannot be used again to move up from the starting point. Schedule 21, para. 9, is of particular interest here, because it states that, when all the aggravating and mitigating circumstances have been taken into account, it may (whatever the original starting point selected) result in a minimum term of any length, or a whole life order. It is clear that the aggravating factors and mitigating factors referred to in paras. 5(2), 10 and 11 are illustrative rather than exhaustive, and the sentencer is not rigidly bound by them (*Last* [2005] EWCA Crim 106 and *Peters*). In one of the appeals dealt with in *Peters* there had been 'broad public dismay' at an offence committed in broad daylight, a relevant aggravating factor (apparently), though one not listed in para. 10. A clearer example, perhaps, is provided by *Richardson* [2005] EWCA Crim 1408, where the judge regarded the offender's possession of the murder weapon (a knife) in a public place in advance of the murder as an aggravating factor. The Court of Appeal agreed, and said that there had been no double counting of this factor.

The list of stated factors is not exhaustive, and the relative *weight* to be attached to each or any particular combination of factors in sch. 21 will, according to the Court in *Peters*, vary greatly depending on the circumstances. This point is generally true of sentencing guideline schemes, which specify one or more starting points, list applicable aggravating and

mitigating factors, but generally stop short of weighting those factors. Since there are many potential factors in play, to do so would produce a scheme of great complexity. How should a sentencer weigh one or more aggravating factors against one or more mitigating factors? In *Richardson* the trial judge had identified two aggravating factors and two mitigating factors. Taken in the round, these balanced out, so that the minimum term was simply the unadjusted starting point. The Court of Appeal in *Warsame* had explained its decision by taking the relevant starting point, adding to reflect a particular aggravating factor and then subtracting to reflect a particular mitigating feature. The Court of Appeal in *Peters*, however, doubted whether this kind of mathematical exercise was necessary or appropriate. Lord Justice Judge said that the seriousness of the case (as represented in the selection of the minimum term) was a balancing of all the relevant factors in the case. In future, it was said, the Court of Appeal would look at the period selected by the sentencing judge and consider the end result, within the discretion given to the sentencer. Nice points, whether or not based on a mathematical calculation, would not result in a successful appeal. The Court would not interfere unless the minimum term selected was manifestly excessive or wrong in principle.

There are also matters of degree within aggravating or mitigating factors. They may appear in weaker or stronger form. This is clear from sch. 21 itself, where examples of aggravating factors are (i) the presence of 'a significant degree of planning or premeditation', or (ii) where the victim is 'particularly vulnerable because of age or disability'. The Court of Appeal in *A-G's Ref (No. 106 of 2004)*, a case involving the murder of a child by the child's father who had been refused access, was now liable to be deported, and was suffering from severe depression, said that while there had been 'planning' in the case, it had not been 'a significant degree of planning'. The case was, however, aggravated by the fact that the child was very young, making the victim 'particularly vulnerable'. In *Peters* the offender had intended to cause grievous bodily harm, rather than intended to kill, a matter identified in para. 11(a) as a potential mitigating factor. Lord Justice Judge stressed that this very much turned on the circumstances. In some cases, a murder committed with intent to kill (such

as a mercy killing) might attract greater mitigation than a case in which death had not been intended as such but resulted from the offender's actions in, say, torturing the victim to extract a ransom.

#### Minimum Custodial Sentences for Firearms Offence

Section 51A of the FA 1968 (as inserted by the CJA 2003, s.287) provides for minimum custodial sentences for certain firearms offences (see E6.3). The sentences are five years' imprisonment or detention in a young offender institution in the case of an offender aged 18 or over, and three years' long-term detention for an offender aged 16 or 17. The sentencing court may avoid passing the minimum sentence if it is of the opinion that there are 'exceptional circumstances relating to the offence or to the offender which justify' doing so. The 'exceptional circumstances' proviso (with variations in wording) is familiar from other provisions such as the minimum custodial sentence of three years for the third domestic burglary offence (see E6.2), the minimum custodial sentence of seven years for the third Class A drug trafficking offence (see E6.1) and the now repealed life sentence for the second serious offence, formerly to be found in the PCC(S)A 2000, s.109. Some of the case law on 'exceptional circumstances' in relation to these provisions may be useful in considering the effect of the Firearms Act provision, but there are important differences. In particular, the Firearms Act provision is unique in setting a minimum sentence for the *first*, rather than a repeat offence. It is also unique in allowing no reduction in sentence for a plea of guilty, however timely that plea may have been: *Jordan* [2004] EWCA Crim 3291.

The Court of Appeal has, in a number of recent decisions, given indication of the factors which might amount to 'exceptional circumstances' in respect of this provision, building on the early declaration in *Jordan* that such cases would be 'rare'. General guidance is given in *Rehman* [2005] EWCA Crim 2056. The Court of Appeal said that it in determining whether the case involved 'exceptional circumstances' it was necessary to look at the case as a whole. Sometimes there would be a single isolated factor that would amount to an exceptional circumstance, but in other cases it would be the collective impact of all the relevant circumstances. The Court

said that, so far as it could identify a rationale for this sentencing provision, it was to do with deterrence, rather than public protection (which had been the case for the PCC(S)A 2000, s.109), so that it could not be treated in the same way. Lord Woolf CJ said that the section was capable of causing considerable injustice, especially bearing in mind that possession of a prohibited firearm was an absolute offence. Reading s. 51A in the light of s. 3 of the HRA 1998, his Lordship said that the circumstances would be 'exceptional' if it would mean that to impose the minimum sentence would result in an arbitrary and disproportionate sentence. Unless a judge was clearly wrong in not identifying exceptional circumstances when they were present, the Court of Appeal would not readily interfere with the trial judge's decision. It may well be that the formulation of the test in *Rehman* permits greater discretion for the trial judge than exists in relation to the repeat domestic burglary and repeat drug offending provisions.

In *Rehman* itself, the Court of Appeal held that the judge had erred in not finding exceptional circumstances in the case, where the defendant's background (in particular his previous good character), his early plea of guilty, his ignorance of the unlawfulness of the weapon (he had purchased it as a collector's model), and the fact that there was just one weapon, taken together amounted to exceptional circumstances. The sentence was reduced from five years to one year, allowing the defendant's immediate release. In *Blackall* [2005] EWCA Crim 1128, the exceptional circumstances were matters personal to the offender. He was paraplegic, with many consequential physical disabilities, such that the imposition of any sentence of imprisonment on

him would be much more severe than the same sentence imposed on an able-bodied defendant. On the other hand, the fact that the defendant was keeping the prohibited weapon for his own protection could not amount to an exceptional circumstance, since that was a common feature of such cases and the minimum sentence was designed to deter people from keeping such firearms, whatever their reason might be. In *McEneaney* [2005] EWCA Crim 431, the defendant suffered from schizophrenia following a head injury incurred in his youth. The illness was controlled by medication. The Court of Appeal said that the defendant's psychiatric history did not amount to exceptional circumstances. In *Evans* [2005] EWCA Crim 1811, the defendant's obsessive compulsive symptoms, which had apparently led him to hoard guns, did not amount to exceptional circumstances. It was relevant in this case that the defendant was a civilian reception officer at a police station, who had abused his position to steal ammunition which had been handed in. Finally, exceptional circumstances were found in *Mehmet* [2005] EWCA Crim 2074, where the defendant, a man of good character, had acquired the gun from a friend some years ago when possession was lawful, but its possession became unlawful in 2004. At that time the defendant was ill with depression and he did not become aware of the change in the law. He had no ammunition for the gun. The Court of Appeal said that, taken together, these factors amounted to exceptional circumstances, and the sentence was reduced from five years to thirty months' imprisonment.

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## PUBLISHING NEWS

**A Practical Approach to Criminal Procedure**

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**John Sprack**, Barrister, Formerly Reader, Inns of Court School of Law**'The most authoritative textbook on criminal procedure available'***New Law Journal, 2005*

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It also provides practical advice and tips on issues likely to arise in practice. This text is an excellent resource for those new to the law; the expert overview and clear layout promote clarity and ease of understanding.

600 pages, 0-19-929830-0, 978-0-19-929830-3,  
Paperback, £34.95, **June 2006**

**The Civil Contingencies Act 2004**

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**Clive Walker**, Professor of Criminal Justice Studies, School of Law, University of Leeds and **James Broderick**, Director of the Emergency Planning Management Programme, University of Leicester

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352 pages, 0-19-929626-X, 978-0-19-929626-2,  
Paperback, £49.95, **June 2006**

**The Court Guide to the South Eastern and Western Circuits 2006/2007****Andrew Goodman**, Barrister, No 1 Serjeant's Inn, London

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168 pages, 0-19-929749-5, 978-0-19-929749-8,  
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