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New York Criminal Law Newsletter

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of the New York State Bar Association

Inside

NYSBA

Message from the Chair

It hardly seems possible that almost two years have elapsed since my first message to the Section. By virtue of our by-laws, this is my final *Newsletter* message, a new slate of officers having been elected at the Annual Meeting in January.

Much has occurred in these past two years. We reviewed pending State legislation regarding taking DNA samples from almost all those charged with criminal offenses. The debate was fair and intense, with pro-prosecution forces within the Section succeeding in proffering some recommendations, and pro-defense groups succeeding in others. Our report to the State Bar was co-authored by a prosecutor and defense attorney and cogently set forth our position.

This Section has assumed the State Bar Task Force on Wrongful Convictions and made it into a permanent committee within our Section, and is in the process of formulating subcommittees to assist in accomplishing its ambitious agenda. The Section has also been active in the field of sealing certain misdemeanor convictions, and a preliminary report has been issued by that Committee. We continue to examine collateral consequences of criminal convictions.

As we move forward into the second decade of the 21st century, we are flexible and strong.

As a Section, we are prepared to study issues pertinent to criminal law, and ready to report and recommend if necessary. We have exerted our influence into State Bar affairs and now are a Section sought for advice and support—and we are now a key player with State Bar. Of course, it helps and is reflective of our success that the next two incoming Presidents of State Bar are both members of our Section.

In closing, I would like to commend the incoming officers for their support and assistance for the past two years, and I urge that you give them the support you have always provided. Special thanks go to New York State Bar Association staff, Kevin Kerwin and Barb Mahan, who are assigned to our Section and always provide yeoman service to us. They find no task too daunting nor difficult, and always steer us in the right direction, cheerfully and promptly. It has been a pleasure working with them.

I wish you all the best as we continue in the future, and I look forward to remaining active within the Section.

James P. Subjack

Message from the Editor

In this issue we provide photos and details regarding the activities at our Section's Annual Meeting, awards luncheon and CLE program, which was held at the Hilton Hotel in New York City on January 27, 2011. Our annual awards luncheon was attended by approximately 100 members. As in the past, several awards were distributed to noteworthy recipients. This year's awards were presented to several individuals who have contributed in some outstanding manner to the criminal justice system. It was a pleasure to recognize these individuals for their outstanding work and service. The names of this year's award winners are published in our "About our Section and Members" article.

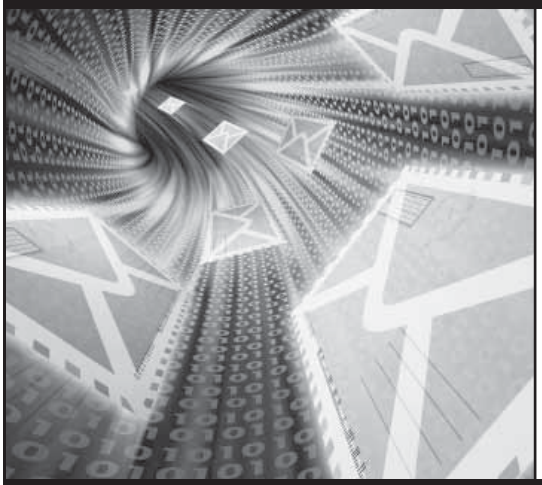
This issue also contains three feature articles which deal with important and extremely relevant present day issues in the Criminal Justice Section. The first article, written by Shirley K. Duffy, with the assistance of three law student interns, deals with the evaluation of eyewitness identification evidence by experts. The second article is written by Acting Supreme Court Justice John J. Brunetti, and concerns the reasonable doubt instruction which is provided to jurors. Both Ms. Duffy and Judge Brunetti are first-time contributors to our *Newsletter*, and we welcome their contributions and look forward to additional articles from them in the future. Our third feature article is written by Peter Dunne, a regular contributor to our *Newsletter*, and he provides guidance to our readers with respect to whether the recent United States Supreme Court decision in *Padilla v. Kentucky* concerning information to be provided to defendants facing possible deportation is to be applied retroactively. This issue is already of growing concern in the trial courts in New York, and Mr. Dunne's article hopefully would shed some light on the issue.

We also provide in this issue our regular summaries of important decisions which have come down from the United States Supreme Court and the New York Court of Appeals. The United States Supreme Court opened its new term on October 4, 2010, and the Court has just begun to issue some important decisions in the field of criminal law. Our New York Court of Appeals, which returned from its summer recess in September, has also decided several cases of relevance and interest to our readers.

Our "For Your Information" Section continues to provide a variety of interesting items for the benefit of our readers. In recent months, there has been an increase in the number of articles submitted for possible publication, and I thank our members for their continued support and interest in our publication.

Spiros A. Tsimbinos

Request for Articles



If you have written an article and would like to have it considered for publication in *New York Criminal Law Newsletter*, please send it to the Editor-in-Chief:

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Articles should be submittted in electronic document format (pdfs are NOT acceptable), and include biographical information.

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Using an Expert to Evaluate Eyewitness Identification Evidence

By Shirley K. Duffy

The United States Supreme Court has recognized the inherent danger and unreliability of eyewitness identification.[1] New York courts also have recognized the need for objective procedures which minimize the chance of misidentification resulting in a wrongful conviction and allowed expert testimony regarding reliability of eyewitness identification within the discretion of the trial court.[2]

Neil v. Biggers[3] and *Manson v. Brathwaite*,[4] stated the five factors that should be taken into account when evaluating the reliability of eyewitness identification: 1) witness opportunity to view the criminal during the crime; 2) the length of time between the crime and the identification; 3) the witness' level of certainty; 4) the accuracy of the witness' prior description; 5) the witness' degree of attention. These factors in addition to other research findings are evident in the many studies and protocols on eyewitness identification.

Studies done over many years have continually indicated that eyewitness identification "is the single largest source of wrongful convictions."[5] Researchers have conducted studies staging eyewitness identification situations, and studies have been repeated in the press and in academic journals, all indicating that "many factors can affect the accuracy of acquisition, storage and retrieval of memories."[6]

Eyewitness identification reliability is also greatly affected by the technique or techniques that are utilized by the criminal justice system.[7] At the present time, law enforcement officials conduct eyewitness identification through a variety of procedural methods: "Live lineups," photo spreads and "show-ups" are common methods. Generally a live lineup proceeds with the eyewitness standing behind a one-way glass and he or she is asked to identify a suspect from a group of five to eight people standing in a line.[8]

In a photo spread, a group of six to twelve photographs is used instead of live actors and the witness is asked to choose the suspect from the group.[9] Photo spreads have gained in popularity by law enforcement officials and are accepted in court just as are live lineups.[10] This growth in popularity may be attributed to the fact that the suspect has no right to counsel with a photo spread, and they are easier to conduct than live lineups.[11]

The show-up is an inherently suggestive identification procedure.[12] Essentially the suspect is shown to the eyewitness who is asked whether or not that particular suspect was the perpetrator.[13]

It is well-established that severe limitations exist when using eyewitness identification evidence. Error rates as low as 25% have been reported, but this low rate cannot be assured.[14] One study, conducted in 1988, found that 52% of the 205 cases of wrongful conviction examined were attributed to erroneous eyewitness identification.[15] Other studies have shown error rates ranging from 45 to 60%.[16] The increased use, and subsequent advancements, of DNA evidence has revealed many of these errors, including in the area of eyewitness identification.[17] Unfortunately, some types of crime do not leave DNA evidence, and exonerations in such cases are extremely low in comparison to cases in which DNA evidence was present.[18] For example, exonerations in rape cases are twenty times more likely than in robbery cases, because rape perpetrators leave far more evidence than perpetrators of robbery.[19] There are no major differences in the problems of eyewitness identification between those cases where DNA evidence is present and those where DNA evidence is absent.[20]

However, the statistics do not tell the whole story, and there are many adverse consequences stemming from faulty eyewitness identifications of an individual, as well as on a societal level. Of course, the most obvious result is that defendants are convicted and sentenced for crimes that they did not commit.[21] The impact is especially harsh in death penalty cases.[22] Moreover, there is an adverse effect on the mistaken witness, who may experience profound distress over playing a role in a miscarriage of justice.[23]

Then, too, there are social effects stemming from wrongful convictions: Society is not served by wrongful convictions because the objectives of the criminal justice system (retribution, deterrence and incapacitation) are not realized.[24] The only "winner" when someone is falsely convicted is the real perpetrator of the crime.[25] Also, wrongful convictions cause an erosion of public trust in the criminal justice system.[26]

A number of factors affect eyewitness identification.[27] For one thing, various circumstances affect the eyewitness's acquisition of the identification and his or her ability to retain and retrieve the memory.[28] These factors are described by Loftus and Doyle[29] and presented by Higgins and Skinner:[30]

Factors Affecting Acquisition

Duration of the event: "The longer a person has to look at something, the better his memory will be."

Stress and fear: "The typical finding is that those who are stressed during some event remember it less well when they are tested later, even though they are not stressed at the time of the later test."

Weapon focus: "The term weapon focus refers to the concentration of a crime witness's attention on a weapon—the barrel of a gun or the blade of a knife—and the resultant reduction in ability to remember other details of the crime."

Age: "Analysis suggests that children past twelve years of age are roughly equal to adults in their ability to recognize faces, but younger children are substantially less able."

Factors Affecting Retention

Time until retrieval: "The 'forgetting curve' shows that we forget a good deal of new information soon after we learn it, and that forgetting then becomes more gradual."

Post-event information incorporation: "[After the event] false information can be introduced into a person's recollection, and later this information may be reported as if it actually occurred."

Factors Affecting Retrieval

Confidence: "In short, the witnessing situations generally encountered in litigation—short, unexpected, often violent—are those in which a correlation between confidence and accuracy is the most difficult to find."

Biased lineups: "The most common problem with a lineup is that many of the distracters can be eliminated immediately—they are simply not plausible alternatives. The suspect is then available to be picked by default."

Sequential presentation of suspects: "With the sequential presentation, the researchers found a reduced rate of false identifications in the lineups that did not contain the perpetrator. The reduction of false identifications occurred without loss of accurate identifications in the lineups in which the perpetrator was there."

Cross-racial identification: "It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own."

These factors are a valid guide for developing questions for cross-examination of eyewitness identification witnesses.

In 1999, the United States Department of Justice's National Institute of Justice issued *Eyewitness Evidence: a Guide for Law Enforcement*. ("The Guide" herein.) The Guide attempted to take into account some but not all of the factors affecting eyewitness identification. Arguably, all such factors should be taken into account and the Guide does not go far enough in precluding faulty eyewitness identifications. However, it is a useful first step to improve current law enforcement practices in this ongoing, problematic area. The Guide was an effort to "bridge the gap between social science research and actual law enforcement practice," a gap that has traditionally existed for many years between the two areas.[31]

The Guide addressed the numerous issues surrounding eyewitness identification evidence, and made numerous suggestions on improving the process. These are discussed *infra* along with an exposition of the limitations of the procedures as discussed by Judges in his treatise. Since the Guide was published in 1999, a training manual has been made available to law enforcement to teach officers in the field the principles espoused by the Guide.[32]

The Guide makes various recommendations in interviewing of eyewitnesses and in the procedures for conducting lineups, photo-spreads and show-ups. Many of the recommendations for lineups are the same as photospreads so they are discussed together. When one procedure differs from the other, it is noted in the text.

The principles recommended for the interviewer apply to all of the identification procedures. The Guide recommends that the interviewer making first contact with the witness avoid contaminating the witness's independent recollection with post-event information.[33]

The interviewer should ask open-ended questions, such as, "What can you tell me about the car?" These are followed by close-ended questions such as: "What color was the car?"[34] The interviewer is cautioned to avoid using suggestive or leading questions such as: "Was the car red?"[35]

The Guide makes other recommendations for the preliminary investigating officer, when he or she processes the crime scene.[36] Multiple witnesses should be separated and advised not to talk to one another or other potential witnesses.[37] The witnesses also should be told to avoid contact with the media or listening and/or watching media coverage.[38] The Guide makes additional recommendations for the follow-up interview. As Judges pointed out, many of these recommendations are consistent with many aspects of the cognitive interview.[39]

For the follow-up interview, witnesses should be encouraged to volunteer information and provide detail.[40] The interviewer is encouraged to have the witness use nonverbal communications, such as: drawing, gestures or objects.[41] The witness should be told to mentally recreate the event, that is, to think about his or her feelings at the time of the event.[42] Moreover, the interviewer should avoid volunteering specific information about the event, as well as avoid interrupting the witness.[43] The witness should be cautioned not to guess, and be encouraged to address the interviewer if anything relevant comes to mind.[44]

The Guide makes further recommendations for the interviewer in processing the information.[45] Each element of the witness's statement should be assessed separately.[46] That is, each element should be compared to the entire story and to other sources of information[47] The Guide also makes specific recommendations with regard to identification procedures. In composing the lineup or photospread, the suspect should not unduly stand out, and there should be only one suspect per lineup.[48]

As Judges pointed out, the Guide's recommendations attempt to avoid "instruction bias."[49] The Guide recommends the following to avoid instruction bias: The witness should be told that it is just as important to clear the innocent as to identify the guilty, and that the perpetrator may or may not be in the lineup.[50] Moreover, he or she should be told that the individuals in the lineup may not look exactly like the suspect at the time of the incident because of changes in head and facial hair.[51] The interviewer should ask how certain the witness is of his or her identification and should be assured that the police will continue to investigate if the identification is not made.[52]

The Guide makes many recommendations in composing the lineup to avoid "foil bias."[53] The Guide recommends the selection of fillers, who generally fit the description of the suspect.[54] If the suspect's appearance differs from the witness's description, the fillers should resemble the suspect with regard to salient features.[55] However, complete uniformity is not required. Fillers should not so closely resemble the suspect that a person familiar with the suspect could not pick him or her out.[56] Further, the Guide recommends that fillers should be consistent with the suspect with regard to unique features, such as tattoos and scars.[57] Further, fillers should not be reused, and there should be four fillers for a live lineup and five fillers for photo spreads.[58]

Judges pointed out several limitations of these procedures. The Guide does not recommend separate lineups for multiple witnesses, rather it recommends different placement only.[59] Further, foil bias is inadequately controlled because a mock witness procedure is not used.[60] Rather, the "quick and dirty" approach is used wherein investigators view the spread once it is completed to ensure that the suspect does not stand out.[61] Judges also point out that lineup size, five for live lineups and six for photo spreads, is not adequate.[62] Lineups of these sizes may result in a ten percent probability of false identifications.[63]

The Guide also recommends certain procedures for show-ups, wherein one suspect is displayed and the witness is then asked if that subject is the perpetrator.[64] The Guide recognizes the inherent suggestiveness of the procedure, but did not recommend eliminating its use,[65] which Judges found to be somewhat vexatious.[66]

The Guide recommends that a description of the suspect be obtained before the show-up.[67] Multiple witnesses should be separated, and if one witness makes a positive identification, then other less suggestive procedures should be used with the remaining witnesses.[68] Further, a non-biased instruction that the individual may or may not be the suspect should be used.[69] Furthermore, a statement of witness certainty with regard to the identification and non-identifications should be obtained and documented[70] The Guide also provides recommendations for the compilation and use of "mug books."[71] According to Judges, two major limitations of the Guide are the failure to endorse double blind procedures[72] and the sequential lineup.[73]

The Guide attempts to compensate for not endorsing the double-blind method with a few guidelines. That is, it recommends that the eyewitness makes a "post-identification certainty" statement, and that it be documented.[74] (Additionally, the interviewer should avoid displaying information about previous arrests and other statements that may influence witness selection.)[75] Moreover, the investigator should avoid giving the witness feedback before the certainty statement is obtained.[76] Further, the witness should be instructed not to discuss the results of the identification procedure with other witnesses.[77] The Guide recommends documentation of the identification procedure but not necessarily videotaping.[78] Of course, there are limitations to videotaping because videotaping itself may influence the witnesses.[79]

The Guide also falls short of recommending the least error-prone identification procedure; that is, the sequential lineup.[80] The Guide does provide instructions for the sequential lineup if law enforcement chooses to use this method.[81] The sequential lineup greatly reduces the rate of mistaken identifications.[82] It is thought that the reason for decreased error rates with the sequential procedure is that the eyewitness makes comparisons between their own memory and the lineup member, rather than making comparisons between lineup members.[83]

A cross-racial identification occurs where a victim / witness of one race identifies a suspect of another race as a perpetrator. A problem exists because cross-racial identifications by witnesses are more likely to result in wrongful convictions.[84] This greater tendency to misidentify suspects of another race has been dubbed the "other-race effect" or "own-race bias." There is some support that the own-race effect is strongest when a white witness must identify a black face.[85] While the majority of research has been conducted using white and black subjects, a recent study has noted the other-race effect between black and Hispanic subjects.[86]

Most research on the other-race effect has been done in controlled laboratory settings, as opposed to field research. Because of the lack of observation of the effect in actual criminal cases, some authors have expressed concern over the studies' generalizing to the courtroom context; [87] however, there is some evidence that the lab experiments do have high external validity.[88] Also, studies have shown a lack of correlation between recognition, accuracy and confidence, both generally and with respect to other-race photographs.[89]

In the last twenty years, research has been conducted in an attempt to discern whether the effect has a social or cognitive explanation. Some researchers have suggested that the inability to accurately encode and recognize other-race faces stems from a simple lack of contact with persons of other races.[90] This theory has not been heavily

supported, however, and many studies have argued that it is the quality—not the quantity—of the contact that results in increased ability to recognize other-race faces.[91] Originally, prejudice and racism were thought to be an explanation for lower recognition rates; however, recent studies have found no correlation.[92]

A cognitive interpretation for the "other-race effect" focuses on the physiognomic variability of faces. Specifically, the type of variability in faces, and not the amount of variability, is what accounts for differences in recognition accuracy.[93] Because different races can differ in the type of variability among their faces (e.g., hair color in whites, skin tone in blacks, etc.), relying on the facial cues that lead to variability in one's own race will be ineffective for encoding and recognition of an other-race face.[94]

Whatever the reason for the other-race effect, it has been extensively documented in laboratory research and has been shown to exist outside the lab as well. If cross-racial identification errors cannot be precluded at the source, then they need to be identified and remedied in the courtroom.

Traditional legal safeguards against the offer of inaccurate eyewitness testimony are the suppression hearing, cross-examination and the closing statement. But, these methods simply do not effectively alleviate misidentification resulting from the other-race effect.

The suppression hearing is designed to assess procedural errors, and so will be ineffective in uncovering any underlying bias on the part of the witness.[95] Further, suppression hearings are meant to protect against suggestiveness through police misconduct. Even the most thorough hearing will fail to investigate the witness's inherent recognition ability.[96]

The cross-examination of the identification witness is another tool that is meant to protect against inaccurate or unreliable identifications. Even though cross-examination is the traditional way to assess the credibility of a witness, the limitations of cross-examination will make it unlikely to reveal any impairment due to the other-race effect.[97] If a witness honestly believes that he suffers from no impairment in the ability to recognize other-race faces, for example, then no amount of cross-examination will tease out the other-race effect.[98] Because a witness's confidence in his ability has been shown to be completely unrelated to his cross-racial recognition ability, the jury's reliance on the witness's sincerity will be unfounded and improper.[99]

Counsel can use the closing argument to explain the other-race effect to jurors; however, courts have been reluctant to allow discussion of possible other-race recognition problems due to considerations that such statements will be racially inflammatory.[100] Further, discussion of cross-racial identification at closing argument usually will have a lack of factual foundation, as there will be no facts in evidence on the problems with cross-racial identification[101] Furthermore, even if counsel could make some argument based on cross-racial identification impairment generally, counsel would have no basis for claiming that the current witness actually suffers from any impairment.[102]

Since traditional safeguards are not adequate to protect against undue reliance on inaccurate identification testimony, other safeguards need to be used. Two leading suggestions in the last twenty years have been to use expert testimony and / or a special jury instruction to educate the jury on cross-racial identification and the other-race effect. These suggestions have fostered mixed review for many different reasons.

For example, expert testimony could be used to describe the effect in general and to explain that research has shown that there is an increased likelihood of recognition error in cross-racial identification.[103] While admission of expert testimony on the other-race effect was met with initial hostility, recently some state and federal courts have allowed narrow use of such testimony.[104] In fact, at this point there seems to be no reason why expert testimony on the matter does not satisfy the standards originally set forth by the Court in *Daubert, Join, and Kumho Tire*, and eventually incorporated into Federal Rule of Evidence 702.[105] The reason that most State courts do not allow expert testimony on other-race effect is that identification reliability is common knowledge and available to the lay juror without expert help.[106] However, the New York Court of Appeals has recently ruled that allowing expert testimony on other-race effect must be considered by New York State courts.[107]

Another tool suggested to aid in calling the jury's attention to the problems of cross-racial identification is the special jury instruction. Courts have attempted to provide adequate instructions on considering racial differences in witness identification for the last thirty years,[108] but have largely been limited to special circumstances where there are other indicia of unreliability.[109] The most important questions to answer are just what to say, and when to say it.[110] Recently, the Supreme Court of New Jersey held in *State v. Cromedy* that a special jury instruction on cross-racial identification is required where "identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."[111] The Court also held that the instruction should "alert the jury…that it should pay close attention to a possible influence of race."[112] Some New York jurisdictions have since followed the *Cromedy* ruling.[113]

Critics of the use of a special jury instruction on other-race effect have argued that such instructions "put a judicial imprimatur, or a cloak of expertise, on questionable stereotypes about interracial recognition that may or may not reflect the recall capacity of a witness."[114] An instruction also allows the court to improperly "comment on the quality, or lack of quality, of one party's evidence."[115]

In conclusion, the best way to prevent wrongful convictions by inaccurate eyewitness identification evidence is at the source. Although the Justice Department's guidance does not go far enough because it does not incorporate double-blind and sequential lineup procedures, it is an important first step. Law enforcement should be encouraged to utilize the Guide. The only winner of an erroneous identification procedure is the actual perpetrator. Further, expert opinion should be allowed to inform the jury of the limitations of this type of evidence. Furthermore, adequate jury instructions should be provided to give the jury guidance on how to use this evidence in coming to a verdict.

Cross-racial-identification error poses unique problems in the realm of eyewitness testimony, primarily because most witnesses either do not know it exists or do not know that they suffer from it. The problem is magnified by the fact that the potential problems with recognition and identification are lost on most jurors. Further, because traditional safeguards against the admission of inaccurate eyewitness testimony (suppression hearings, cross-examination and closing arguments) fail to bring out the existence of any bias, attorneys that are aware of the other-race effect cannot educate the jurors properly. The use of expert testimony and special jury instructions has shown some promise; however, they carry an inherent ineffectiveness because they attempt to make jurors aware of the problem after-the fact, with only mixed results.

Endnotes

1. *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 US 293 (1967); *Simmons v. U.S.*, 390 U.S. 377 (1968).
2. *People v. LeGrand*, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007) (held that it is an abuse of discretion to exclude expert testimony on the reliability of eyewitness identifications where accuracy of the identification is an issue and there is little or no corroborating evidence); See also *People v. Abney*, 13 N.Y.3d 251, 889 N.Y.S.2d 890 (2009); see also *People v. Morales*, 37 N.Y.2d 262, 271, 372 N.Y.S.2d 25, 33-34.
3. *Neil v. Biggers*, 409 U.S. 188 (1972).
4. *Manson v. Brathwaite*, 432 U.S. 98 (1976).
5. Gary L. Wells & Eric P. Seelau, Eyewitness Identification: Psychological Research and Legal Policy on Lineups, 1 Psych. Pub. Pol'y & L. 765 (1995).
6. Edmund S. Higgins & Bruce S. Skinner, Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies, 30 N. Ky. L. Rev. 471 (2003).
7. Wells & Seelau, *supra* note 5, at 766.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement 27 (1999).
13. Donald P. Judges, Two Cheers for the Department of Justice's Eyewitness Evidence; A Guide for Law Enforcement, 53 Ark. L. Rev. 231, 254 (2000).
14. Avrahim M. Levi & R.C.L. Lindsay, Lineup and Photo Spread Procedures: Issues Concerning Policy Recommendations, 7 Psych. Pub. Pol. and L. 770, 776 (2001).
15. Wells & Seelau, *supra* note 5, at 765, 766.
16. Richard A. Wise & Martin A. Safer, A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony, 40 Court Review 6, 7 (2003).
17. U.S. Dept. of Justice, *supra* note 12, at iii, see also Judges, *supra* note 13, at 232.
18. Laurie Gould, Brian Von Hatten & John W. Stickels, Art.: Reforming the Use of Eyewitness testimony, 35 Okla. City. U.L. Rev. 131, 136 (2010).
19. *Id.*
20. Richard A. Wise, Kirsten A. Dauphinais, & Martin A. Safer, Criminal Law: A Tripartite Solution to Eyewitness Error, 97 J. Crim L & Criminology 807, 870 (2007).
21. Judges, *supra* note 13, at 234.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Higgins & Skinner, *supr*a note 6, at 476.
28. *Id.*
29. *Id.*
30. *Id.* at 476-77.
31. Judges, *supra* note 13, at 234.
32. U.S. Dept. of Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement (2003) (The manual builds on the principles in the Guide for purposes of classroom discussion and, for the most part, incorporated the suggestions of the Guide, and will not be discussed further in this article).
33. U.S. Dept. of Justice, *supra* note 12, at 13, and Judges, *supr*a note 13, at 264.
34. U.S. Dept. of Justice, *supra* note 12, at 13.
35. *Id.*
36. *Id.* at 15.
37. *Id.*
38. *Id.*
39. Judges, *supr*a note 13, at 251 (The cognitive interview proceeds according to a particular set of general instructions that support the natural processes of memory retrieval). *See generally id.*
40. U.S. Dept. of Justice, *supra* note 12, at 22.
41. *Id.* at 23.
42. *Id.*
43. *Id.*
44. *Id.* at 15.
45. *Id.* at 24.
46. *Id.*
47. *Id.* at 25.
48. *Id.* at 29-30.
49. Judges, *supra* note 13, at 257 (which occurs where a witness believes that the perpetrator is in the lineup and the witness is not given the option of replying that he or she is not present).
50. U.S. Dept. of Justice, *supra* note 12, at 31-32.
51. *Id.* at 32.

52. *Id.*

53. Judges, *supra* note 13, at 258 (which occurs where the selection of the innocent "fillers" (also known as the "foil") or "distractor individuals" bear little resemblance to the description of the suspect, so that the suspect in the lineup stands out).

54. U.S. Dept. of Justice, *supra* note 12, at 29, 30.

55. *Id.* at 29.

56. *Id.* at 29, 31.

57. *Id.* at 29-31.

58. *Id.*

59. U.S. Dept. of Justice, *supra* note 12, at 30, and Judges, *supra* note 13, at 278.

60. Judges, *supra* note 13, at 261 (In a mock witness procedure people who did not actually see the event are given a pre-lineup description from the real witness and are then shown the lineup. If the mock witnesses select the suspect with a greater frequency than the other members of the lineup, the lineup is biased to highlight the suspect.).

61. *Id.* at 279.

62. *Id.* at 262.

63. *Id.*

64. U.S. Dept. of Justice, *supra* note 12, at 27.

65. *Id.*

66. Judges, *supra* note 13, at 276.

67. U.S. Dept. of Justice, *supra* note 12, at 27.

68. *Id.*

69. *Id.*

70. *Id.*

71. U.S. Dept. of Justice, *supra* note 12, at 17-18, and Judges, *supra* note 13, at 276.

72. Judges, *supra* note 13, at 253 (in which the test is administered by an investigator that has only general background knowledge of the event and does not know who the perpetrator, is only that he or she may be present in the group).

73. *Id.* at 263 (in which individuals in the lineup are presented to the eyewitness one at a time. The witness is then asked which is the perpetrator, and is to give a yes or no answer. The procedure stops when the witness makes a positive identification. Thus, the sequential lineup results in fewer false positives).

74. Judges, *supra* note 13, at 279.

75. *Id.*

76. *Id.* at 279-280.

77. *Id.* at 280.

78. *Id.* at 281.

79. *Id.* at 283.

80. David L. Feige, I'll Never Forget that Face: The Science and Law of the Double-Blind Sequential lineup, 26 Champion 28, 29 (2002).

81. U.S. Dept. of Justice, *supra* note 12, at 34-35.

82. Feige, *supra* note 80, at 29.

83. *Id.*

84. Sheri L. Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934, 936 (1984).

85. John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207 (2001) p; Johnson, *supra,* note 84, at 938-941.

86. Otto H. MacLin & Roy S. Malpass, Eyewitness Identification: Racial Categorization of Faces: The Ambiguous Race Face Effect, 7 Psych. Pub. Pol'y & L. 98 (2001).

87. Deborah Bartolomey, Cross-Racial Identification Testimony and What Not to Do About It: A Comment on the Cross-Racial Jury Charge and Cross-Racial Expert Identification Testimony, 7 Psychol. Pub. Pol'y & L. 247, 230 (2001).

88. Johnson, *supra* note 84, at 941-943.

89. *Id.* at 942.

90. *Id.* at 944, MacLin & Malpass, *supra* note 86, at 99.

91. MacLin & Malpass, *supra* note 86, at 100 (noting the difference between experience hypotheses posed by other researchers).

92. Johnson, *supra* note 84, at 943.

93. Gary L. Wells & Elizabeth A. Olson, The Other-Race Effect in Eyewitness Identification: What Do We Do About It?, 7 Psych. Pub. Pol'y & L. 230, 236 (2001).

94. *Id.*

95. Johnson, *supra* note 84, at 951-952 (As Johnson states, "The witness's individual recognition impairment just does not fit the focus of suppression hearings.").

96. *Id.* at 953.

97. *Id.*, at 953.

98. *Id.*

99. *Id.*

100. Johnson, *supra* note 84, at 955-956.

101. *Id.*

102. *Id.* at 956-957.

103. *Id.* at 959.

104. Rutledge, *supra* note 85, at 218-220 (listing a breakdown of use in the federal system).

105. *Id.*

106. Rutledge, *supra* note 85, at 220-221.

107. *People v. Abney*, 13 N.Y.3d 251, 889 N.Y.S. 2d 890 (2009) (held that it was an abuse of discretion to not hold a *Frye* hearing on the admissibility of cross-racial identification expert testimony when eyewitness testimony was the only evidence against the defendant).

108. *United States v. Telfaire*, 469 F. 2d 552 (D.C. Cir. 1972).

109. *State v. Cromedy*, 727 A.2d 457 (N.J. 1999).

110. Johnson, *supra* note 84, at 975-977.

111. Cromedy, 727 A.2d at 467.

112. *Id.*

113. See *Applewhite v. McGinnis*, No. 04 Civ. 6153 (PKC)(JCF) 2005 U.S. Dist. LEXIS 41970 (S.D.N.Y. Nov. 29, 2005); see also *State v. Ellison*, 8 A.D.3d 400; 777 N.Y.S.2d 760 (2d Dep't 2004).

114. Bartholomey, *supra* note 87, at 247.

115. *Id.*

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The Flaw in New York's Reasonable Doubt Instruction

By John J. Brunetti

In its 1996 opinion in *People v. Cubino*,[1] the Court of Appeals dubbed the CJI 1st 6:20 pattern instruction the preferred phraseology to be used by New York trial judges in conveying the concept of reasonable doubt: "The doubt, to be a reasonable doubt, should be one which a reasonable person acting in a matter of this importance would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case (CJI 6:20, at 249)." Understandably, the Second Edition of CJI includes almost identical language, citing *Cubino*.[2] Aside from the fact that it uses one of the two terms to be defined (doubt) in its definition and uses the adjective "reasonable" to modify a "person" rather than a "doubt," the instruction's major flaw is its use of "matter of this importance" to describe the context in which jurors are acting. Its failure to provide jurors guidance in assessing the matter's importance results in each juror being free to ascribe whatever degree of importance he or she sees fit, resulting in the possible application of twelve different definitions of "reasonable doubt" in the same case.

What Preceded *Cubino*'s Adoption of CJI 1st 6:20?

Prior to 1777, in colonial New York, jurors were all on the same page when it came to the importance of the matter on trial because a right to a trial by jury meant a right to a jury aware of the possible penalty.[3] Knowledge of that fact makes it easy to understand why, up until 1889, New York State courts were receptive to defendants' complaints that trial courts failed to advise the jury of the penalty.[4]

Just four years later, in 1893, our Court of Appeals approved of a definition of reasonable doubt analogizing voting guilty or not guilty in a criminal case to important decisions made by jurors in their daily lives.[5] The Court relied upon an 1880 United States Supreme Court opinion that approved of an instruction in a federal criminal case analogizing the context of a juror's vote to "matters of the highest concern and importance to his own dearest personal interests."[6]

In 1910, in another federal criminal case, the United States Supreme Court approved language that retained the "hesitate to act" phrase, but transposed the focus of the importance from the personal affairs of jurors to a "matter of like importance."[7]

In 1954, a third federal criminal case, *Holland v. U.S.*,[8] presented the Court with a return of the personal affairs analogy. In finding that the trial court mis-expressed the definition, the Court added that the analogy to personal affairs "should have been in terms of the kind of doubt that would make a person hesitate to act." According to the 2007 edition of a popular treatise on federal criminal jury instructions, the language recommended by the Supreme Court in Holland is found in the "most common definition" of reasonable doubt used by the federal trial courts.[9]

What Is the Problem with the Analogy to Personal Affairs?

Justice Murphy of the First Department, dissenting in the *Cubino* case that led to the Court of Appeals's approval of CJI 1st 6:20,[10] deemed the analogy to personal affairs a "fallacy of equating the degree of certainty we demand in matters of personal importance, with that constitutionally required in support of a juror's vote to convict one accused of crime." He then cited cases holding that such an instruction not only reduces but trivializes the burden of proof in criminal cases,[11] and quoted an oft-cited Vermont opinion containing the observation that decision-making in personal affairs "involves the balancing of advantages and disadvantages and the decision is reached upon a mere tip of the balance…. If people really did make important personal decisions only when convinced beyond a reasonable doubt as to their correctness, human activity would evidence far more inertia than it does."[12]

U.S. Supreme Court Justice Ginsburg's criticism of the personal affairs analogy centers on the fact that decision-making about future events necessarily involves risk-taking and has nothing to do with the resolution of conflicting positions concerning past events, quoting a report by the Judicial Conference: "In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases."[13]

A federal appeals court judge, writing about his days as trial judge, had this to say about "hesitate to act": "Although, as a district judge, I dutifully repeated [the 'hesitate to act' standard] to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to 'hesitate to act in a matter of importance' what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?"[14]

Over the course of the twentieth century, the "hesitate to act in personal affairs" analogy slowly made its way into New York jurisprudence[15] to the point where, in 1993, the concept was said by the Appellate Division, First Department, to be "firmly embedded in the accepted definition of reasonable doubt."[16] Just three years later the Court of Appeals "disembedded" the analogy to a juror's personal affairs,[17] saying "[t]he comparative characterization used in the instruction by the trial court in this case was less definitive and potentially more troublesome than the preferred language [CJI 6:20] and such variations should be avoided."[18]

Despite all of these criticisms, the 1994 decision of the United States Supreme Court in *Victor v. Nebraska*[19] placed its imprimatur upon a definition of reasonable doubt as "a doubt that would cause a reasonable person to hesitate to act…a formulation [the Court has] repeatedly approved,"[20] citing the case that approved of the analogy to personal affairs.[21]

The Lack of Universal Agreement

While the Constitution requires that the prosecution prove a criminal defendant's guilt beyond a reasonable doubt,[22] there is no universal agreement on a definition of "reasonable doubt."[23] In fact, the Seventh Circuit has both "admonished" U.S. District Courts in that circuit for defining "reasonable doubt"[24] and "forbidden" them from doing so.[25] Yet, empirical studies show that "reasonable doubt" is not self-explanatory,[26] and the failure to define the term "leaves the juror no choice but to use a standard of proof based on his own 'common sense.'"[27]

Unlike the Seventh Circuit, which exercises supervisory power over its district courts, the U.S. Supreme Court concedes that it has "no supervisory power over the state courts" as to how reasonable doubt should be defined.[28] The scope of the Supreme Court's review of state court reasonable doubt instructions is limited to determining whether or not the instruction invites the jury to convict on proof less than that required by the due process clause, i.e., whether or not the trial court "impress[ed] upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused."[29]

Closer to home, three years before *Cubino*'s adoption of CJI 1st 6:20 as the preferred phraseology, there was a lack of universal agreement among the departments of the Appellate Division on the definition of "reasonable doubt" and the propriety of equating "reasonable doubt" with "moral certainty." As the Third Department then explained: "The terms 'to a moral certainty' and 'beyond a reasonable doubt' have been held to be synonymous by the First Department. However, the Second Department held that equation of 'beyond a reasonable doubt' with 'moral certainty' is error. We have found that a charge using the terms, taken as a whole, correctly placed the burden of proving guilt beyond a reasonable doubt upon the prosecution. In our view something additional to the mere use of the term 'to a moral certainty' that lessens the People's burden of proof is required to render a trial court's charge reversible error."[30]

Where Did CJI 1st 6:20 Come From?

The Pattern Instruction 6:20 on Reasonable Doubt that the Court of Appeals in 1996 dubbed the preferred phraseology for reasonable doubt instructions was first published in 1983 in Volume One of *Criminal Jury Instructions—New York*.[31] The Comment section that followed 6:20 provided no insight on where the derivation of "matter of this importance" came from.

A WestLaw search of the entire national database (allcases, allfeds, US and NY-CS) with the phrase "matter of this importance" in the same paragraph as "reasonable doubt" turns up not a single case, except those decided after 1983 by New York courts and federal courts reviewing New York convictions. Only two New York cases contain "matter of like importance." One trial court opinion published in 1959[32] and one Appellate Division opinion published in 1989, six years after CJI 1st 6:20 was published.[33] The cases cited in that Appellate Division opinion do not contain the phrase "matter of like importance."[34] The 1959 trial court opinion cites the 1910 U.S. Supreme Court case (discussed earlier) that retained the "hesitate to act" phrase, but transposed the focus of the importance from the personal affairs of jurors to a "matter of like importance."[35]

Since the 1959 trial court opinion citing the 1910 U.S. Supreme Court's approval of "matter of like importance" was decided by Yates County Court when the District Attorney of Yates County was Lyman Smith, and since Judge Lyman Smith was the Chairperson of the CJI Committee, one might assume that Judge Smith crafted CJI 1st 6:20. One would be wrong. Judge Peter McQuillan, a member of the CJI Committee since its inception, reports that the precursor to CJI 1st 6:20 was a reasonable doubt instruction, crafted by an unknown author, based on the 1910 Supreme Court-approved language, that was handed down from judge to judge over the decades preceding formation of the CJI Committee.[36] The irony is that not a single Supreme Court case decided since 1910 contains "matter of like importance" and that only four other cases in the allfeds database even mention it, yet a century later it stands as the cornerstone of New York's reasonable doubt instruction.

What Is the Problem with CJI 1st 6:20?

CJI 1st 6:20's reference to "matter of this importance" provides no guidance to jurors in assessing the importance of the matter and literally invites jurors to apply a

lesser or greater standard depending upon each juror's subjective assessment of the matter's importance. In fact, the Seventh Circuit Court of Appeals has indirectly poked fun at CJI 1st 6:20 by saying "[j]udges' and lawyers' attempts to inject other amorphous catch-phrases into the 'reasonable doubt' standard, such as 'matter of the highest importance,' only muddy the water."[37]

The very language "in a matter of this importance" begs the compound question: in a matter of what importance and to whom? The defendant, the prosecution, the alleged victim, society? What if the juror's assessments of the degree of importance to each of those four groups differ? That circumstance may result in twelve jurors applying four distinct reasonable doubt standards. But there's more.

What if the all twelve jurors interpret the instruction to mean a matter of importance to society? Does that mean that the standard of proof varies depending upon its impact on society? If Bernie Madoff had gone to trial on New York charges, would his jury have applied a different (lower?) standard than another jury deliberating on a misdemeanor DWI in the same building?

Since jurors receive no guidance in considering to whom the "matter of importance" refers when they are voting ("acting"), it would not be unexpected for some jurors to infer that the judge means "matter of importance" to the prosecution and defense. While most jurors are not lawyers, they are astute enough to appreciate the difference in importance between murder and petit larceny, rape and DWI, etc. In some cases they are actually told by the judge that an offense is of a lesser degree than another.[38] If jurors gauge the importance of the matter based upon the severity of the offense (which they are permitted to do since they receive no guidance from the court), the threshold the prosecution must meet in order to sustain its burden may fluctuate proportionately with that severity.

Because criminal case jury instructions are defendant-centric, it would be natural for one or more jurors to interpret the instruction to mean "matter of importance" to the defendant. As discussed above, jurors have a general appreciation of the difference in severity (and consequent difference in penalty) between certain types of offenses. However, jurors are not advised of the possible penalty for the offense on trial. In fact, jurors are expressly told that "in determining the issue of guilt or innocence, [they may not] consider or speculate concerning matters relating to sentence or punishment."[39] Are these two instructions contradictory? How is it possible for a juror to assess the importance of a matter to an accused without knowing the adverse consequences the convicted defendant may face?

Is "matter of this importance" actually intended to mean matter of importance to the defendant because of the potential loss of liberty and stigma of conviction? The Supreme Court of the United States might have already answered that question in the affirmative forty years ago when it decided that the due process clause requires that the guilt of an accused in juvenile delinquency and adult criminal cases be proven beyond a reasonable doubt: "The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[40]

If CJI 1st 6:20 is Ever Reexamined

Any discussion of "reasonable doubt" definitions in general, and CJI 1st 6:20 in particular, must recognize two immutable facts. The first is that any definition of "reasonable doubt" will always express a subjective standard because, while the word "reasonable" may attempt to convey an objective standard, when it allows each juror to be the sole arbiter of his or her reasonableness, a subjective standard results.[41] Granted, most reasonable doubt instructions, including CJI,[42] give examples of doubts that are not reasonable, but that is not much help in defining what is a reasonable doubt.[43]

The second fact is that the noun "doubt" is derived from the Latin word *dubitare* which means "to hesitate,"[44] and one of the dictionary definitions of "doubt" is a "hesitation to believe."[45] That circumstance makes use of "hesitate" proper in defining reasonable doubt, especially when the very case CJI 1st 6:20 is based upon included the words "hesitate to act."[46] and it is the analogy to personal affairs, not use of "hesitate," that the Court of Appeals and others have found objectionable

Following the Supreme Court's lead in resorting to dictionary definitions in evaluating reasonable doubt instructions,[47] and using the dictionary definitions for "reasonable," "doubt," and "reason,"[48] a dictionary-based definition of "reasonable doubt" might read: "sensible basis for a hesitation to believe." Using that definition, an instruction to jurors might read: "If you have a sensible basis for hesitating to believe that all elements have been established as true, then that is a reasonable doubt."

Conclusion

Despite its shortcoming, CJI 1st 6:20 is probably here to stay. The chances of a case reaching the Court of Appeals on a reasonable doubt definition issue are remote because most trial judges are not likely to experiment with a reasonable doubt definition that the Court prefers. But the dutiful allegiance[49] of trial judges to the language preferred by the State's highest court should not preclude

recognition of its need for reexamination, a need already recognized by the Seventh Circuit.[50]

Endnotes

1. *People v. Cubino*, 88 N.Y.2d 998, 1000 (1996).
2. CJI II: "It is a doubt that a reasonable person, acting in a matter of this importance, would be likely to entertain because of the evidence that was presented or because of the lack of convincing evidence."
3. See the exhaustive discussion of jury trial procedures in colonial *New York in U.S. v. Polouizzi*, 687 F. Supp. 2d 133, 169 (E.D.N.Y. 2010).
4. See *People v. Ryan*, 8 N.Y.S.241, 243 (1889), quoting *People v. Cassiano*, 1 N.Y. Crim. Polouizzi, R. 505, as follows: "In *People v. Cassiano*, the jury inquired of the court what the punishment would be for the offense included in the indictment. This was not given; and the court, in its opinion, said: "We think the information should have been given. In all cases the jury should know the effect of their verdict." In *People v. Ryan*, the Court rejected the defendant's contention that his jury should have been informed of the penalty without its having asked.
5. *People v. Hughes*, 137 N.Y. 29, 40 (1893) ["very grave and serious matter, affecting their own affairs, they would not hesitate to act upon such conviction"].
6. *Miles v. U.S.*, 103 U.S. 304, 309 (1880).
7. *Holt v. U.S.*, 218 U.S. 245, 254 (1910) ["If you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt"].
8. *Holland v. U.S.*, 348 U.S. 121, 140, 75 S. Ct. 127, 138 (1954).
9. Sand, Siffert, Louglin, Reiss, MODERN FEDERAL JURY INSTRUCTION, Pages 4–13 [2007 ed. Matthew Bender].
10. *People v. Cubino*, 222 A.D.2d 346, 348-350 (1st Dep't 1995) (Murphy, J., dissenting).
11. *Id.* At 350 ["(see, e.g. *Scurry v. United States*, 347 F.2d 468, 470, *cert. denied Scurry v. Sard*, 389 U.S. 883, 88 S.Ct. 139, 19 L.Ed 2d 179 ["Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act…in the more weighty and important matters in your own affairs,"]; 349 *Commonwealth v. Rembiszewski*, 391 Mass. 123, 131, 461 N.E. 2d 201, 207 "…Equating the proof that the jurors might have wanted in making decisions with respect to their personal affairs with the degree of certitude necessary to convict the defendant tended to reduce the standard doubt to the standard in civil cases, proof by a fair preponderance of the evidence."].
12. *State v. Francis*, 151 Vt. 296, 303-304, 561 A.2d 392, 396 (1989) ["We also believe it trivializes the proof-beyond-a-reasonable-doubt standard to compare it to decisions of personal importance in a juror's life. Making a decision about the guilt of an accused is dissimilar to deciding important personal matters. The latter often involves the balancing of advantages and disadvantages and the decision is reached upon a mere tip of the balance. If people really did make important personal decisions only when convinced beyond a reasonable doubt as to their correctness, human activity would evidence far more inertia than it does."].
13. *Victor v. Nebraska*, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring) ["A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, has criticized this "hesitate to act" formulation "because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987) (commentary on Instruction 21).
14. Second Circuit Chief Judge Jon O. Newman, Beyond "Reasonable Doubt," 68 N.Y.U.L. Rev. 201, 204 (1994) James Madison Lecture, delivered at New York University Law School, Nov. 9, 1993.
15. See, e.g., *People v. Baucom*, 154 A.D.2d 688 (2d Dep't 1989) ["In any event, we note that it was not error to instruct the jurors that reasonable doubt existed if they had a doubt upon which they believe 'a reasonable person would hesitate to act' (see *People v. Quinones*, 123 A.D.2d 793, 507 N.Y.S.2d 417; see also, CJI [NY] 6.20 at 248)."]; *People v. Alston*, 211 A.D.2d 498 (1st Dep't 1995) ["Nor do we find error in the court's description of reasonable doubt as a doubt that would make a 'reasonable person…hesitate to act' (see *People v. Quinones*, 123 A.D.2d 793, 507 N.Y.S.2d 417"].
16. *People v. Morgan* 199 A.D.2d 143, 144(1st Dept' 1993); see also *People v. Simon*, 224 A.D.2d 458, 459 (2d Dep't 1996) ["It was also proper for the court to instruct the jury that a reasonable doubt was one upon which a reasonable person 'would hesitate to act.' This concept is contained in the Pattern Jury Instructions (see, 1 CJI [NY] 6.20) and 'is firmly embedded in the accepted definition of reasonable doubt'(*People v. Morgan*, 199 A.D.2d 143, 144, 605 N.Y.S.2d 85; see, *People v. Alston*, 211 A.D.2d 498, 621 N.Y.S.2d 329; *People v. Quinones*, 123 A.D.2d 793, 507 N.Y.S.2d 417.]."
17. The objectionable language is reported in the Appellate Division opinion as "the quality and the amount of proof that you would require before you made an important decision concerning your own lives." *People v. Cubino*, 222 A.D.2d 346 (1st Dep't 1995).
18. *People v. Cubino*, 88 N.Y.2d 998, 1000 (1996).
19. *Victor v. Nebraska*, 511 U.S. 1 (1994).
20. *Id.* at 20-21.
21. *Holland v. U.S.*, 348 U.S. 121, 140, 75 S. Ct. 127, 138 (1954).
22. *In re Winship*, 397 U.S. 358 (1970).
23. See the exhaustive discussion in Hisham Ramadan, The Challenge of Explaining "*Reasonable Doubt*," 40 No. 1 Crim. Law Bulletin 1 (Winter 2004).
24. *U.S. v. Hall*, 854 F.2d 1036, 1038 (7th Cir. 1988) ["In response, the government concedes that this court has indeed *admonished the district courts* not to define reasonable doubt."].
25. *U.S. v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988) ["This case illustrates all too well that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct 127, 138.99 L.Ed. 150 (1954). And that is precisely why this circuit's criminal jury instructions *forbid* them. See Federal Criminal Instructions of the Seventh Circuit 2.07 (1980."].
26. *Ramadan, supra* note 23, at Footnote 6.
27. *Ramadan, supra* note 23, at Footnote 20.
28. *Victor v. Nebraska*, 511, 511 U.S. 1, 17 (1994) ["[W]e have not supervisory power over the state courts, and in the context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional."].
29. *Id.* at 14-15 (1994), citing *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).
30. *People v. Zebrowski*, 198 A.D.2d 716, 720 (3d Dep't 1993).
31. The PREFACE to CJI 1st Volume One states: "Prior publications and distributions include: Volumes 2 and 3 (CJI-NY), containing abstract or model charges for all degrees of virtually all substantive crimes defined in the Penal Law." That explains the references to CJI in cases decided prior to 1983, cited at the end of this note, albeit not on reasonable doubt, but rather various sections of the penal law. E.g., *People v. Fischer*, 53 N.Y.2d 178, 183

(1981) ["recommended charge set out in Criminal Jury Instructions (3 CJI [N.Y.], Penal Law, § 215.51, p. 1650)"].

32. *People v. Moore*, 20 Misc. 2d 48, 49 (Yates Co. Ct. 1959) ["therefore became incumbent upon the prosecution in the instant case to prove the appellant guilty beyond a reasonable doubt. Reasonable Doubt has been defined as an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant is entitled to have the benefit. See *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed 1021."].

33. *People v. Hill*, 154 A.D.2d 887 (4th Dep't 1989) ["It was not error to instruct the jury that if they were "satisfied that in entertaining such a doubt [they were] acting as a reasonable person would in a matter of like importance, then that would be a reasonable doubt' (see, *United States v. Ivic*, 700 F.2d 51, 69, n. 11; *People v. Jones*, 27 N.Y.2d 222, 316 N.Y.S.2d 617, 265 N.E.2d 446; *People v. Rivera*, supra; *People v. Quinones*, 123 A.D.2d 793, 507 N.Y.S.2d 417, *lv. denied*, 69 N.Y.2d 749, 5121 N.Y.S.2d 1053, 505 N.E.2d 251)."].

34. Note that none of the four cases cited in *Hill* contains "like importance" or "this importance" or "importance," and three of them approve the "hesitate to act" language. *People v. Rivera*, 135 A.D.2d 755 (2d Dep't 1987) ["It was not error for the court to instruct the jury that if they had a doubt upon which they believed a reasonable person would hesitate to act, that was reasonable doubt." (see *United States v. Ivic*, 700 F2d 51.69, n. 11; *People v. Quinones*, 123 A.D.2d 793, *lv. denied*, 69 NY2d 749)] *People v. Quinones*, 123 A.D.2d 793 (2d Dep't 1986) ["It was not error for the court to instruct the jury that if they had a doubt upon which they believed a reasonable person would hesitate to act, that was reasonable doubt." (see *United States v. Ivic*, 700 F2d 51.69, n. 11)]; *U.S. v. Ivic*, 700 F.2d 51, 69 n. 11 (2nd Cir. 1983) ["That model instruction read, in pertinent part, as follows: 'It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.'"].

35. *Holt v. U.S.*, 218 U.S. 245, 254 (1910) ["if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt"].

36. E-Mail discussion with Hon. Peter McQuillan, member of CJI 1st Committee, on July 23, 2010. Judge McQuillan immediately recalled that CJI 6:20 was based on language from a 1910 U.S. Supreme Court opinion that had been "around forever." The CJI Project Coordinator recalls that Judge Nathan Sobel had been working on a book of Criminal Jury Instruction for years before the CJI Committee was formed, but that most of Judge Sobel's work was "destroyed in a fire at the Court House one weekend. That which survived was also part of the discussions leading to the final charges." E-mail discussion with Michael McEneney, Esq., on July 23, 2010.

37. *U.S. v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988).

38. CPL 30.50 authorizes a judge to submit lesser included offenses to a trial jury.

39. CPL 300.10(2).

40. *In re Winship*, 397 U.S. 358 (1970).

41. Ramadan, *supra* note 23, at Footnote 13 ["One of the problems with the criminal standard of proof arises from the word reasonable, which is a qualifying adjective, referring to the degree. This qualifying adjective is subject to interpretation… Professor Horowitz after reviewing empirical research suggests that diverse definitions of 'beyond a reasonable doubt' permit the jury to supply a subjective conviction standard that is much lower than the standard understood by lawyers. Irwin A. Horowitz, Reasonable Doubt Instructions: Commonsense Justice and the Standard of Proof, 3 Psych. Pub. Pol'y. & L. 285, 298-299 (1997). He concluded that '[b]ecause the courts have apparently resisted providing a quantities definition of the reasonable doubt standard and have suggested that it is an inherently qualitative notion, the way seem clear for courts, legislators and citizens to decide that lower certainty of guilt levels are acceptable.' *Id.* at 300-301.")].

42. CJI 2nd: "It is an actual doubt, not an imaginary doubt…Whatever your verdict may be, it must not rest upon baseless speculations. Nor may it be influenced in any way by bias, prejudice, sympathy, or by a desire to bring an end to your deliberations or to avoid an unpleasant duty."

43. *See, e.g., U.S. v. Hernandez*, 176 F.3d 719, 728 (3rd Cir 1999) ["Reasonable doubt is, therefore, a doubt based upon reason rather than whim, possibilities or supposition."].

44. Latin Verbs at http: / / flashcarddb.com dubito, dubitare, dubitavi, dubitatum means to doubt, hesitate.

45. Random House Unabridged Dictionary.

46. *Holt v. U.S.*, 218 U.S. 245, 254 (1910)["if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt"].

47. See, e.g. *Victor v. Nebraska*, 511 U.S. 1, 12-38 (1994), for an exhaustive discussion of dictionary definitions of terms used in reasonable doubt instructions culminating with: "On the one hand, 'substantial' means 'not seeming or imaginary'; on the other it means 'that specified to a large degree' Webster's Third New International Dictionary, at 2280."

48. Random House Unabridged Dictionary (1966).

49. Newman, *supra* note 14 ["as a district judge, I dutifully repeated"].

50. *U.S. v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988) ["[j]udges' and lawyers' attempts to inject other amorphous catch-phrases into the 'reasonable doubt' standard, such as 'matter of the highest importance,' only muddy the water."].

The Honorable John J. Brunetti is a Judge of the New York Court of Claims, having been appointed in 1995. He is presently serving as an Acting Supreme Court Justice in Onondaga County, Syracuse, New York.

Padilla and Retroactivity

By Peter Dunne

In *Padilla v. Kentucky,*[1] the United States Supreme Court held that it was ineffective assistance of counsel in 2002 to fail to advise a client of the immigration consequences of a guilty plea to a drug charge.

This article will examine some of the consequences of this ruling, some of the questions left unanswered and whether this ruling has retroactive effect.

In 2002, Jose Padilla pleaded guilty to the transportation of a large amount of marijuana in the Commonwealth of Kentucky. Mr. Padilla was born in Honduras, served in the Armed Forces in the Vietnam War and was a lawful permanent resident of the United States for more than forty years. Following his plea, the Federal government began proceedings to deport him as a result of the plea.

Padilla filed a motion in Kentucky to vacate his plea. He claimed that prior to entering the plea, his attorney told him that he "did not have to worry about immigration status since he had been in the country so long."[2]

The Supreme Court of Kentucky held that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction.[3] This holding was based on a long line of cases which hold that before pleading guilty, a defendant must be given a full understanding of the rights being waived by the plea and the consequences of the plea.[4] However, there is a distinction between the direct consequences of the plea, which must be told to the defendant, and collateral consequences, about which the defendant need not be advised.

A direct consequence is one which has a definite, immediate and largely automatic effect of defendant's punishment.[5] For example, a defendant must be told that a period of post-release supervision will follow his prison sentence.[6]

On the other hand, some illustrations of collateral consequences are the loss of the right to vote, loss of civil service employment, or loss of the right to possess firearms. Prior to *Padilla*, the New York Court of Appeals stated that "Deportation is a collateral consequence of conviction…. Therefore,…the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation."[7]

The United States Supreme Court reversed the decision of the Kentucky Supreme Court and remanded the case to Kentucky for further proceedings.

The Supreme Court relied on its earlier holdings involving effective assistance of counsel as stated in *Strickland v. Washington*.[8] In that case the Court established a two-pronged test for determining whether counsel was ineffective. In the first prong, counsel's representation must fall "below an objective standard of reasonableness." To satisfy the second prong, the defendant must establish that but for counsel's unprofessional errors, he would have gone to trial.

The Court reviewed the prevailing norms of professional conduct at the time of Padilla's plea and decided that the weight of prevailing professional norms supported the view that "counsel must advise her client regarding the risk of deportation."[9] Furthermore, in a case like Padilla's, the relevant immigration statutes were succinct, clear and explicit. The pertinent immigration statute stated: "Any alien who at any time after admission has been convicted of a violation of…any law…relating to a controlled substance…other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."[10] The Court stated that "[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."[11] The Court went further and held that it was not only ineffective to give erroneous advice, as Padilla's counsel did, but it was also ineffective to fail to give advice.[12]

Therefore, the Court found that the advice given to Padilla fell below an objective standard of reasonableness and remanded the case to Kentucky to address the second prong of the *Strickland* test: whether the defendant was prejudiced by the erroneous advice of counsel. The defendant would have to show that if he had been given the correct advice, he would not have taken the plea.

Among the many questions left unanswered by *Padilla* is the scope of the holding and whether the decision is to be applied retroactively to pleas taken before the date of the decision.

Scope of the Holding

The *Padilla* decision imposes two duties on defense counsel. First, where the law is clear and deportation is "presumptively mandatory," such as with "aggravated felonies" or crimes involving moral turpitude, counsel must inform his client of those consequences. Where the law is unclear, counsel need only inform the defendant of the risk of adverse consequences.

The problem with these duties was mentioned in the concurring opinion by Justice Alito. "As has been widely acknowledged, determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude' is not an easy task."[13]

One of the intriguing implications of the *Padilla* decision is whether the failure to advise a client of other so-called collateral consequences to a guilty plea will be held to be ineffective assistance of counsel in the future. The majority decision explicitly refused to consider whether

deportation was a direct or collateral consequence of a plea of guilty because "deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence."[14] Therefore, other so-called collateral consequences may be deemed to be closely connected to the criminal process.

For example, should counsel advise that a guilty plea may affect eligibility for subsidized housing, or the loss of employment, or even the loss of a driver's license? All of these, as well as the other collateral consequences mentioned above, may be deemed as important as remaining in the United States.

Retroactivity

One of the questions left open by the *Padilla* decision is whether the decision is to be applied retroactively. Whether or not this decision can form the basis of a post-conviction motion to vacate the plea, for pleas taken prior to the *Padilla* decision, was not specifically addressed by the Court.

The leading case on retroactivity is *Teague v. Lane*.[15] In *Teague*, the Supreme Court held that a new decision would be applied on collateral review to post judgment motions only if the decision fell into one of two categories.

The first category is that of an "old" rule; that is, the decision applied settled law to new facts. Such a decision is to be applied retroactively.

The second category is that it is a "new" rule. But a "new rule" is retroactive only if the new rule establishes that the defendant's conduct was not criminal at all and not subject to prosecution, or that the new rule is a watershed rule that is "so fundamental to the fair administration of justice in the adjudication of innocence or guilt that its retroactive application is required."[16]

The second category is rather easily addressed. Clearly *Padilla* did not decriminalize any conduct. With regard to whether the rule is a "watershed" rule, within the meaning of *Teague* is also easily addressed. The only case which the Supreme Court has identified as a "watershed" rule is *Gideon v. Wainwright*,[17] which established the requirement that counsel must be appointed for every indigent defendant charged with a felony. Among recent groundbreaking decisions which have been held not to be "watershed" new rules are the decision in *Crawford v. Washington*,[18] involving testimonial statements from absent witnesses, and *Ring v. Arizona*,[19] involving the requirement that aggravating factors necessary for the imposition of the death penalty must be found by a jury.

It is unlikely that the failure to advise a defendant of the immigration consequences of a plea is so fundamental to the fair administration of justice in the adjudication of innocence or guilt that its retroactive application is required.

Therefore, the issue of retroactivity comes down to this. If *Padilla* applied settled law to new facts, then it will be retroactive. If not, then it is a "new" rule and is not retroactive.

The post-*Padilla* decisions are split on this question, with the large majority favoring the view that the decision applied settled law to new facts.[20]

Among the factors to be considered in deciding whether a decision applied settled law to new facts or is a "new" rule are 1) whether the decision breaks new ground or imposes a new obligation on the states or on the federal government; 2) whether the result was dictated by precedent existing at the time the defendant's conviction became final; and 3) whether, at the time of conviction, the unlawfulness of the defendant's conviction was apparent to all reasonable jurists.[21]

The pro-retroactive cases focus on a number of facets of the decision. First, they point to language in the decision which implies that the Court is merely applying *Strickland* to a new set of facts. "We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim."[22]

In a case involving the effectiveness of counsel during the death penalty phase of a trial, the Supreme Court held that applying *Strickland* to a new scenario does not create a new rule as "it can hardly be said that recognizing the right to effective assistance of counsel breaks new ground or imposes a new obligation on the states."[23]

The Court of Appeals has also held that when a Supreme Court decision applies a well-established rule to a new circumstance, it is considered to be an application of an old rule and is always retroactive.[24]

Another facet relied upon by the pro-retroactive cases is that *Padilla* did not overrule any prior decision of the Supreme Court. In fact one court[25] viewed that *Padilla* was a foreseeable decision based upon the Court of Appeals ruling in *People v. McDonald*[26] which stated a defense attorney's incorrect advice as to deportation consequences of a plea constituted ineffective assistance of counsel.

Lastly, the pro-retroactive decisions also rely upon the extensive discussion in the majority opinion about whether its decision would be applied retroactively. "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains…. Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after trial."[27] These statements appear to all but literally state that the Supreme Court intended the *Padilla* decision to be applied retroactively.

The anti-retroactive cases focus on the same three factors.[28]

First, these cases argue that the decision was not dictated by precedent. No case had ever held that counsel's failure to apprise the defendant of the immigration consequences of a plea was ineffective assistance of counsel.

Second, although *Padilla* did not overrule any existing Supreme Court case, it did overrule decisions from 10 federal circuits and 23 states.

Essentially, the anti-retroactive cases argue that applying *Strickland* as the standard to judge the effectiveness of counsel is not new, but applying *Strickland* to an area which had been considered collateral by the vast majority of jurisdictions is new, and therefore not retroactive.

As far as the "floodgates" discussion by the Supreme Court, these decisions argue that there is nothing in the *Padilla* decision which indicates that *Teague* and the rest of retroactivity jurisprudence has been changed, and that because, in the view of these cases, *Padilla* is a new rule under *Teague*, the discussion is irrelevant and dicta.

Suggestions for Attorneys

In terms of current practice, it is absolutely essential that defense counsel, at a minimum, familiarize themselves with the portion of the immigration statutes which describe "aggravated felonies" and "crimes involving moral turpitude" and other offenses which render a client deportable. These crimes would presumably subject the client to deportation, and the client must be informed of that fact.

Attorneys who are contemplating bringing a motion to vacate a plea taken before the *Padilla* decision face a number of significant hurdles.

First, assuming that one is able to persuade the court that *Padilla* is retroactive, the defendant must also establish the second prong of the *Strickland* test: that he was prejudiced by the ineffectiveness of counsel. Essentially, the defendant must prove that if he had been told of the deportation consequences of the plea, he would not have taken the plea. Obviously, the credibility of this claim will depend on things as disparate as the proof against the defendant, the background of the defendant, and the nature of the promised sentence. Whether this can be done merely by an affidavit from the defendant or would require a hearing is obviously another question.

Secondly, even assuming that the defendant prevails in the motion, the defendant is no better off than when he was arrested. The original indictment is reinstated and the defendant is faced with full exposure to the charges. The likelihood of a retrial will depend on the circumstances of each case, but obviously the possibility of a trial on the original charges must be considered.

Anecdotally, this writer has seen and read a large number of motions to vacate pleas based upon *Padilla*. In the unpublished opinions which I have read, most have denied the motion without a hearing, on the grounds that the affidavit submitted by the defendant establish neither of the *Strickland* prongs.

Conclusion

Although a persuasive argument can be made that under existing retroactivity jurisprudence *Padilla* should not be applied retroactively, it seems likely that in the future the Supreme Court will rule that *Padilla* applied settled law to a new set of facts and will be applied retroactively.

Endnotes

1. __ U.S. __ , 130 S. Ct. 1473, 176 L. Ed. 2d 264.
2. *Id.* at 1478.
3. *Commonwealth v. Padilla*, 253 S.W. 3d 482.
4. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274.
5. *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270.
6. *People v. Catu*, 4 N.Y.3d 242.
7. *People v. Ford*, *supra*, at 403.
8. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.
9. *Padilla*, *supra*, at 1482.
10. 8 U.S.C. 1227 (a)(2)(B)(i).
11. *Padilla*, *supra*, at 1483.
12. *Id.* at 1484.
13. *Id.* at 1488.
14. *Id.* at 1482.
15. 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334. The retroactivity principles in *Teague* have been adopted by New York in *People v. Eastman*, 85 N.Y.2d 265, 648 N.E.2d 459, 624 N.Y.S.2d 83.
16. *Teague*, at 311.
17. 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.
18. 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177; *Wharton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1.
19. 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556; *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442.
20. Among the notable New York cases holding that *Padilla* should be applied retroactively are *People v. Bennett*, 28 Misc. 3d 575, 903 N.Y.S.2d 696, *People v. Paredes*, 29 Misc. 3d 1202A, and *People v. Garcia*, 907 N.Y.S.2d 398.
21. *Teague*, *supra*, at 301.
22. *Padilla*, *supra*, at 1482.
23. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389.
24. *People v. Eastman*, *supra*.
25. *People v. Bennett*, *supra*, at 700.
26. 1 N.Y.3d 109, 802 N.E. 2d 131, 769 N.Y.S.2d 781.
27. *Padilla*, *supra*, at 1485.
28. For an excellent review of the anti-retroactive arguments, see *People v. Kabre*, 29 Misc. 3d 307, 905 N.Y.S.2d 887; *People v. Ebrahim*, 2010 N.Y. Slip Op. 32794U.

Peter Dunne is presently serving as the law secretary to Queens Supreme Court Justice Robert McGann. While at Boston University School of law, he served as the Editor of the *Law Review*. He has also written several articles for our publication over the last few years.

Scenes from the Criminal Justice Section

Annual Meeting

Thursday, January 27, 2011

Hilton New York • New York City

NYSBA President-elect Vincent Doyle III addresses luncheon attendees

New York County D.A. Cyrus Vance, Jr. and colleague congratulate award winner Sean E. Smith (center)

Section Chair Jim Subjack greets luncheon attendees

Luncheon and CLE Program

Joanne Macri happily accepts her award

Award winner Sean E. Smith receives congratulations from fellow prosecutor Dan McCarthy

Corrections Commissioner Brian Fischer accepts his award and provides a few remarks

Newsletter **Editor Spiros Tsimbinos, Norman Effman, Chair Awards Committee, Section Chair Jim Subjack and Section Secretary Mark Dwyer**

Judge Jed S. Rakoff receives his award from Vincent Doyle III

Judge Phylis S. Bamberger accepts her award from Norman Effman

Elsie Chandler accepts her award from Norman Effman and Jim Subjack

CLE Program Chair John T. Hecht with morning panelists at CLE program

Luncheon attendees engage in pleasant conversation

New York Court of Appeals Review

The New York Court of Appeals issued several important rulings in the field of criminal law in the last few months. Summarized below are the significant decisions issued by the New York Court of Appeals from November 2, 2010 to January 30, 2011.

Calibration of Breathalyzers

***People v. Boscic*, decided November 17, 2010 (N.Y.L.J., November 18, 2010, pp. 1, 12 and 28)**

In a unanimous decision, the New York Court of Appeals held that breathalyzer results in a drunken driving case should not be thrown out simply because the device has not been checked for accuracy in the six month period before the defendant's arrest. The Court held that it would not apply a bright-line calibration rule, and that any claim that the breathalyzer device was not working properly would have to be assessed on a case by case basis. Judge Graffeo, who wrote the Court's opinion, stated "that given the technological advances that have occurred, and the proliferation of available breath-alcohol detection devices, we do not believe that a court-imposed calibration timing rule would be helpful in achieving the primary objective, which is to provide the fact-finder a basis to determine whether the particular instrument used produced reliable results in a specific instance."

Alleged *Brady* Violation

***People v. Bayard*, decided November 17, 2010 (N.Y.L.J., November 18, 2010, p. 29)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction and denied his claim that the People's failure to disclose a police officer's identity amounted to a *Brady* violation. In the case at bar, the People had turned over a police complaint report that included descriptive information relating to the crime and the perpetrator but did not contain the name of the officer that compiled the information. The Court held that even assuming that the omitted name had exculpatory or impeachment value, there is no reasonable possibility that if the officer's identity had been discovered, the outcome of the proceeding would have been different. No reversible error had therefore occurred.

Counterfeit Goods

***People v. Levy*, decided November 18, 2010 (N.Y.L.J., November 19, 2010, p. 26)**

In the case at bar, the Defendant was accused of dealing in counterfeit parts for Ford Motor Vehicles. The Defendant claimed that several of the counts related to parts which were not covered by the Trademark Registration Certificates introduced into evidence, and therefore were not counterfeit within the meaning of Penal Law Section 165.70. The Defendant had also requested a trial instruction that an unlawful intent was required, and that a defendant had to have knowledge that the parts were counterfeit. In reviewing the evidence, the Court of Appeals upheld the Defendant's conviction, and found that a rational juror could find beyond a reasonable doubt that the Defendant was guilty of the crime charged, and that the Court's charge adequately informed the jury of the proper legal principles to be followed.

Depraved Indifference Murder

***People v. Taylor*, decided November 18, 2010 (N.Y.L.J., November 19, 2010, p. 29)**

In a unanimous decision, the New York Court of Appeals determined that the evidence was legally insufficient to establish depraved indifference murder, and that the issue was adequately preserved for Court of Appeals review. A new trial was thus ordered on the charge of manslaughter in the first degree. In the case at bar, a female victim was found dead on a roof of an apartment building. The Defendant was a resident of the building where the victim was found. The evidence indicated that the Defendant and the victim had smoked crack, that she later had attacked him, and that he hit her to protect himself. He thereafter placed a plastic bag around her to stop the bleeding, and put her on the roof of his building. She was subsequently found dead, and the Defendant was charged with both manslaughter in the first degree and depraved indifference murder.

In finding that the evidence was legally insufficient to establish depraved indifference murder under recent New York case law, the Court stated,

> In this case, defendant struck the victim on her head and went to sleep. After he awoke, defendant knotted a plastic bag over the victim's head and dumped her body on the roof of his building. As the dissent below noted, the People did not establish "torture or a brutal, prolonged" course of conduct. These facts do not fall within the limited nature of a depraved indifference murder set forth by this Court, which requires "utter depravity, uncommon brutality and inhuman cruelty" and "indifference to the victim's plight" (Suarez, 6 NY3d at 211, 216).

Civil Commitment

Matter of the State of New York v. Rashid, decided November 23, 2010 (N.Y.L.J., November 24, 2010, pp. 1, 2 and 26)

In a 5-2 decision, the New York Court of Appeals held that civil confinement proceedings to place dangerous sex offenders in secure mental facilities after their release from prison must begin either while an offender is still incarcerated or under post-release supervision. In the case at bar, the Attorney General's Office had filed a Sex Offender Management Petition against the Defendant a week after he was released from Riker's Island, and one day after his paroled supervisory period had ended. The five-Judge majority found that under the Mental Hygiene Law, the Petition in question must be filed while a defendant is in state custody or still subject to state supervision. The majority opinion was written by Judge Read, and was joined in by Judges Ciparick, Pigott, Jones and Chief Judge Lippman. Judges Graffeo and Smith dissented. The dissenters argued that the majority ruling could compromise public safety, and that the Attorney General's action could be upheld under a reasonable interpretation of the Statute.

Business Records Exception to Hearsay Rule

People v. Ortega

People v. Benston, decided November 23, 2010 (N.Y.L.J., November 24, 2010, pp. 2 and 26)

In a unanimous decision, the New York Court of Appeals upheld the Defendant's convictions in two separate cases, and ruled that statements which appeared in the medical records of crime victims were properly allowed into evidence during the Defendants' trials under the business records exception to the hearsay rule. The Court found that the statements were relevant to the diagnosis and treatment of the victim, and that their admission did not constitute reversible error. The Court's opinion was written by Chief Judge Lippman, and Judges Smith and Pigott issued additional concurring opinions.

Denial of Peremptory Challenge

People v. Hecker, decided November 30, 2010 (N.Y.L.J., December 1, 2010, pp. 1, 7 and 26)

In a 4-3 decision, the New York Court of Appeals held that under New York State Constitutional Law, the mistaken denial by a trial court of the use of a peremptory challenge is reversible error, per se. The majority opinion was written by Judge Ciparick, and was joined in by Judges Jones, Pigott, and Chief Judge Lippman. The majority ruling relied upon the United States Supreme Court decision in *Rivera v. Illinois*, 129 S. Ct. 1446 (2009), which held that when a judge improperly refuses a peremptory challenge, reversal is not automatic under the due process clause of the Fourteenth Amendment, but that states can decide if such mistakes are reversible error per se under state law. Based upon the Supreme Court ruling, the majority in the Court of Appeals found that, based upon existing precedent and the provisions of CPL 270.25(2), the unjustified denial of a peremptory challenge requires reversal without regard to the consideration of harmless error. A new trial was therefore ordered. Judges Smith, Read and Graffeo dissented, arguing that the majority ruling would prove problematical in practice, and would load the dice against the People.

In the *Hecker* case, the mistaken ruling under peremptory challenge involved a *Batson* issue. As part of the decision in *People v. Hecker*, the Court of Appeals also dealt with issues raised in three other cases—*People v. Guirdano*, *People v. Hollis*, and *People v. Black*. In those cases, however, the Court unanimously determined that *Batson* violations did not occur in the trials regarding those defendants, and the Court affirmed those convictions.

Gun Registration

People v. Stepter, decided December 16, 2010 (N.Y.L.J., December 17, 2010), p. 27

In a unanimous decision, the New York Court of Appeals determined that any challenge to New York City's Gun Offender Registration Act cannot be raised on direct appeal from a judgment of conviction and sentence. In the case at bar, the Defendant had raised the matter based upon an appeal involving a crime for which he was convicted. Although the Court held that it could not determine the issue on the appeal before it, it noted that the People already conceded that the Defendant had no obligation to register as a gun offender based upon the crime for which he was convicted, and therefore the issue was moot. The Court's decision, however, may have a future impact on other cases involving the same issue.

Gun Offender Registry

People v. Smith, decided December 16, 2010 (N.Y.L.J., December 17, 2010, p. 26)

In a unanimous decision, the New York Court of Appeals determined that including the Defendant on a list maintained by New York City pursuant to the Gun Offender Registry Act, which was adopted in 2006, was not part of a Court's sentence, and that, therefore, the issue was not reviewable on a direct appeal from a judgment in a criminal proceeding. In a decision written by Judge Ciparick, the Court held that registration was an administrative act between the Defendant and the New York City Police Department, and that any appropriate action would have to be taken by means of an Article 78 proceeding. In reaching its determination, the Court affirmed the decision of the Appellate Division, First Department.

Consecutive v. Concurrent Sentences

People v. McKnight, decided December 14, 2010 (N.Y.L.J., December 15, 2010, pp. 1 and 26)

In a 4-3 decision, the New York Court of Appeals held that consecutive sentences could properly be imposed upon a Defendant who had been convicted of committing multiple crimes during a single incident. Defendant McKnight was accused, along with an accomplice, of firing 10 shots on a Brooklyn Street in 2005. Two of the shots hit and killed a bystander. The Defendant was sentenced to consecutive terms of 25 and 20 years to life in prison for the murder and attempted murder convictions. In a decision written by Judge Read, and joined in by Judges Ciparick, Graffeo and Pigott, the majority concluded that consecutive terms were properly imposed under Penal Law Section 70.25, because during the entire transaction, separate acts were committed with the requisite criminal intent. In a dissenting opinion, joined in by Chief Judge Lippman and Judges Jones and Smith, the dissenters argued that both the attempted murder and the murder conviction constituted the same action, and therefore concurrent terms were required.

People v. Battles, decided December 14, 2010 (N.Y.L.J., December 15, 2010, pp. 2 and 27)

In another case involving the issue of consecutive sentences, the Court held by a 5-2 vote that one of the assault counts for which the Defendant was convicted required the imposition of a concurrent sentence. With respect to the other charges, consecutive sentences were properly imposed. In the case at bar, the Defendant had splashed gasoline on four people in a Brooklyn crack den. He then wielded a cigarette lighter and one man was burned to death and three others suffered severe burns. With respect to the sentence in question, the majority found that the victim was not directly splashed with gasoline like the others, but sprayed with the gas the Defendant was trying to douse on others. Thus, this action constituted a single act. However, with respect to the other victims and the consecutive sentences imposed thereon, the Court held that separate criminal acts had been committed, and that because the Defendant engaged in conduct which created a grave risk of death or serious physical injury to each of those victims by separate and distinct acts of dousing them with gasoline, imposition of consecutive sentences was authorized. The majority opinion was written by Judge Pigott, and was joined in by Judges Ciparick, Graffeo, Read and Smith. Chief Judge Lippman and Judge Jones dissented, arguing that all of the Defendant's actions constituted but a single act, for which sentences should run concurrently.

People v. Frazier, decided December 14, 2010 (N.Y.L.J., December 15, 2010, p. 26)

In the case at bar, the Defendant had been sentenced to consecutive sentences for the crimes of burglary in the second degree and grand larceny in the third degree. The Appellate Division had modified the sentence on the larceny convictions so as to run concurrently with the sentences for the burglary matters. The Court of Appeals, however, found that the crimes in question were separate offenses that were committed through separate acts. Concurrent sentences were therefore not required. The matter was therefore remitted to the Appellate Division to exercise its discretion as to whether consecutive sentences were appropriate under the facts of the case.

Sentencing

People v. Bell, decided December 14, 2010 (N.Y.L.J., December 15, 2010, pp. 2 and 28)

In a unanimous decision, the New York Court of Appeals affirmed the Defendant's sentence as a persistent violent felony offender, and rejected the Defendant's claim that such a sentence was unconstitutional under the Supreme Court rulings in *Apprendi v. New Jersey*. In rejecting the defendant's claim, the Court noted that it had affirmed the constitutionality of the type of sentence involved in several previous decisions, and most recently in *People v. Quinones*, 12 N.Y. 3d, 116 (2009).

Discharge of Juror

People v. Wells, decided December 14, 2010 (N.Y.L.J., December 15, 2010, p. 28)

In a 6-1 decision, the New York Court of Appeals found that no reversible error had occurred when the trial judge discharged a juror after determining that he would be incapable of properly performing his duties. In the case at bar, one of the sworn jurors advised a court officer that he had neglected to tell the Court that he worked the night shift and would be coming to Court directly from work, raising concerns about his ability to stay awake during the trial. The Court conducted an inquiry of the juror and ascertained the information in question. Over defense counsel's objection, the Court discharged the juror, finding that he would be unable to remain sufficiently alert during court proceedings. The Court of Appeals concluded that under the circumstances, the Court had acted within its discretion to discharge the juror in question. Chief Judge Lippman issued a dissenting opinion.

As in the case of *People v. Bell* cited above, the Court also rejected the Defendant's challenge to the constitutionality of the sentence imposed, pursuant to the Persistent Felony Offender Statute.

Batson Issue

People v. Sweeper, decided December 14, 2010 (N.Y.L.J. December 15, 2010, p. 29)

In a unanimous decision, the New York Court of Appeals rejected a Defendant's claim that a *Batson* violation

had occurred during the trial. The Court found that the Defendant had failed to establish a prima facie case of racial discrimination. The Court also found that the Defendant's challenge to the constitutionality of the Persistent Violent Felony Offender Statute was without merit, in line with several of the determinations indicated above.

Substitution of Counsel

People v. Porto

***People v. Garcia, a/k/a Rodriguez*, decided December 21, 2010 (N.Y.L.J., December 22, 2010, p. 26)**

In a 6-1 decision, the New York Court of Appeals determined that the Defendant's motions in both cases to substitute counsel were properly denied in light of the minimal inquiry standard established by the New York Court of Appeals in *People v. Sides*, 75 N.Y. 2d 822 (1990). In the *Porto* matter, the Defendant, on the eve of trial, submitted a pro se motion form seeking reassignment of counsel. The Defendant did not provide any detailed information as to the reasons for his request. The Court conducted an inquiry of counsel and determined that he had been a long time member of the Legal Aid Society and had conducted numerous felony trials.

In the *Garcia* matter, the Defendant indicated at sentence that he was considering withdrawing the plea which he had previously entered, and that at final sentence hearing the Defendant raised objections regarding his defense counsel, and wished to have new counsel appointed. The Court conducted an inquiry of both the Defendant and defense counsel, and later determined to deny the motion to substitute counsel. The Appellate Divisions had affirmed the Defendant's convictions in both matters. The New York Court of Appeals found that in both cases the trial courts had conducted an adequate inquiry, and that there was no showing made by the Defendants to warrant substitution of counsel. The request in question did not appear to be based upon specific factual allegations of serious misconduct by counsel, and that the assignment of new counsel did not have to be casually granted based upon any type of request.

Judge Pigott dissented, arguing that the Court should have conducted a more detailed inquiry of the Defendant before denying the request in question.

Recent United States Supreme Court Decisions Dealing With Criminal Law and Recent Supreme Court News

Although opening its new term in early October, and having several criminal law matters on its docket, the United States Supreme Court, during the last few months, has issued decisions only in a few criminal law cases. The one which may be of some significance to criminal law practitioners is summarized below.

Wilson v. Cochrane, 131 S. Ct. 13 (November 8, 2010)

In a unanimous decision, the United States Supreme Court held that the allegedly unreasonable determination of the facts by a State's highest court when it accepted the State's trial court's representation that it had not relied on non-statutory aggravating factors, in contravention of State law when it had imposed the death penalty, did not provide a basis for federal habeas corpus relief in the absence of any determination by the federal court that a violation of federal law existed. In issuing its per curiam decision, the Court emphasized that it was not the province of a federal habeas court to re-examine state court determinations on state law decisions. The Court specifically noted that federal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law.

Upcoming Decisions

In early November, 2010, the United States Supreme Court agreed to hear the appeal of a 13-year-old North Carolina burglary suspect, and decide whether children questioned by police at school must be provided with the *Miranda* warnings. The North Carolina Supreme Court had stated that a student questioned by an officer at school was not in custody, and need not be warned of his rights. Based upon prior United States Supreme Court rulings, it is unclear whether the requirement for the furnishing of *Miranda* warnings applies to students. It is not expected that oral argument in this case will be held until the spring, and a decision may not be reached until the end of the Court's current term. We will keep our readers advised of developments.

On November 30, 2010, the Supreme Court heard arguments in the case of *Schwarzenegger v. Plata*, an important case involving a claim that conditions in California's prisons are so bad that they violate the United States Constitution. California has the highest number of incarcerated inmates in the United States, although its prison population has dropped in the last two years from 170,000 to 147,000. The lawsuit alleges that prison facilities are vastly overcrowded, and that inmates are being denied proper care and medical treatment. The inmates have alleged that the conditions in question constitute cruel and inhuman punishment. The Justices, during the oral argument which lasted about 80 minutes, appeared concerned with the described conditions, but also questioned whether forcing California officials to dramatically reduce their prison population in a short period of time would have adverse public safety consequences. A special three-Judge Federal Court had ordered California to reduce its prison population by as many as forty-five thousand inmates over the next two years. The propriety of the lower Court's order is the precise issue before the United States Supreme Court. It appears that a divided decision may result in this matter, and we will report on the Court's determination when a decision is reached, sometime in the next few months.

U.S. Supreme Court Announces Assignment of Justices During the October 2010 Term

With the opening of the Court's new term, Chief Justice Roberts announced the allotment of the Justices to the various federal circuits throughout the Nation. The new allotment includes the assignment of Justice Kagan, who recently replaced Justice Stevens.

District of Columbia and Federal Circuit

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.
Appointed Chief Justice by President George W. Bush
September 29, 2005; took office October 3, 2005

First Circuit

Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico

Justice STEPHEN BREYER, of Massachusetts
Appointed by President Clinton August 2, 1994; took office September 30, 1994

Second Circuit

Connecticut, New York, and Vermont

Justice RUTH BADER GINSBURG, of New York
Appointed by President Clinton August 3, 1993; took office August 10, 1993

Third Circuit

Delaware, New Jersey, Pennsylvania and Virgin Islands

Justice SAMUEL A. ALITO, JR., of New Jersey
Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

Fourth Circuit

Maryland, North Carolina, South Carolina, Virginia, and West Virginia

Chief Justice JOHN G. ROBERTS, JR. of Washington, D.C.
Appointed Chief Justice by President George W. Bush
September 29, 2005; took office October 3, 2005

Fifth Circuit

Louisiana, Mississippi, and Texas

Justice ANTONIN SCALIA, of Washington, D.C.
Appointed by President Reagan September 25, 1986; took office September 26, 1986

Sixth Circuit

Kentucky, Michigan, Ohio, and Tennessee

Justice ELENA KAGAN, of Massachusetts
Appointed by President Obama May 10, 2010; took office August 7, 2010

Seventh Circuit

Illinois, Indiana, and Wisconsin

Justice ELENA KAGAN, of Massachusetts
Appointed by President Obama May 10, 2010; took office August 7, 2010

Eighth Circuit

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota

Justice SAMUEL A. ALITO, JR., of New Jersey
Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

Ninth Circuit

Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Northern Mariana Islands

Justice ANTHONY M. KENNEDY, of California
Appointed by President Reagan February 11, 1988; took office February 18, 1988

Tenth Circuit

Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming

Justice SONIA SOTOMAYOR, of New York
Appointed by President Obama May 26, 2009; took office August 8, 2009

Eleventh Circuit

Alabama, Florida and Georgia

Justice CLARENCE THOMAS, of Georgia
Appointed by President George H.W. Bush October 16, 1991; took office October 23, 1991

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from November 1, 2010 to January 30, 2011.

People v. Knowles (N.Y.L.J., November 1, 2010, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Third Department, rejected a Defendant's claim regarding an alleged *Batson* violation, and affirmed the Defendant's conviction. The Defendant had claimed that the prosecution's peremptory challenges of a black woman from a murder jury because she read the Bible in her free time was not a rational and non-discriminatory determination. The prosecution had also challenged two other potential jurors who were the only blacks in the jury pool. The appellate panel stated that in the trial in question, the prosecutor explained to the trial judge that he was using his peremptory challenge against the Bible-reading juror because while there was nothing wrong with the practice it was an unusual reading choice that suggested to the prosecutor that she might be a person who would be on the spectrum of forgiveness rather than judgment.

The Court further held that a great deal of discretion and deference in deciding *Batson* claims must be given to the trial judge, and that in the case at bar, it could not be stated that the prosecutor's objection was based upon discriminatory grounds rather than on other acceptable reasons. With regard to the other two peremptory challenges which were made against black jurors, the Court found that one of the jurors was removed because she oversaw an education program in which the murder victim's mother was a student. With respect to the other juror, the prosecutor had removed her because she stated that her relatives had been the subject of criminal prosecutions. Based upon all the circumstances, the Appellate Court upheld the Defendant's conviction for murder in the second degree, and refused to order a new trial. Attorneys for the defense have indicated that they may seek review by the New York Court of Appeals.

People v. Paige (N.Y.L.J., November 2, 2010, p. 1)

In a 3-2 decision, the Appellate Division, Third Department, upheld the search of a woman's apartment who was sought by state police. In the case at bar, the police officers had kicked open the door of the apartment, even though an occupant therein had said that the woman who was being sought was not there. The three-judge majority held that the three troopers had a warrant for the arrest of the woman they were seeking, and had reasonable doubts about the statements which were made regarding her absence from the apartment. The Defendant, who had told the police that the woman being sought was not in the apartment, was charged with obstructing governmental administration and possession of cocaine after the troopers found a quantity of drugs in the bedroom. The three-judge majority consisted of Justices Kavanagh, Egan, and Rose.

Justices McCarthy and Spain dissented, arguing that the search was a violation of the Fourth Amendment because the troopers did not have a valid basis for a reasonable belief that the person sought was in the apartment. The dissenters noted that the Defendant Paige had told the officers that the woman sought was not there, and that the Defendant was in his rights to deny the officers access to the apartment. The dissenters also noted that a wide-ranging search was conducted and that the apartment door had been broken down. Based upon the sharp split in the Third Department ruling, and the interesting issue involved, it appears certain that this case will have to be decided by the New York Court of Appeals.

People v. Morales (N.Y.L.J., November 10, 2010, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, held that a shooting at a Bronx church party in 2002 that paralyzed a young man and killed a 10-year-old girl, was not an act of terrorism which could be prosecuted under the violent-crimes provision of New York's Anti-Terrorism Act, which was enacted in 2001. The issue which was presented to the Court was whether the shooting, which came during a fight between rival gang members at a christening, was intended to intimidate or coerce a civilian population as required by the anti-terrorism law and provided for in Penal Law Section 490.25.

Bronx prosecutors had argued that the civilian populations which the Defendant intended to intimidate were rival gang members and Mexican Americans living in the West Bronx. The Appellate Division, First Department, however, rejected this claim, and dismissed the terrorism enhancements. The Court ruled that the 2001 law which was passed six days after 9/11 was intended to penalize crimes targeted at much broader populations than rival gangs or residents of a particular neighborhood. With the reversal of the terrorism enhancements, the Defendant's sentence to possible life imprisonment was eliminated, and the matter was remanded to the trial court, where the maximum sentence which could be imposed is 25 years.

Matter of Khalil H. (N.Y.L.J., November 15, 2010, p. 1 and 8)

In a unanimous decision, the Appellate Division, Second Department, held that a hazing law passed in 1894 could properly be used to prosecute participants in a high

school gang initiation. The Court found that the gang in question was the type of organization the legislature contemplated when it enacted the law. The case involved the issue of whether the Queens gang was organized for mutual protection and constituted an organization which was covered under the 116 year old state hazing statute.

People v. Waddell (N.Y.L.J., November 15, 2010, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Third Department, reinstated an indictment against the Defendant for second degree assault and criminal possession of a weapon in the third degree. The Appellate Division found that although the prosecution failed to implicitly instruct grand jurors that it is the burden of the District Attorney's Office to disprove a defendant's potential justification defense beyond a reasonable doubt, it implicitly conveyed that obligation and satisfied its duty as legal advisor to the grand jury. The appellate panel concluded that the People's instructions provided adequate guidance for the Grand Jury to carry out the role it is called upon to fulfill, that of determining whether a prima facie case exists.

People v. Henderson (N.Y.L.J., November 17, 2010, pp. 1 and 10)

In a unanimous decision, the Appellate Division, Fourth Department, upheld the Defendant's conviction for both attempted murder and depraved indifference murder. The Defendant had driven his SUV into a crowd outside a sports bar in Syracuse, New York, killing one person and injuring three others. The Court held that the situation in the case at bar involved a rare situation in which the Defendant might have acted with two seemingly contrary mental states-intent and depraved indifference. The Court concluded that the jury could have reasonably found that the Defendant tried to kill one member of the crowd, while acting with a depraved indifference with the others.

People v. Pirillo (N.Y.L.J., December 1, 2010, p. 4)

In a unanimous decision, the Appellate Division, Third Department**,** reversed a Defendant's conviction and ordered a new trial, finding that the trial court had made an improper ruling on a suppression motion. The Appellate Division determined that flight from a police officer who has no information linking the individual to a crime, except that he is running away, does not justify police intervention. The Court found that an officer responding to a report of a "suspicious man" in a neighborhood in upstate Broome County did not have the necessary reasonable suspicion that a crime had been or was about to be committed. Therefore, the officer had no right to pursue the Defendant and to seize items which were used to support a charge of possession of stolen property.

People v. Welsh (N.Y.L.J., January 13, 2011, p. 1)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction for robbery in the first degree involving the possession of a firearm. The issue in the case was whether the facts which emerged at trial constituted sufficient proof that a firearm appears to have been displayed, even though no testimony was provided that the gun was visible. The counterman at the pizza parlor which was robbed testified that although he could not see the Defendant's hands, the perpetrator's actions and words together created a reasonable impression that he was armed. The robber had told the counterman that he had a gun and was going to shoot him in the face.

The appellate panel found that the Defendant's hiding of his hand behind the counter display was no different from sliding it inside of a jacket, and that the implication that the hand was reaching for a gun was sufficient to support the conviction in question. It was therefore not necessary that the sight of the weapon itself be established.

Editor's Note

We recently received a letter from the Westchester County District Attorney's Office regarding the summary of the case of *People v. DiGuglielmo,* which appeared in our *Newsletter* at page 16, in the Fall 2010 issue. The Westchester Office expressed the view that our summary improperly conveyed the impression that the Appellate Division had found that the office had committed prosecutorial misconduct. Although we feel that we accurately summarized the Appellate Division decision in question, and that our *Newsletter* did not imply any misconduct to the District Attorney's Office, in order to clarify any misunderstanding, we hereby state that the Appellate Division, Second Department, in its decision, took no position on whether prosecutorial misconduct occurred, but found that on legal grounds, the Defendant failed to meet his burden of establishing a reasonable probability that non-disclosure of the evidence affected the outcome of the trial.

For Your Information

Appellate Divisions Obtain New Court Clerks

During the last two years, all four of the Appellate Division Departments have obtained new Clerks of the Court. In April of 2010, Matthew G. Kiernan took over as the Clerk of the Appellate Division, Second Department, replacing Edward Pelzer, who retired. Patricia L. Morgan became the Clerk in the Fourth Department in April of 2009, replacing Jo Ann Wahl, who also retired. In November of 2010, Michael J. Novack retired as the Clerk of the Appellate Division, Third Department, and was replaced by Robert D. Maberger, who had previously served as Deputy Clerk of that Court. Most recently, in November of 2010, Susanna Molina Rojas was appointed as the Clerk of the Appellate Division, First Department. Ms. Rojas has been with the Appellate Division, First Department, for several years, with her most recent position being that of Chief Court Attorney. She replaces David Spokony, who retired on November 23, 2010. The position of Clerk of an Appellate Division is an extremely important one, and we congratulate all of the newly appointed Clerks and wish them well in their new positions. We also thank those Clerks who have retired for their many years of devoted service.

Federal Workforce Increases While States and Localities Institute Cuts

A recent report from the Bureau of Labor Statistics reports that many states, cities and school districts are trimming their payrolls, in a cost-cutting effort to reduce their budgets. The action taken by these government localities is directly related to the recent economic recession, which has depleted the budgets of many local governments. It has been estimated that in the past year, state and local governments have reduced their workforce by 258,000 workers, or 1.3%. It is estimated that nationwide, there are still some 19.2 million workers who work for local governments in various capacities. Interestingly, and not too surprisingly, the largest numbers of state and local cuts have occurred in five States—New Jersey, New York, California, Ohio and Michigan. These States all have large public payrolls, and have been severely impacted by the economic downturn. Overall, the study reported that some 35 States have had some kind of reduction in government payrolls during the last year.

While state and local governments have been reducing their workforce, the federal government has engaged in significant increases. The report stated that the federal workforce in the past year grew by 3.4%, to 2.2 million workers. It was also recently reported that workers for the federal government are the only significant sector of the workforce which has continued to see salary increases, with many top officials in the federal government now making over $150,000 per year.

Home Ownership Drops to Lowest Level

As a direct result of the economic downturn and the foreclosure crisis that has occurred during the last few years, a recent report by the Untied States Census Bureau reported that the Nation's home ownership rate is at its lowest point in more than a decade. Currently it is estimated that 66.9% of households in the United States own their own home. The last time the rate was this low or lower was in 1999. Home ownership hit a peak in 2004, when it was at 69%, but during the last few years it has been declining at a gradual level, and the prospects for any improvement in the next few years are not good.

Obesity Dangerous to Health and Economy

A new study conducted by a research team at Cornell University and released by the National Bureau of Economic Research indicates that the problem of obesity in the United States is reaching crisis proportions, with dire effects, not only on individual health, but also on the Nation's economy. The new research suggests that almost 17% of medical costs in the United States can be blamed on obesity. The Nation's weight problem is now viewed as being more serious than previously estimated. The annual obesity-related costs are now placed at approximately $168 billion. The study concludes by stressing that new efforts must be made to correct the obesity problem, both from a health and an economic point of view.

Hispanics Enjoy Longer Life Expectancy

A recent study by the National Center for Health Statistics reports that Hispanics in the United States can expect to outlive whites by more than two years, and blacks by more than seven. The report is the first to calculate Hispanic life expectancy in the Country, and has produced some surprising results. The current life expectancy for Hispanics was placed at 80.6, for non-Hispanic whites at 78.1 and for non-Hispanic blacks at 72.9. It is unclear as to what factors account for the difference in life expectancies, and additional studies and research is expected. Hispanics are now the largest and fastest growing

minority in the United States, accounting for nearly 18% of the population.

Trial Courts Begin Re-Sentencing of Juvenile Offenders Who Committed Non-Homicide Crimes Following Supreme Court Ruling Outlawing Life Without Parole

Following the United States Supreme Court decision in *Graham v. Florida*, 130 S. Ct. 2011(2010), which declared unconstitutional life imprisonment without parole for juvenile offenders who committed non-homicide crimes, trial courts in several states which had imposed those sentences are now beginning to re-sentence juvenile offenders to comply with the Supreme Court ruling. The Supreme Court issued its decision in June of 2010. One of the points made clear by Justice Alito, who was part of the dissenting group of Justices, was that the Court's ruling did not prohibit terms specifying a maximum number of years, even though the number of years imposed could be quite high. Within the State of Florida, which had the highest number of juvenile offenders now facing re-sentence, the first re-sentencing which occurred involved a 16-year-old Defendant who had committed rape and had terrorized two waitresses at gunpoint. The sentencing court modified the Defendant's sentence to 65 years in prison, and the sentence was made to run consecutively to a term of 27 years which the Defendant had received in another matter.

The defense attorney objected to the sentence imposed, and argued that the Supreme Court ruling required a meaningful opportunity for release. Under the sentence imposed, the defense argued that the Defendant would in all probability die in jail, and that the spirit of the Supreme Court ruling was being violated. It thus appears that despite the United States Supreme Court determination, lower courts may continue to be reluctant to provide an early release for juvenile offenders considered to be dangerous to the public.

New York State Town Declared Safest in the Nation

Although many people suspect that large urban centers such as New York City, and large population states such as New York, will tend to have higher crime rates than other parts of the Country, recent FBI statistics reveal that New York City is ranked as having a relatively low crime rate in comparison to other large cities, and that the Town of Colonie, in upstate New York, had the lowest crime rate of any municipality with populations of over 75,000 in the entire Nation. Colonie ranked first in terms of safety in the FBI statistics for the year 2009. The distinction of being the City with the highest crime rate for 2009 went to St. Louis, Missouri.

Judicial Pay Commission

The New York State Legislature, in late November, approved the creation of a commission to recommend new salary levels once every four years. The Governor signed the legislation in question on December 10, 2010. The commission will begin operating on April 1, 2011, and will recommend, within 150 days, salary adjustments for the next four years. The creation of the commission is the latest response in the long effort by judges to obtain salary increases. No judicial increases have been received since 1999, and the poor financial condition of the State has made it difficult for any increases to be approved in the near future. It appears that the creation of the commission, which was pushed by both former Governor Paterson and Chief Judge Lippman, is an effort to bring about some sort of increase in judicial salaries within the next few years. Under the legislation which was approved, the commission will consist of seven members, three to be appointed by the Governor, and one each by the Assembly Speaker and the Senate Majority Leader, and two by the Chief Judge.

The creation of the commission follows recent efforts to enforce a Court of Appeals directive that an appropriate and expeditious review of judicial salaries be conducted by the State Legislature. The directive was issued as part of a decision in *Larabee v. Governor*, which came down from the New York Court of Appeals on February 23, 2010. The New York Court of Appeals recently rejected an effort by some of the judicial Plaintiffs to have the *Larabee* case re-argued in the Court of Appeals, on the grounds that the legislature has failed to take expeditious action on the issue.

Although Chief Judge Lippman hailed the creation of the commission and predicted that judicial pay raises should shortly be forthcoming, the worsening financial condition of the State and Governor Cuomo's public statements that spending must be controlled indicate that the issue of judicial pay raises is not yet fully resolved. Under the legislation which created the commission, the Governor and Legislature can still act to reject any pay raise recommendations. We look forward to further developments.

New York City Acts to Alter System of Representation for Indigent Defendants

While litigation is still pending regarding the efforts by New York City to create additional defender groups to handle conflict cases, the City, in recent actions taken by the Office of the Criminal Justice Coordinator, has redistributed caseloads handled by private defense contractors. One group that had previously handled approximately 9,000 cases in Staten Island did not receive a renewal contract, and other contractor groups, primarily from the Bronx, Brooklyn and Queens, were awarded an additional amount of cases to handle during the coming

year. The Bronx defenders caseload, for example, will rise to 28,000, from its previous amount of 12,000, and the Brooklyn defenders service will go to 38,000 from 18,000. Queens Law Associates will see an increase from 15,000 to 25,000, and New York County Defender Services will take on 18,000 cases from its current level of 16,000. The increase awarded to the private contractor groups will mean that the Legal Aid Society will be handling approximately 20,000 fewer cases than it has in the past.

Since in early January 2011 the City's plan to assign conflict cases to additional institutional providers was upheld by Justice Singh from the Manhattan Supreme Court, it appears likely that the City will soon be moving to shift more cases from 18-B attorneys to institutional providers. The five County Bar Associations who commenced the lawsuit against the City have indicated that they will continue their litigation in the Appellate Courts, and the more than 1,000 attorneys in New York City who handle 18-B cases have expressed their determination to continue with legal action against the City's proposed plans. A stay of Justice Singh's decision was recently issued by the Appellate Division, First Department, pending its determination of the matter.

Attorney General Schneiderman Utilizes Large Transition Team to Begin Staffing of His New Office

In late November, Attorney General Eric Schneiderman assembled a 71-member transition committee to assist him in the recruiting of personnel for the Attorney General's Office. Among the transition team were Zachary Carter and Robert Abrams, who previously served as Attorney General. The transition team was divided into several groups, covering criminal justice, economic justice, infrastructure, technology and regional offices, public integrity, anti-fraud, social justice, solicitor general and state counsel.

Utilizing his transition team, Attorney General Schneiderman, in early January, announced several major appointments. Among them was the continuation of Barbara Underwood as New York State's Solicitor General.

U.S. Population Rises

A recent estimate from the Census Bureau indicated that the Country's population continued to grow during the last decade, and stands today at somewhere near 309 million. In 2000, the official census count was placed at 281.4 million. The official census count for 2010, which was recently conducted, is expected to provide a more accurate figure for the Nation's population. It is estimated that Hispanics will account for continued growth, and that they will now account for about 18% of the U.S. population. We await the official detailed results of the recent census within the next few months.

Census Bureau Issues Report on 2010 Population Shifts

At the end of December, the United States Census Bureau issued the results of the recent comprehensive census which was conducted throughout the Nation. The report basically revealed that the Southern and Western States, during the last ten years, experienced population increases, and that several of the states in the Northeast and Midwest had declining populations. As a result of the new census, some states, primarily in the South and West, will receive additional congressional seats, as well as presidential electors, while others in the Northeast and Midwest will see their political power diminish. Early indications are that the biggest gainer will be Texas, which is expected to gain four new House seats, as well as four additional electoral votes. The State of Florida is also expected to gain two additional House seats, and two additional electoral votes. Other states in the South and West which are expected to gain political power are Georgia and Arizona. Our own State of New York, along with Ohio, is expected to lose two congressional and electoral votes. Other Northern states which may lose political power include Massachusetts and Pennsylvania. Final results from the census report are expected within the next few months, and we will keep our readers advised of developments.

Governor Paterson Makes Final Appointments to Appellate Division

In December 2010, as one of his last official acts before leaving office, Governor Paterson announced the appointment of two Justices to fill vacancies on the Appellate Division, Second Department. His first appointment was Justice Jeffrey A. Cohen, who had been serving in the Supreme Court in Westchester County. Justice Cohen previously served as a County Court and Town Justice and has been a member of the judiciary for nearly twenty years. Prior to his elevation to the bench, he worked with the Legal Aid Society as a felony trial attorney. Justice Cohen replaces Justice Howard Miller, who retired last year. Justice Cohen is a graduate of the Rutgers School of Law. Governor Paterson also selected Justice Robert J. Miller to fill the seat which was created by the untimely death of Justice Steven W. Fisher. Justice Miller had served in Brooklyn and had most recently been assigned to the Commercial Division in the Brooklyn Supreme Court. Justice Miller is 61 years of age. The annual salary of the new Justices servicing in the Appellate Division will be $144,000.

Republicans Regain Control of State's Senate

After several close elections for members of the State Senate, and weeks of uncertainty, the last contested seat in the State Senate was resolved with the announcement that the Republican candidate was victorious. Thus, control of the New York State Senate will revert back to the Republicans, and it appears that they will have a 32-30 advantage in the Senate when it convenes in January. Dean Skelos, from Nassau County, was designated as Senate Majority Leader, and State Senator Stephen M. Saland, from Poughkeepsie, was named as Chair of the powerful Senate Codes Committee, which also deals with criminal law matters. Senator Saland replaces Eric Schneiderman, who recently was elected to the position of Attorney General. It is hoped that this term's session will not have the rancor or gridlock which characterized the situation during the last two years.

New York Loses Political Influence

As result of the 2010 census, the State of New York will lose two Congressional seats, and also two electoral votes, with respect to presidential elections. New York joins several other Northeast and Midwest States which have lost population during the last ten years. Ohio will also be losing two seats, while Illinois, Iowa, Louisiana, Massachusetts, Michigan, Missouri, New Jersey and Pennsylvania will lose one seat each.

New York's loss is Florida's gain. The State of Florida, along with several other states in the South and West, gained additional Congressional seats and electoral votes as a result of their rapid population growth during the last ten years. Texas gained four seats, Florida gained two, and the States of Arizona, Georgia, Nevada, South Carolina, Utah and Washington gained one seat each. Overall, the 2010 census report concluded that the United States now has nearly 309 million people, up from 280 million in 2000. The 9.7 percentage growth during the last ten years was the slowest for a decade since the Great Depression. The political effects of the 2010 census will be felt beginning with the 2012 elections.

U.S. Debt Reaches All-Time High

As we began the New Year 2011, the United States Budget Office reported that the Nation had reached a dubious milestone, to wit: that government debt had reached an all-time high, topping $14 trillion. This means that for every person currently in the United States there is an amount of $43,300 which is owed. The issue of the financial condition of the Nation is taking center stage as the new Congress conducts its session, and it is expected that there will be sharp disagreements between those who seek to obtain a balanced budget by additional spending cuts and others who look toward additional taxation as a means of closing the budget gap. We await further Congressional and Presidential initiatives to deal with the financial crisis currently facing the Nation.

Study Predicts Future Growth in Lawyer Population

A recent report by the Bureau of Labor Statistics projected that the number of attorneys in the United States should increase by approximately 13% by the year 2018. The study reviewed numerous job categories and concluded that although there are a large number of attorneys in the United States, the increasingly complex nature of our society and the tendency of Americans to consult and utilize attorneys will lead to a significant increase in the number of attorneys in the future. The study found that the largest percentage increase is expected to be in the area of bio-medical engineers and home health aides. The expected increase in the number of attorneys was well above many other professions and occupations, and was higher than the overall average for all occupations, which was listed at just slightly under 10%.

Many High School Graduates Fail Military Educational Exam

A recent report issued by the Education Trust Foundation reported that nearly one-quarter of the students who try to join the military fail its entrance examination. Approximately 23% of recent high school graduates fail to get a minimum score need on the enlistment test to join any branch of the military. The report painted a grim picture of students who have graduated from high school but who are unable to answer basic math, science and reading questions. Following the report, U.S. Education Secretary Arne Duncan stated "too many of our high school students are not graduating ready to begin college or a career, and many are not eligible to serve in our armed forces. I am deeply troubled by the national security burden created by America's underperforming education system."

About Our Section and Members

Annual Meeting, Luncheon and CLE Program

The Section's Annual Meeting, awards luncheon and CLE program were held on Thursday, January 27th, at the Hilton Hotel in New York City. This year's event was impacted by a strong winter snowstorm which struck New York on Wednesday and Thursday. Our CLE program, which had a registration of 61, was attended by 37 participants, and some of our scheduled panelists were also unable to attend. The luncheon, which had 137 reservations, was attended by approximately 100 attorneys and judges. Our scheduled luncheon speaker was also unable to attend due to the weather. However, during the luncheon, we were able to present awards to several outstanding practitioners and governmental officials for exemplary service during the past year. The awards were as follows:

The Michele S. Maxian Award
For Outstanding Public Defense Practitioner
Elsie Chandler, Esq.
Neighborhood Defender Service of Harlem
New York City

Charles F. Crimi Memorial Award
For Outstanding Private Defense Practitioner
James P. Harrington, Esq.
Harrington & Mahoney
Buffalo

Outstanding Contribution to the Delivery
of Prosecutorial Services
Sean E. Smith, Esq.
New York Prosecutors Training Institute
Albany

The Vincent E. Doyle, Jr. Award
For Outstanding Jurist
Honorable Jed S. Rakoff
United States District Court, Southern District
New York City

Outstanding Contribution in the Field of
Criminal Law Education
Joanne Macri, Esq.
New York State Defenders Association
Albany

Outstanding Contribution in the Field of Corrections
Commissioner Brian Fischer
New York State Department of Correctional Services
Albany

Outstanding Contribution to the Bar and the Community
Honorable Phylis S. Bamberger
New York City

This year's luncheon, although impacted by the weather, was still well attended, and was both an enjoyable and informative event. James P. Subjack, our Section Chair, provided welcoming remarks, as did Norm Effman, Chair of the Awards Committee. We were pleased that several governmental officials, including some District Attorneys from throughout the State, attended.

This year's CLE program was held at 9:00, prior to the awards luncheon, and involved a discussion of "Identification from Photographs—What's Working, What's Not." The topic was discussed through the use of two panels of 45 minutes each. The scheduled speakers for the first panel were Prof. Steven Penrod, Ezekiel Edwards, Esq., Hon. Kathleen B. Hogan, Robert J. Masters, Esq., and Chief Margaret Ryan.

The second panel dealt with additional ways to protect against misidentification in photo identification procedures. "What courts can do, and what does the example of New Jersey teach us?" The scheduled speakers for the second panel were Prof. Sandra Guerra Thompson, Hon. Gustin Reichbach, Miriam Hibel, Esq., and Hon. Edward DeFazio.

The CLE program was organized and moderated by John Hecht.

At our Annual Meeting, officers and district representatives of the Criminal Justice Section were also elected as follows:

Position	Individual
Chair	Marvin E. Schechter
Vice-Chair	Hon. Mark R. Dwyer
Secretary	Sherry Levin Wallach
Treasurer	Tucker C. Stanclift

Representatives

1. Guy Hamilton Mitchell
2. Patricia A. Pileggi
3. Michael S. Barone
4. Donald T. Kinsella
5. Nicholas DeMartino
6. Kevin T. Kelly
7. Betsy Carole Sterling
8. Paul J. Cambria, Jr.
9. Gerard M. Damiani
10. Marc Gann
11. Anne J. D'Elia
12. Christopher M. DiLorenzo
13. Timothy Koller

Spring CLE Program Set

New Section Chair Marvin Schechter, who will assume office in June, announced at the Annual Meeting that a spring CLE program has been set for May 13-15 in Saratoga, NY. The program will deal with the presenta-

tion of evidence, and details regarding the event will shortly be forthcoming in a separate mailing.

Seymour W. James, Jr. Nominated as New York State's Bar Association President-Elect

Seymour James, an active member of our Criminal Justice Section, who has also served on the Executive Committee for several years, was nominated in December as the President-Elect of the New York State Bar Association. Mr. James is currently the head of the Criminal Division of the New York City Legal Aid Society. He has also served as the Treasurer of the New York State Bar Association and is a Past President of the Queens County Bar Association. We congratulate Seymour on his nomination and look forward to his continued service to both our Section and the Bar Association.

Membership Composition and Financial Status

As of January 27, 2011, our Criminal Justice Section had 1,520 members. This constitutes a loss of 24 from the same time last year, when we had 1,544 members. With respect to gender, the Section consists of 1,141 men, or approximately 77% of the Section, and 338 females, or approximately 23% of the Section. No data was available for 4 members. In line with last year's situation, 49% of the Section, or 740 members, are in some type of private practice. Within the private practice group, the largest composition continues to be solo practitioners who make up 26% of the Section. This is almost identical to last year's situation.

In terms of age groupings, 25% of the Section is between 56 and 65, again similar to last year. The number of younger attorneys, 36 and under, now comprises 20% of the Section, up from 18% last year. In terms of years of practice, 49% have been in practice for 20 or more years, and 20% have been in practice for 5 years or less. This year's figures reflect the fact that we are slowly gaining younger members in the Section.

The Criminal Justice Section is one of 25 Sections in the New York State Bar Association which, as of January 27, 2011, had a total membership of almost 78,000. We regularly provide a welcome to those members who have recently joined, and a list of our new section members who have joined in the last several months, appears on the bottom of this page.

With respect to the financial status of our Section, our Treasurer, Sherry Levin Wallach, recently reported at our annual meeting, that as of November 30, 2010, the Section had received total income of $49,395.36. We had originally been budgeted for total income for the year 2010 at $51,950.00. Our income is basically derived from membership dues and from meetings and programs that the Section holds. It is expected, based upon current projections, that expenses for the full year of 2010, will amount to slightly over $32,000.00, and that we may be able to end the year with a surplus of approximately $17,000.00. In the past, the Section had accumulated surpluses of approximately $25,000.00, and with this year's expected surplus, we should be able to have a reserve account of approximately $40,000.00.

The Criminal Justice Section Welcomes New Members

We are pleased that during the last several months, many new members have joined the Criminal Justice Section. We welcome these new members and list their names below.

Hali MacLister Adair
David Wolf Albers
Jeffrey N. Bagnoli
Nathaniel L. Barone
Johnny L. Baynes
Pierre Bazile
Justin I. Bernstein
Andrew D. Briker
Patrick Kevin Brosnahan
Bryan L. Browns
Christina Marie Calabrese
James A. Caruso
Jessica L. Chiappone
Benjamin Stephen Clark
Darcel Denise Clark
William J. Comiskey
Cristina Garcia Da Silva
Melissa Defrances
Joseph Paul DePaola
Muhammad Salah El Gawhary
Charles L. Emma
Michael James Ercolini
Lillian Evans
Richard K. Farrell
William Taber Ferris
Sandrine Gaillot
Timothy Donovan Gallagher
Elizabeth Anne Garry
Fabio Gomez
Kenneth V. Gomez
Eric D. Gottlieb
Daniela Guerrero
Frank Handelman
Jay Young Kim
Robert Scott King
Barbara A. Leak
Michael Leff
Thomas Francis Liotti
Brian Scott MacNamara
Jeffrey C. Matte
Steven F. Munoz
Joanna E. Nowokunski
Roderick J. O'Connor
Mollie E. O'Rourke
Kimberly O'Toole
Jaeyoung Oh
Esereosonobrughue Joy Onaodowan
Christina M. Paliogiannis
Laurie Anne Parise
Jill Partridge
H. Benjamin Perez
Harry Peters
Jeffrey John Pietrzyk
Steve Pilnyak
Glenn Pincus
Jonathan David Scharf
William R. Small
Jesse Smith
Mayra P. Suazo
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NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

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____ Transition from Prison to Community
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Please return this application to:
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For ease of publication, articles should be submitted on a 3½" floppy disk or CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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