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New York Criminal Law Newsletter

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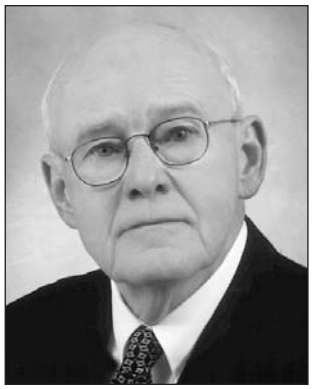
Message from the Chair



As many of you know, the Criminal Justice Section passed a resolution this past May 7th at the Executive Committee meeting asking that the NYSBA House of Delegates adopt our position that the legislature enact a law to require videotaping of police interrogations. The resolution asked that there be videotaping of the total interrogation beginning the minute the suspect enters a building in police custody. We also asked that the videotaping be only for serious crimes.

At the same time the New York County Lawyers' Association asked the NYSBA House of Delegates to approve their resolution that videotaping be required for all crimes and that the videotaping be done even in the police car.

We spoke to NYCLA about changing their position because the prosecutors in our Criminal Justice Section raised the issue of cost and felt that asking for the videotaping of all crimes and installing cameras in all cars would sound the death knell for any type of bill. NYCLA agreed to support our resolution at the House of Delegates and we owe a great debt of gratitude to NYCLA for their support.

Both Jack Litman and I attended the House of Delegates meeting on June 19th and Jack and NYCLA presented a film to show the Delegates how police would trick a suspect into making a false confession. After the presentation the Chair asked for any discussion and one Delegate made a motion to amend the resolution to include *all crimes*. Again, NYCLA backed our position, and several of us, including Vince Doyle III, Susan Lindenauer, and myself, spoke against the amended resolution and it was defeated. Our resolution was then passed unanimously.

I will be asking the NYSBA Legislative Committee to make this resolution one of their five "hot spots" to try to push through the legislature this year.

Incidentally, as a result of the film shown to the House of Delegates, Pat Bucklin, our Executive Director at NYSBA, called and told me of President Ken Standard's interest (along with many other Delegates) in the fact that police interrogators lie with impunity to suspects to try to trick them into confessing. Pat and Ken asked that we take this up in the coming year and I will put it on the agenda.

I hope all are having a pleasant summer, and we'll see you soon.

Michael T. Kelly, Esq.
Chair, Criminal Justice Section
New York State Bar Association

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New York Criminal Law Newsletter

www.nysba.org/criminal

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New York Criminal Law Newsletter Index

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Message from the Editor

The last few months have been extremely busy ones in the area of criminal law for both the New York Court of Appeals and the United States Supreme Court. Both Courts have issued important decisions which will have a significant impact on the criminal justice system.

In a 4-3 decision, the New York Court of Appeals declared a key provision of the death penalty statute unconstitutional, with the decision reflecting the sharp divisions within the Court on the issue. Similarly, in divided decisions, the United States Supreme Court limited the authority of judges to consider certain factors in sentencing, enlarged a defendant's right to confront witnesses and required persons to provide identification to police on request. All of these important decisions are discussed in detail within this issue.

I am also happy that we are able to present three interesting and informative articles covering various aspects of the criminal justice system ranging from depraved indifference murder to violent felony offenses to abuse in prisons. I hope that you enjoy this issue and continue to look forward to our publication. I am thankful that we continue to receive many compliments regarding our newsletter, and the regular publication of our issues has sparked renewed interest for membership in our Section.

Due to the fact that the state legislature has still been meeting into the months of July and August and that issues still have not been decided regarding important criminal law legislation, we only have a limited report in this issue regarding legislative enactments. Our usual detailed analysis on enacted legislation will be included in our Winter issue, which we expect to have available in January.

"Both Courts have issued important decisions which will have a significant impact on the criminal justice system."

I thank our readers and articles contributors for support of our newsletter, and I continue to look forward to your comments and remarks and the submission of articles for publication.

Spiros T. Tsimbinos

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *New York Criminal Law Newsletter* Editor

Spiros A. Tsimbinos
120-12 85th Avenue
Kew Gardens, NY 11415
(718) 849-3599

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Is There Life Left in Depraved Indifference Murder?

By Peter Dunne

The interplay between intentional and depraved indifference murder is revisited in the decision of the recent case *People v. Gonzalez*.[1] The holding will have a profound effect on decision making by prosecutors, defense attorneys, and courts. The decision limits the circumstances under which a defendant may be convicted of depraved indifference murder, and in the language used by the Court, may reflect a new approach to *mens rea* analysis in the homicide statutes.

This article will briefly examine the appellate history of the relationship between intentional murder and depraved murder, and will point out the treacherous terrain that now confronts prosecutors, defense attorneys and trial courts.

Intentional murder is defined as intentionally causing the death of another person.[2] Depraved indifference murder is defined as recklessly engaging in conduct which creates a grave risk of death to another person, and thereby causing the death of that person, under circumstances evincing a depraved indifference to human life.[3]

On January 25, 2000, Walter Gonzalez walked into a Rochester barber shop, whispered something into the ear of a patron, and quickly left. He soon returned, kicked in the door, pulled a gun from his waistband, and shot the victim in the chest. The victim fell to the floor, and Gonzalez shot him in the head. He then walked over to the victim and shot him eight more times in the back and head.

Following testimony, the jury was instructed on intentional murder, depraved indifference murder, and possession of a weapon with intent to use. The jury acquitted Gonzalez of intentional murder, but convicted him of depraved indifference murder, and gun possession.

The Court of Appeals affirmed the Appellate Division's order dismissing the depraved indifference count. After shooting a man ten times, the defendant stood convicted of only gun possession, which carried a maximum term of imprisonment of 15 years.

There was a time when it was common practice in the appropriate case to charge a defendant with both intentional murder and depraved indifference murder. Where such a defendant was convicted of both charges, it was improper to sentence the defendant consecutively, but the convictions for both charges would be routinely affirmed.[4] For example, in affirming a conviction for both intentional and depraved indifference murder, the Court of Appeals said,

> Thus, for example, depraved indifference murder differs from intentional murder because the former requires a *mens rea* of recklessness, a lesser state of mental culpability, coupled with the existence of an objective factual setting, independent of the defendant's state of mind, which rises to the level of "circumstances evincing a depraved indifference to human life."[5]

The first serious analysis of the differences between intentional and depraved indifference murder occurred in *People v. Register*.[6] Although this case is fundamentally about the intoxication defense, the Court's analysis of depraved indifference murder is important because it attempted to explain the difference between depraved indifference murder and reckless manslaughter.[7] In *Register*, the defendant was in a bar, and after an unspecified period of drinking, took out a gun, shot at one person and missed, but injured another, and then shot and killed someone who was walking by him. The defense admitted the shootings but introduced expert evidence of the "debilitating effects of consuming alcoholic beverages." In their requests to charge, the defense requested the intoxication defense[8] to both intentional and depraved indifference murder. The court granted the request as to the intentional count, but declined to charge intoxication as to the depraved indifference count. The jury acquitted the defendant of intentional murder but convicted him of depraved indifference murder.

"Depraved indifference murder is defined as recklessly engaging in conduct which creates a grave risk of death to another person, and thereby causing the death of that person, under circumstances evincing a depraved indifference to human life."

The trial court's failure to charge intoxication as to the depraved indifference count became the basis for

the appeal. The defendant conceded that intoxication was not an appropriate defense to "recklessness." However, the defendant argued that the difference between reckless manslaughter and depraved indifference murder is the element of "circumstances evincing a depraved indifference to human life." This added element, the defendant argued, can be clouded by the effects of alcohol intoxication, and therefore should be subject to the intoxication defense.

The Court of Appeals disagreed. It held that the state of mind required for depraved indifference murder is and always has been recklessness: the same as reckless manslaughter. The phrase "circumstances evincing a depraved indifference to human life" does not raise the *mens rea* level. Indeed, the Court pointed out that there are only four levels of *mens rea* applicable to all offenses in the Penal Law: a crime is committed intentionally, knowingly, recklessly, and with criminal negligence.[9] There is no separate *mens rea* for depraved indifference murder. The Court said, "The concept of depraved indifference was retained in the new statute not to function as a *mens rea* element, but to objectively define the circumstances which must exist to elevate manslaughter to murder."[10] Therefore, the difference between manslaughter and depraved indifference murder was not some heightened state of mind, but rather the circumstances of the recklessness. "Circumstances evincing a depraved indifference to human life" is not part of the state of mind or the act. Rather, it is a definition of the factual setting in which the risk-creating conduct must occur. "The focus of the offense is not upon the subjective intent of the defendant, as it is with intentional murder, but rather upon an objective assessment of the degree of risk presented by the defendant's reckless conduct."[11] Notice how the focus shifts from the subjective view of the defendant's state of mind to an objective view of the circumstances surrounding the defendant's conduct.

People v. Gallagher[12] changed the landscape. The defendant was a New York City police officer. After an all-night St. Patrick's Day celebration, he shot and killed a fellow police officer. The prosecution charged him with intentional murder and depraved indifference murder. Following the testimony, over the objection of the defendant, the court submitted both counts to the jury. The defendant was found guilty of intentional murder and manslaughter in the second degree, as a lesser included offense to the count of depraved indifference murder.

The Court of Appeals reversed, stating "[w]here a defendant is charged with a single homicide, in an indictment containing one count of intentional murder and one count of depraved [indifference] murder, both counts may be submitted to the jury but only in the alternative."[13] Their reasoning was that "[o]ne who acts intentionally . . . cannot at the same time act recklessly. . . . The act is either intended or not intended; it cannot simultaneously be both."[14]

This holding was unanticipated. The rationale was based on C.P.L. § 300.40(5) which mandates that inconsistent counts be submitted in the alternative. Two counts are inconsistent when guilt of the one necessarily negates guilt of the other.[15]

There had been no precedent for this finding that guilt of intentional murder necessarily negates guilt of depraved indifference murder, or vice versa.[16] Indeed, in his concurrence, Judge Bellacosa pointed out that the holding was without precedent and he could not accept the majority's view that these counts are inconsistent.

> These controlling definitions do not in my view lend themselves to the facile mutual exclusivity which the majority gives them. The guilt of one offense does not "necessarily negate" guilt of the other because the carefully drawn language does not by its words so state, and because there may be circumstances, where in the split second it takes to form and hold a culpable mental state, that person can intend an act and simultaneously be "aware and consciously disregard" a risk. Intent and conscious disregard may be compatible, rather than inconsistent in the workings of the human mind. . . .[17]

The impact of this decision cannot be overestimated. The first problem faced by trial courts was how to charge the jury on lesser included counts. If only the intentional and depraved indifference counts were to be submitted, there would be no problem; the jury could be charged in the alternative and satisfy *Gallagher*. However, it is often the case that lesser included offenses could properly be requested and charged. In what order was the jury to deliberate? Were they to deliberate on one theory before proceeding to the other? For example, what if the jury began deliberations on the intentional count, found the defendant not guilty, and proceeded at that point to deliberate on the lesser included offense of manslaughter in the first degree, and found the defendant guilty? *Gallagher* would preclude the jury from ever considering depraved indifference murder.

Ultimately, this issue was resolved by the direction to the jury to deliberate first on intentional murder, and then if the defendant was found not guilty, consider depraved indifference murder, and then, manslaughter

in the first degree, and manslaughter in the second degree if necessary.[18]

However, notice that this charge scheme has the potential effect of giving the impression that depraved indifference murder is in some way of a lesser degree than intentional murder. The notion that depraved indifference murder is in some way a lesser included offense to intentional murder is not as outlandish as it may sound. Many jurisdictions indeed have deemed it so.[19] Indeed, Justice Bellacosa in his dissent in *Gallagher* concluded "that depraved indifference murder, *for purposes of instruction to the jury*, is a lesser category of crime which qualifies as an inclusory concurrent count, even though the classification degree, *for the purposes of punishment upon conviction*, is equivalent as a legal fiction to intentional murder."[20]

For the next decade or so, cases proceeded in this manner. Defendants charged with murder were charged with both intentional and depraved indifference murder and juries were instructed to deliberate first on one, then the other. The situation is best exemplified by *People v. Sanchez*.[21] Oswaldo Sanchez and the victim both attended a family birthday celebration. They argued, and agreed to take the dispute outside. On their way out of the apartment, with the victim behind a partially closed door, the defendant pulled out a gun and shot him once in the chest.

The defendant was charged with intentional and depraved indifference murder, as well as other charges. As agreed to by the defendant, the court charged the jury on manslaughter in the first degree and manslaughter in the second degree as lesser included offenses. The defendant was acquitted of intentional murder but convicted of depraved indifference murder and possession of a weapon.

The defendant appealed, alleging that the proof was consistent only with intentional murder. The Court of Appeals disagreed and found that there was a reasonable view of the evidence that the defendant did not act intentionally, but that the "defendant's shooting into the victim's torso at point blank range presented such a transcendent risk of causing his death that it readily meets the level of manifest depravity needed to establish [depraved indifference] murder. . . ."[22]

Judge Rosenblatt, in a harbinger of *Gonzalez*, dissented that intentional murder and depraved murder were now merged; that there are no conceivable circumstances under which a charge of intentional murder would not be amenable to a conviction for depraved indifference murder.[23] In essence, depraved indifference murder was now a lesser included offense of intentional murder. In his view, depraved indifference murder was meant to address unique situations where the manifestation of evil was apparent in the recklessness of the conduct. Such acts would include, according to Judge Rosenblatt, firing a bullet into a room of occupants; starting a fire at the front door of an occupied building; shooting into a moving train or automobile, or playing Russian roulette.

Significantly, he also explicitly pointed out what had been unsaid until then. The cascade method of jury deliberation was unfair because it gave to juries the overwhelming impression that depraved indifference murder was in some way a lesser grade of offense. "[T]he charge of depraved indifference murder, intended to be a rare indictment for a rare breed of criminal, has undeniably become a tactical weapon of choice that distorts the Penal Law and skews the process of indictment, trial and plea. . . ."[24] His unstated fear must have been that if a jury were in the view to compromise on a lesser offense, they would seize upon depraved indifference murder, under the wrongful impression that it carried a lesser punishment than intentional murder. The fact that juries are instructed to ignore punishment was ignored.

Which brings us to *Gonzalez*. In a unanimous opinion by the Court of Appeals, the Court held that under the facts of the case, there was no reasonable view of the evidence that Walter Gonzalez was indifferent to the consequences of his actions, and therefore set aside the conviction for depraved indifference murder.

This represents a change in the method of analysis employed in *Register*. Recall that in *Register* the subjective state of mind of the defendant was the same as in reckless manslaughter, i.e., recklessness. The difference was in the objective nature of the circumstances of the homicide, not in the *mens rea*. However, the holding in *Gonzalez* emphasizes a strict subjective view of depraved indifference murder, that is, not how a reasonable person would have viewed the circumstances of the shooting, but an examination of what the defendant thought. Whether this represents a reversal of *Register* will remain to be seen.

The question now is: Under what circumstances is a conviction for depraved indifference murder appropriate? Here are brief fact patterns from four cases from the past three years: following a fight in a bar, the defendant stabs the victim once in the chest[25]; following a day-long verbal altercation, the defendant fires into a car killing two people[26]; following a night of drinking and arguing, firing one shot into the victim's face[27]; and one shot to the head and one shot to the chest.[28] It may be clear from these cases that it may not be simple to say what is intentional and what is depraved indifference. This decision will have a profound effect on prosecutors, defense attorneys and trial courts.

Prosecutors will need to decide, if not at the time of indictment, certainly at the time of trial, whether to choose which offense to prosecute, or take the risk that if both are charged, a depraved indifference conviction will be set aside as in *Gonzalez*. This decision must be made prior to trial, in order to fashion the testimonial portion of the trial effectively. If it is anticipated that only intentional murder will be charged, the intentional aspects of the case must be stressed and the reckless aspects minimized.

"Finally, trial courts will be under extreme pressure to charge only one theory. "

Defense attorneys will face extremely difficult decisions throughout the case. First, in the omnibus motion, it would be appropriate to move to dismiss the depraved indifference count pursuant to *Gonzalez*. Similarly, the motion to dismiss at the end of the trial for failure to prove depraved indifference murder pursuant to *Gonzalez* might be natural. However, if this motion were to be denied by the trial court, the decision to request the lesser included offense of reckless manslaughter is extremely difficult. A request for this lesser included offense precludes an appeal on the *Gonzalez* issue, because the request concedes that there is a reasonable view of the evidence that the defendant acted recklessly.[29]

Finally, trial courts will be under extreme pressure to charge only one theory. Perhaps this decision is not difficult when a person shoots a victim ten times as in *Gonzalez*. But as we have seen, there are other fact patterns which are not so simple. To date, the Appellate Division cases have affirmed convictions for depraved indifference murder by distinguishing *Gonzalez* on the facts of the case, stating that there was a reasonable view of the evidence that the defendant acted recklessly and not intentionally. Whether *Gonzalez* has any application beyond its unusual fact pattern of ten shots remains to be seen.

Endnotes

1. 1 N.Y.3d 464, 807 N.E.2d 273, 775 N.Y.S.2d 224.
2. P.L. § 125.25(1).
3. P.L. § 125.25(2).
4. *People v, Gomez*, 65 N.Y.2d 9, 478 N.E.2d 759, 489 N.Y.S.2d 156 (1985); *People v. Fenner*, 61 N.Y.2d 971, 463 N.W.2d 617, 475 N.Y.S.2d 276; *People v. Millson*, 93 A.D.2d 899, 461 N.Y.S.2d 586.
5. *Gomez, supra*, at 11.
6. 60 N.Y.2d 270, 457 N.E.2d 704, 469 N.Y.S.2d 599.
7. P.L. § 125.15.
8. CJI § 9.45
9. P.L. § 15.05.
10. *Register, supra*, at 278.
11. *Id.* at 277.
12. 69 N.Y.2d 525, 508 N.E.2d 9009, 516 N.Y.S.2d 174.
13. *Id.* at 528.
14. *Id.* at 529.
15. C.P.L. § 300.30
16. The only authority cited by the Court of Appeals for this holding was *People v. Brown*, 32 A.D.2d 760, 301 N.Y.S.2d 687, *aff'd without opinion*, 27 N.Y.2d 499, an Appellate Division case from 1969, decided prior to enactment of the Penal Law.
17. *Gallagher*, at 533.
18. *People v. Johnson*, 87 N.Y.2d 357, 662 N.E.2d 1066, 639 N.Y.S.2d 776.
19. Alaska Stat. § 11.41.100; A.R.S. § 13-1105 (Arizona); A.C.A. § 5-10-103 (Arkansas); Iowa Code § 707.5; K.S.A. § 21-3402 (Kansas); Minn. Stat. § 609.195; R.S.A. 630:1-b (New Hampshire); N.J. Stat. § 2C:11-4; 21 Okla. St. § 701.8; O.R.S. § 163.118 (Oregon); 18 Pa. C.S. § 2502; S.D. Codified Laws § 22-16-7; Wis. Stat. § 940.02.
20. *Gallagher*, at 532–533.
21. 98 N.Y.2d 373, 777 N.E.2d 204, 748 N.Y.S.2d 312.
22. *Id.* at 378.
23. *Id.* at 394.
24. *Id.* at 402.
25. *People v. Hafeez*, 100 N.Y.2d 253, 792 N.E.2d 1060, 762 N.Y.S.2d 572 (act deemed intentional, not depraved).
26. *People v. Baptiste*, 306 A.D.2d 562, 760 N.Y.S.2d 594 (depraved conviction affirmed).
27. *People v. Flowers*, 289 A.D.2d 504, 734 N.Y.S.2d 638 (depraved conviction affirmed).
28. *People v. Lyons*, 280 A.D.2d 926, 721 N.Y.S.2d 179 (depraved conviction affirmed).
29. *Sanchez, supra,* at 378; *People v. Borst*, 232 A.D.2d 727, 728, 648 N.Y.S.2d 720; *People v. Ford*, 62 N.Y.2d 275, 283, 465 N.E.2d 322, 476 N.Y.S.2d 783.

Mr. Dunne is presently serving as the Principal Law Clerk to Acting Supreme Court Justice Robert McGann, presently sitting in Queens County. He also previously served as an Assistant District Attorney in Queens County. He is a graduate of Boston University School of Law, where he served as the Editor of the *Boston University Law Review*.

Is It Time to Limit the Number of Violent Felony Offenses?

By Spiros A. Tsimbinos

In 1967, when our current Penal Law went into effect, felony crimes were divided into a neatly devised classification which labeled felony crimes Class A, for the most serious, to Class E, for the least serious, with each letter classification carrying a specified range of imprisonment or other sentencing options. As the crime rate grew from the 1960s through the early 1990s and the public began to clamor for strong action against the criminal element, particularly violent offenders, the legislature reacted with a series of measures which basically singled out violent offenders for reduced plea opportunities, enhanced punishment and restrictions on parole eligibility.

Effective in 1978, a large group of crimes were specifically given the added designation of "violent felony offenses" and the available sentences for such crimes were specifically covered by a new Penal Law section designated as Penal Law § 70.02. The original 1978 list consisted of some 18 designated crimes of a clearly heinous and violent nature, with most of the crimes being listed in the Class B violent felony category. However, over the years the legislature has seen fit to periodically make additions to the list. By 1995, the list had grown to 30. In 1996, seven additional crimes were added. In 1998, one additional crime was added. In 1999, four additional crimes were added. In 2000, two additional crimes were added. In 2001, largely due to the government's response to the terrorism attacks, ten additional crimes were added. Thus today, the total number of violent felony offenses is 54, three times the original number specified in 1978, and many are now included in the Class D and E violent felony categories. The classification as of 1995, along with the new additions since 1996, is listed in the charts below.

Class B Violent Felony Offenses

Crime	Penal Law Section
Aggravated assault on a police officer or a peace officer	120.11
Aggravated sexual abuse in the first degree	130.70
Arson in the second degree	150.15
Burglary in the first degree	140.30
Criminal possession of a dangerous weapon in the first degree	265.04
Criminal use of a firearm in the first degree	265.09
Intimidating a victim or witness in the first degree	215.17
Kidnapping in the second degree	135.20
Manslaughter in the first degree	125.20
Rape in the first degree	130.35
Robbery in the first degree	160.15
Criminal sexual act in the first degree (previously designated as sodomy in the first degree)	130.50
Attempted arson in the first degree	110.00 & 150.20
Attempted kidnapping in the first degree	110.00 & 135.25
Attempted murder in the second degree	110.00 & 125.25
By 1996 Legislation	
Course of sexual conduct against a child in the first degree	130.75
Gang assault in the first degree	120.07
Assault in the first degree	120.10
By 1999 Legislation	
Criminal sale of a firearm in the first degree	265.13
By 2001 Legislation	
Intimidating a victim or witness in the first degree	215.17
Hindering prosecution of terrorism in the first degree	490.35

Class C Violent Felony Offenses

Crime	Penal Law Section
Attempted Class B Violent Felony Offenses	(110.00, see prev. chart)
Aggravated sexual abuse in the second degree	130.67
Burglary in the second degree	140.25

Criminal possession of a weapon in the second degree	265.03
Criminal sale of a firearm in the first degree	265.13
Criminal use of a firearm in the second degree	265.08
Robbery in the second degree	160.10
By 1996 Legislation	
Gang assault in the second degree	120.06
Assault on a peace officer, police officer, fireman or emergency medical services professional	120.08
By 1999 Legislation	
Criminal sale of a firearm in the second degree	265.12
Criminal sale of a firearm with the aid of a minor	265.14
By 2001 Legislation	
Soliciting or providing support for an act of terrorism in the first degree	490.15
Hindering prosecution of terrorism in the second degree	490.30

Class D Violent Felony Offenses

Crime	Penal Law Section
Attempted Class C Violent Felony Offenses	(110.00, see prev. chart)
Assault in the second degree	120.05
Criminal sale of a firearm in the second degree	265.12
Criminal sale of a firearm with the aid of a minor	265.14
Intimidating a victim or witness in the second degree	215.16
Sexual abuse in the first degree	130.65
Criminal possession of a weapon in the third degree (subd. 4 & 5)	265.02
By 1996 Legislation	
Course of sexual conduct against a child in the second degree	130.80
Aggravated sexual abuse in the third degree	130.66
By 1998 Legislation	
(Subd. 6 of criminal possession of a weapon in the third degree), to wit, such person knowingly possesses any disguised gun	265.02
By 1999 Legislation	
Stalking in the first degree	120.60
By 2000 Legislation	
(Subd. 7 of criminal possession of a weapon in the third degree), to wit, such person possesses an assault weapon	265.02
(Subd. 8 of criminal possession of a weapon in the third degree), to wit, such person possesses a large-capacity ammunition feeding device	265.02
By 2001 Legislation	
Soliciting or providing support for an act of terrorism in the second degree	490.10
Making a terroristic threat	490.20
Placing a false bomb in the first degree	240.62
Placing a false bomb in a sports stadium or arena, mass transportation facility, and closed shopping mall	240.63

Class E Violent Felony Offenses

An attempt to commit any of the felonies of Criminal Possession of a Weapon in the Third Degree as defined in subdivisions four and five of § 265.02 as a lesser included offense of that section as defined in § 220.20 of the Criminal Procedure Law.

Crime	Penal Law Section
By 2001 Legislation	
Falsely reporting an incident in the second degree	240.55
Placing a false bomb in the second degree	240.61

The Sentencing Reform Act of 1995 also increased the penalties for violent felony offenders who have previously, within a ten-year period, committed a felony offense or a violent felony offense. This was accomplished not only by increasing the number of years of incarceration but by changing indeterminate sentences

to determinative terms and restricting possible parole time to only one-seventh (1/7th) of the term imposed. The sentences for these categories of violent felony offenders effective for crimes committed on or after October 1, 1995, are as follows:

Sentences for Second Felony Offenders Where the Second Felony Is a Violent Felony Offense

(Subdivision 6 of PL § 70.06, effective for crimes committed on or after October 1, 1995)

Crimes Involved	Determinate Term to Be Imposed
Class B Violent Felonies:	At Least 8 yrs. At Most 25 yrs.
Class C Violent Felonies:	At Least 5 yrs. At Most 15 yrs.
Class D Violent Felonies:	At Least 3 yrs. At Most 7 yrs.
Class E Violent Felonies:	At Least 2 yrs. At Most 4 yrs.

Sentences for Second-Time Violent Felony Offenders

(PL § 70.04, effective for crimes committed on or after October 1, 1995)

Crimes Involved	Determinate Term to Be Imposed
Class B Violent Felonies:	At Least 10 yrs. At Most 25 yrs.
Class C Violent Felonies:	At Least 7 yrs. At Most 15 yrs.
Class D Violent Felonies:	At Least 5 yrs. At Most 7 yrs.
Class E Violent Felonies:	At Least 3 yrs. At Most 4 yrs.

Note: The determinate sentence imposed must be in the form of a whole or half year.

With respect to persistent violent felony offenders who have committed three or more violent felony offenses, the Sentencing Reform Act of 1995 retained the concept of indeterminate sentencing, but raised the minimum terms while maintaining life imprisonment as the maximum possibility. Penal Law § 70.08 also makes sentencing under that provision mandatory for violent felony offenders who fall within the persistent category. The current sentences for persistent violent felony offenders is illustrated by the following chart:

Sentences for Persistent Violent Felony Offenders

(PL § 70.08, three or more violent felony offenses, effective for crimes committed on or after October 1, 1995)

Term to Be Imposed

Crimes Involved	Minimum Term	Maximum Term
Class B Violent Felonies:	At Least 20 yrs. At Most 25 yrs.	life
Class C Violent Felonies:	At Least 16 yrs. At Most 25 yrs.	life
Class D Violent Felonies:	At Least 12 yrs. At Most 25 yrs.	life

As a result of Jenna's Law, effective September 1, 1998, determinate sentences were also applied to first-time violent felony offenders and designated minimums and maximums were set as follows:

Sentences for First-Time Violent Felony Offenders

(Effective for crimes committed on or after Sept. 1, 1998)

Crimes Involved	Minimum Term	Maximum Term
Class B Violent Felonies:	5 Years	25 Years
Class C Violent Felonies:	3½ Years	15 Years
Class D Violent Felonies:	2 Years	7 Years
Class E Violent Felonies:	1½ Years	4 Years

Note: The limited possibilities of a definite or intermittent sentence under certain circumstances for a Class D or E violent felony offense have remained in effect throughout.

One of the major objectives of the Sentencing Reform Act of 1995 and Jenna's Law in 1998 was to severely restrict judicial discretion in sentencing when dealing with violent felony offenders and repeat violent felony offenders. This can be clearly observed from the various charts reproduced herein which indicate that a judge's discretionary range substantially narrows as the violent felony offense becomes more serious and the offender being sentenced is a repeat or persistent offender.

In addition to being aware of the enhanced sentences involved with respect to violent felony offenders, the practitioner must also be aware of the plea bargain limitations that are in place with respect to such offend-

ers. Penal Law § 220.10 provides that where an indictment charges a Class B violent felony offense, which is also an armed felony offense, a plea of guilty must include at least a plea of guilty to a Class C violent felony offense. If a Class B or a Class C violent felony offense is charged in the indictment, which is not an armed felony offense, a plea of guilty must include at least a plea of guilty to a Class D violent felony offense. With respect to indictments which charge Class D violent felony offenses, Penal Law § 220.10(5)(d) provides as follows in subdivisions (iii) and (iv):

> (iii) Where the indictment charges the Class D violent felony offense of criminal possession of a weapon in the third degree as defined in subdivision four of section 265.02 of the penal law, and the defendant has not been previously convicted of a Class A misdemeanor defined in the penal law in the five years preceding the commission of the offense, then a plea of guilty must be either to the Class E violent felony offense of attempted criminal possession of a weapon in the third degree or to the Class A misdemeanor of criminal possession of a weapon in the fourth degree as defined in subdivision one of section 265.01 of the penal law.
>
> (iv) Where the indictment charges the Class D violent felony offenses of criminal possession of a weapon in the third degree as defined in subdivision four of section 265.02 of the penal law and the provisions of subparagraph (iii) of this paragraph do not apply or subdivision five, seven or eight of section 265.02 of the penal law, then a plea of guilty must include at least a plea of guilty to a Class E violent felony offense.

As can be seen by the above charts and the discussion herein, the classification of certain crimes as violent felony offenses has serious consequences, to wit, reduced plea bargaining opportunities, enhanced punishment and restrictions of parole. The designation of a crime within the violent felony category should therefore not be done lightly but should only be done after careful consideration and determination that the character of the offense is of such a violent nature as to warrant its special designation.

The great increase in the number of violent felony offenses in recent years appears to arise more from responses to political considerations, special interest groups, and a knee-jerk reaction to a temporary public concern. This is evident from the number of crimes added to the list following the September 11th attacks. Raising the level of many of these crimes from a misdemeanor status to a violent felony offense is subject to serious question and the creation of many new offenses could have been handled within the parameters of already existing crimes. It also appears that various crimes involving terrorism acts may be better left to federal prosecution rather than state action.

It must be noted that while this article was being prepared, a local newspaper reported that in Suffolk County, a 17-year-old female high school student was arrested and charged as a result of making a false cell phone call that a bomb had been placed on a high school campus and two students had been shot in the lobby. The charge imposed on the 17-year-old was that of Falsely Reporting an incident in the second degree, one of the class E violent felonies, which was added by the 2001 legislation. Although the 17-year-old is clearly guilty of extreme stupidity and should not escape some sort of punishment, one must wonder whether facing a possible 4-year sentence as a violent felony offender, along with the other consequences of such a designation, is the appropriate response which the Penal Law should make in such a situation.

A review of the now-lengthy list of violent felony offenses indicates many instances where the crime should not really be within the violent felony offense category. It is time to begin to consider whether the current trend of steady increases in the list should be reconsidered and a thorough review undertaken to determine whether elimination of some of the crimes from the list should be accomplished.

It was recently reported in an article in our *Newsletter*, that in 1995 violent felonies represented 51% of the state prison population. At the end of 2003, 56% of the inmate population were incarcerated for violent crimes. Although the category of a violent felony offense is warranted in many situations, we must be sure that those who are charged and imprisoned for that category of offense are truly violent criminals who deserve the sentence imposed.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 35 years. A graduate of New York University School of Law, he served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is a past president of the Queens County Bar Association and has been a frequent lecturer on legal topics. Mr. Tsimbinos has authored many articles that have appeared in the *New York Law Journal*, the New York State Bar *Journal*, the *Queens Bar Bulletin* and other legal publications.

The Legal System Moves to Deal With an Age-old Problem—Rape in Prison

By George Thomas Kochilas

Our nation's attention has recently been focused on the problem of prison abuses in some of our military prisons overseas. Little attention however, has been paid to a long-standing domestic problem—rape of prisoners in correctional facilities throughout the United States, including our state of New York. This article seeks to shed some light on the problem and to discuss the slowly evolving response of our legal system to the situation.

The Scope of the Problem

There are over 2 million people currently serving some form of a correctional sentence in the United States.[1] Stop Prisoner Rape (SPR), a non-profit organization committed to fighting sexual violence in prison facilities, estimates that 10% of prison inmates or some 200,000 prisoners are raped while incarcerated. Furthermore, the Stop Prisoner Rape organization estimates that juveniles serving time in adult prison facilities as opposed to juvenile detention centers are five times more likely to be a victim of rape.

Victims of inmate rape experience a wide range of physical injuries, and psychological trauma. Psychologically, victims of inmate rape suffer from shock, disbelief, anger, guilt, shame, and humiliation and even suicide. In fact, the suicide rate of juveniles incarcerated in adult prisons is nearly 8 times higher than that of juvenile detention centers.

Prisoner rape also greatly increases the risk of sexually transmitted diseases in prison amongst inmates. Nationwide, the HIV rate in prison is at least four times that of the public. Furthermore, the inmate infection rate of hepatitis C is almost 10 times higher than in the public.[2] Inmates are also at an increased risk of contracting other sexually transmitted diseases, including hepatitis A, hepatitis B, gonorrhea, and syphilis.

These facts not only have a devastating impact on the victims of prison rape, but also affect the public. The Department of Corrections releases approximately 600,000 inmates each year. Thus, the physical and psychological effects of prison rape spread rampantly throughout the public. Pat Burns, President of the Justice Fellowship,[3] states: "Experts estimate that at least one in 10 inmates is raped in prison. Because 95 percent of prisoners will eventually be released back into our communities, the horrors that occur inside prison have consequences for the rest of us, too."

Factors More Likely to Lead to Prison Rape

Several factors may combine to make it more likely that certain individuals incarcerated in prison will be more likely to be victims of prison rape than other inmates. Unfortunately, the prison subculture and the make-up of the prison population dictate that race is highly polarized, and there is an overwhelming sense that each race must stick together to protect its own. Since the overwhelming majority of the prison population is African-American and Hispanic, with Caucasian inmates in a distinct minority, Caucasian inmates are more likely to be the subject of attacks. An interesting study of survival in New York State prisons showed that race is a predominant factor in determining whether an inmate would be victim to a violent attack. The study showed that 19% of the victims were African-American while 79% were Caucasian.[4]

Age is another physical characteristic that contributes to inmate rape. The younger the inmate, the greater his chances are of being raped. In fact, a recent study showed that juveniles serving time in adult prison facilities as opposed to juvenile detention centers are five times more likely to be victims of inmate rape.

Physical build is another physical characteristic that contributes to inmate rape. Frequently, a muscularly built inmate uses physical force and strength to overpower an inmate and rape him. Therefore, inmates who are weak in strength and diminutive in size are more susceptible to inmate rape.

New inmates are often frightened and unaccustomed to prison life. They do not understand the prison subculture, and, lacking allies, are viewed by other inmates as "fresh fish." Thus, new inmates are vulnerable to other inmates and are likely targets of prison rape. According to Human Rights Watch (HRW), newly incarcerated first offenders are especially vulnerable to sexual abuse. Lacking allies, unfamiliar with the unwritten code of inmate rules, and likely to feel somewhat traumatized by the new and threatening environment, they are easy prey for experienced inmates.[5]

Usually, inmates convicted of nonviolent crimes are vulnerable to prison rape and inmates convicted of a violent crime tend to take on the role of the aggressor in another inmate's rape. The psychology of such a dichotomy rests in the perception that an inmate convicted of a nonviolent crime (i.e., fraud) is less mascu-

line than an inmate convicted of a violent crime (i.e., murder) and therefore more vulnerable to rape.

The exception to the rule is an inmate convicted of a sex crime. Regardless of the violent nature of the crime, inmates consider a sex offender to be "the lowest of the low." Sex offenders are extremely susceptible to particularly brutal encounters of rape, which is why they are often segregated from the general population for their own protection.[6]

Reluctance to Report

The stigma attached to victims of prison rape is that of shame, embarrassment, and humiliation. Therefore, victims are reluctant to report attacks to prison officials. According to Human Rights Watch:

> Only a small minority of victims of rape or other sexual abuse in prison ever report it to the authorities. Indeed, many victims—cowed into silence by shame, embarrassment and fear—do not even tell their family or friends of the experience.[7]

Victims are also reluctant to report the attack to prison officials for fear of retribution from other inmates. The prison subculture views "rats" and "snitches" as the lowest members of the prison hierarchy. Inmates who report other inmates to prison officials place their lives in danger and risk deadly retaliation from other inmates. According to HRW: There is a strongly-felt prohibition among inmates against reporting another inmate's wrongdoing to the authorities . . . In the case of rape, the tacit rule against snitching is frequently bolstered by specific threats from the perpetrators, who swear to the victim that they will kill him if he informs on them.[8]

Though inmates are reluctant to report their attackers to prison officials, recent legal measures have begun to deal with the problem of rape in prison.

The Legal System's Response

In 1994, the Supreme Court of the United Stated decided the groundbreaking case of *Farmer v. Brennan*,[9] which brought to light the harsh reality of rape in prison. The case presented to the Court the issue of whether the failure of prison officials to prevent inmate assaults constituted a violation of the victim's Eighth Amendment right under the United States Constitution to be free from cruel and unusual punishment. The Court ruled that it did and in rendering its decision, the Supreme Court noted at page 853:

> The horrors experienced by many young inmates, particularly those who are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but it is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.

In its decision, the Court established a two-prong test to determine whether prison officials violated the victim's Eighth Amendment right. Under the test, the inmate must show that their deprivation of safety by prison officials was "objectively and sufficiently serious," and that prison officials possessed a "sufficiently culpable state of mind." The Court defined mental culpability as subjective with respect to the "deliberate indifference" to inmate health or safety.

The case stemmed from a complaint filed by Dee Farmer, a transsexual inmate serving a federal sentence for credit card fraud. During Farmer's incarceration at a maximum-security correctional facility for men, another inmate raped Farmer.

As a result of the rape, Farmer, acting pro se, filed a complaint in District Court against several defendants, including the director of the Bureau of Prisons and the warden of the correctional facility. The complaint alleged that the defendants knew Farmer was at a high risk of being sexually assaulted by fellow inmates due to "feminine characteristics" and failed to adequately protect Farmer from attacks by fellow inmates. The defendants filed a motion for summary judgment, which the District Court granted. Farmer appealed, and the Court of Appeals for the Seventh Circuit affirmed the District Court's decision. Farmer, again acting pro se, successfully petitioned for certiorari to the Supreme Court of the United States.

The Supreme Court held that Farmer was incarcerated under conditions posing a sufficiently substantial risk of "serious damage to Farmer's future health." The Court stated that an inmate can establish exposure to such a risk by showing that they belong to a class of inmates susceptible to frequent violent attacks by fellow inmates. The Court stated that due to Farmer's youth and transsexual status, Farmer was likely to be subject to a great deal of sexual pressure in prison.

Furthermore, the Supreme Court held that prison officials were deliberately indifferent to Farmer's safety. The Court stated that the determination of whether a prison official possessed a sufficient mental culpability is a question of fact and that a trier of fact may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. The Court

stated that since Farmer possessed breast implants and had taken female hormones, a trier of fact could infer that prison officials must have known that Farmer was at risk of attack by fellow inmates when placed in the general population.

The Court determined that there were adequate facts to support the two-prong test. Accordingly, the Court vacated the lower court's decision and remanded Farmer's case for reconsideration in light of the Supreme Court decision.

Human rights organizations heralded the landmark decision, which serves as the leading precedent in the area of inmate-on-inmate rape and custodial sexual misconduct.[10] In fact, *Farmer v. Brennan* is the only Supreme Court decision involving rape in prison, which is a concern to many prison rights activists since rape in prison constitutes a gross violation of basic human rights and is prevalent throughout the country.

While case law in the area of prison rape has been scant, the federal government through legislative action has recently taken an important step in moving to curtail the problem. On September 4, 2003, President George W. Bush signed into law the Prison Rape Elimination Act of 2003. The federal law marked the first time in United States history that the government passed a law dealing with sexual assault in prison. The law calls for the gathering of national statistics concerning sexual assault in prison; the development of guidelines for each state to address the issue of inmate rape; the provision of grants to each state to combat inmate rape; and the creation of a review panel to hold annual hearings.

"The passage of this law is a major milestone, finally bringing prisoner rape out of the shadows," said Lara Stemple, Executive Director of Stop Prisoner Rape. Senators Jeff Sessions (R-Ala.) and Ted Kennedy (D-Mass.) co-sponsored the bill. Senator Sessions, a former federal prosecutor, Alabama Attorney General, and a member of the Senate Judiciary Committee, stated: "My colleague, Senator Ted Kennedy, was chief co-sponsor of this bill. He's a liberal and I'm a conservative, but we both agree that punishment for a criminal defendant should be set by a judge and should not include sexual assault. It is time to put an end to prison rapes and the fear of such assaults. This bill can help us do that."

In conclusion, prison rape is a grim reality that has devastating consequences on both the victims and the public. Winston Churchill observed, "The real measure of civilization in any society can be found in the way it treats its most unfortunate citizens—its prisoners." Recent events have placed the problem of prisoner abuse squarely within the public eye. Domestically, within our nation's prisons, prisoner rape has been a long-standing, neglected problem. Our legal system, however, has begun to move recently, both through case law decisions and governmental legislation, to correct the problem. It is hoped that this article has shed some additional light on the matter and on recent developments to correct the situation.

Endnotes

1. U.S. Department of Justice, Bureau of Justice Statistics, Nation's Prison and Jail Population Exceeds 2 Million Inmates For First Time, April 6, 2003, *available at* http://www.ojp.usdoj.gov/bjs/pub/press/pjim02pr.htm (last visited Jan. 24, 2004).
2. Wendy McElroy, *Confronting Prison Rape*, American Daily News And Commentary (September 9, 2003), *available at* http://www.sierratimes.com/03/09/19/mcelroy.htm (last visited Jan. 24, 2004).
3. Justice Fellowship is a non-profit organization in Reston, Va., that ministers to prisoners, ex-prisoners, and their families.
4. Hans Toch, Living in Prison: The Ecology of Survival (1993), at page 145.
5. *Id.*
6. Man & Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference*, 92 J. Crim. L. & Criminology 127 (Fall 2001/Winter 2002), at 174.
7. Human Rights Watch, No Escape: Male Rape in US Prisons (2001), note 30, ch. VII.
8. *Id.*
9. 511 U.S. 825, 114 S. Ct. 1970 (1994).
10. Custodial sexual misconduct is defined as the sexual abuse of inmates by guards or other corrections officials.

George Thomas Kochilas is a recent graduate of Brooklyn Law School and has served as an intern with our *Criminal Law Newsletter*.

New York Court of Appeals Review

During the last few months, the Court of Appeals issued several significant decisions in the field of criminal law. Perhaps the most prominent decision was the 4-3 determination finding unconstitutional a key provision of New York's death penalty statute, in *People v. LaValle*.

Listed below are the criminal law decisions issued by the New York Court of Appeals from May 4, 2004 to August 2, 2004, including the *LaValle* decision.

Appellate Standard for Ineffective Assistance of Counsel

***People v. Stultz*, decided May 4, 2004 (N.Y.L.J., May 5, 2004, p. 19)**

In a unanimous decision, the Court of Appeals adopted the trial standard for ineffective assistance of counsel when dealing with issues of ineffective assistance of counsel in appellate cases. The standard first enunciated by the Court in *People v. Baldi*, 54 N.Y.2d 137 (1981), sets the standard at the deprivation of meaningful representation. In adopting the standard, the Court held that the same standard should apply in both trial and appellate matters. In applying the *Baldi* standard, the Court continued to adhere to a more lenient standard of review than that adopted by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984).

The Court's decision in *Stultz* was a matter of first impression and was made necessary by the addition of the amendment to CPL section 450.90 in 2002 which gave the Court of Appeals jurisdiction to hear cases involving claims of ineffective assistance of appellate counsel. After adopting the meaningful representation standard, the Court of Appeals denied the defendant's contention that his appellate counsel had not provided such representation and affirmed the defendant's conviction.

Parent of Juvenile Offender May Invoke Right to Counsel

***People v. Mitchell*, decided May 4, 2004 (N.Y.L.J., May 5, 2004, p. 18)**

In a unanimous decision, the Court of Appeals held that the parent of a juvenile offender can invoke the right to counsel on the child's behalf. After so holding, the Court found, however, that the actions of the mother in merely advising the police officer that the juvenile had a lawyer and whether he wanted the attorney's number failed to meet the standard of unequivocal request for counsel. The Court specifically held that "whether a particular request is or is not unequivocal must be determined with reference to the circumstances surrounding the request." In reviewing the circumstances in the case at bar, the Court found that the mother's remarks were consistent with a variety of interpretations and that she did not unequivocally invoke the son's right to counsel. The Court of Appeals therefore upheld the juvenile's conviction for robbery in the first degree.

Orders of Protection Are Appealable But Issue Must Be Preserved

***People v. Nieves*, decided May 6, 2004 (N.Y.L.J., May 7, 2004, p. 18)**

In a unanimous decision, the Court of Appeals made clear for the first time that orders of protection issued against defendants at the time of sentence can be challenged on the direct appeal from the judgment of conviction. In the case at bar, the defendant had claimed in the Appellate Division that the Orders of Protection exceeded both the scope and duration authorized by CPL section 530.13 (4). The Court of Appeals found that pursuant to CPL section 450.10, the Orders of Protection were subject to appellate review. The Court found, however, that since the issue had not been raised before the trial court, and was raised for the first time in the Appellate Division, the appellant's contentions were not preserved and the Court of Appeals would not review the matter.

Reversal Required Because of Defective Allen Charge

***People v. Aponte*, decided May 11, 2004 (N.Y.L.J., May 12, 2004, p. 18)**

In a unanimous decision, the Court of Appeals upheld a 3-2 determination of the Appellate Division First Department, reversing a defendant's conviction because of an improper Allen charge. After two days of deliberations, the jury had reported itself deadlocked and in response, the trial court provided a supplemental charge which stressed that the "point of the process was to get a result" and that they were nowhere near to the point where the judge would consider a mistrial. The supplemental charge also suggested that the jurors were failing in their duty, and failed to caution jurors not to surrender their consciously held beliefs. Follow-

ing the supplemental instructions, the jury returned with a guilty verdict in just five minutes.

The Court of Appeals held that the supplemental instruction overemphasized the jury's obligation to return a verdict and did not provide a proper balancing instruction that they should not surrender their honest convictions for the mere purpose of returning a verdict. The Court of Appeals thus found that the defendant had been denied a fair trial and that a re-trial of the matter should be held.

Limited Police Search Upheld as Reasonable Under Circumstances of Case

***People v. Wheeler,* decided May 13, 2004 (N.Y.L.J., May 14, 2004, p. 21)**

In a unanimous decision, the Court of Appeals upheld a defendant's gun conviction and denied his claim that his motion to suppress should have been granted. The defendant was in the company of two others in an apartment when the police entered with arrest warrants seeking a probation violator. After finding guns on two of the other persons in the apartment, the officer observed a gun in the defendant's possession after he had been ordered to place his hands in plain view. The defendant had also initially resisted the police officer's request.

The Court of Appeals determined that the proper test to be utilized in determining whether a proper search and seizure occurred was the reasonableness of the governmental invasion of the defendant's privacy under the Fourth Amendment. The Court of Appeals also recognized that the determination of the suppression court with its particular advantages of having seen and heard the testimony was entitled to great deference. The Court thus concluded:

> Applying these principles to the instant case, we conclude that the police officers legitimately focused their attention on defendant during the execution of the arrest warrants in the apartment. Certainly, Officer Groves' request that defendant shift his position and show his hands was justified at its inception. The officers had discovered two loaded .380 automatic handguns near defendant's companions before turning their full attention to defendant who, by that time, was sitting on his hands, fidgeting and mumbling. Under the circumstances the officers had reason to believe that defendant could also be armed and dangerous.

Request for New Counsel Properly Denied

***People v. Linares*, decided June 3, 2004 (N.Y.L.J., June 4, 2004, p. 18)**

In a unanimous decision, the Court of Appeals upheld a defendant's conviction and denied the defendant's claim that he was entitled to a substitution of assigned counsel. The defendant had complained about his assigned trial counsel because the attorney had urged him to accept a plea offer that he felt was inappropriate. The defendant thereafter apparently began threatening his attorney and a request was made for new counsel. The trial court had found during an inquiry that trial counsel's ability to represent the defendant had not been impaired by his client's threatening conduct. The Court of Appeals found that there was nothing in the record to indicate that defense counsel had developed a conflict of interest or in any way was deficient in his representation of the defendant. The Court further noted that the defendant was never able to articulate a single valid reason for the court to assign another lawyer. The Court of Appeals also noted that to the extent the defendant's relationship with counsel soured, the fault lay wholly with the defendant. The Court noted that "substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay."

Prosecutor's Authority in Grand Jury

***People v. Aarons*, decided June 8, 2004 (N.Y.L.J., June 9, 2004, p. 18)**

In a 7-2 decision, the Court of Appeals held that a prosecutor was authorized to suspend grand jury proceedings if it appeared a no-bill is imminent and can then produce additional evidence as needed to obtain an indictment. The decision empowers prosecutors so long as the jury has not taken a formal vote, to present minimal evidence and then bolster their case with additional proof if required. The Court, in rendering its determination, held that in order for a grand jury to dismiss a charge, twelve of its members must concur in the decision and until that occurs the prosecutor was authorized to present additional proof. Judges Ciparick and Kaye dissented. The dissent took the position that because the prosecutor may not without judicial leave and absent a sua sponte request from the grand jury present additional evidence and re-submit a case after the grand jury failed to vote a true bill on the initial presentation, they were without authority to request the grand jury to cease further deliberations.

Evidence was Legally Sufficient to Support Conviction

***People v. Calabris*, decided June 8, 2004 (N.Y.L.J., June 9, 2004, p. 19)**

In a second 7-2 decision, the Court of Appeals affirmed a conviction and held that the evidence was legally sufficient to support the jury's determination. Judge Ciparick, writing for the majority, stated that the jury's determination was rational and its verdict should not be disturbed. The majority opinion expressed the view that although the dissenters seemed to believe that the jury verdict was wrong, it was not proper for the Court to substitute its view in the absence of proof that the verdict was legally deficient. Judges G.B. Smith and R.S. Smith supported the dissenting opinion and Judge Rosenblatt, while concurring with the majority, requested that the prosecutor re-examine the case since he was troubled by the weakness of the evidence.

Forgery Conviction Reversed

***People v. Cunningham*, decided June 10, 2004 (N.Y.L.J., June 11, 2004, p. 19)**

In a unanimous decision, the Court of Appeals reversed a forgery conviction holding that a person who signs his own name to a corporate check without authorization does not commit a forgery crime. The Court determined that there was a distinction between authenticity and exceeding one's authority. Under the circumstances of the case, the Court found that the defendant did not commit forgery merely by exceeding the scope of authority delegated to him by the corporation. In reviewing the forgery statute (Penal Law section 170.10) and its prior decision in *People v. Levitan*, 49 N.Y.2d 87 (1990), the Court stated that although in certain rare instances one may commit a forgery by signing one's own name, this only occurs where the signing is done in such a way as to deceive others into believing that the signer is in fact some third party.

Contempt Conviction Upheld

***People v. Konieczny*, decided June 10, 2004 (N.Y.L.J., June 11, 2004, p. 19)**

In a unanimous decision, the Court of Appeals upheld a criminal contempt conviction where the defendant was accused of violating an order of protection issued under unclear circumstances. The Court upheld the conviction because the defendant pleaded guilty and effectively abandoned any claim that the order of protection was invalid. The defendant's challenge rested upon an interpretation of CPL section 530.13, and Judge Graffeo, writing for the Court, cautioned against the misuse of that statute. She stated, however, that the defendant had given up any claim to challenge the order of protection because of his guilty plea.

Warrantless Arrest Upheld

***People v. Reynoso*, decided June 10, 2004 (N.Y.L.J., June 11, 2004, p. 22)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction and rejected his claim that his warrantless arrest violated the dictates of *Payton v. New York*, 445 U.S. 573 (1980). After reviewing the record, the Court determined that the arrest occurred either after the defendant exited his home voluntarily or while he stood in the doorway. Under these circumstances the *Payton* rule did not apply.

The Court also commented upon a secondary issue in the case, finding that there was no merit to defendant's claim that his constitutional right to confront witnesses was violated when the trial court allowed the People to elicit a statement that a non-testifying co-defendant had made to a detective. The Court stated that the statement was admitted not to establish the truth of the matter asserted, but rather to show the detective's state of mind. The Court's decision cited the recent Supreme Court case of *Crawford v. Washington,* __ US __, 124 S. Ct. 1354, where the Court observed that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

Death Penalty Statute Ruled Unconstitutional

***People v. LaValle*, decided June 24, 2004 (N.Y.L.J., June 25, 2004, p. 18)**

In a 4-3 decision, the Court of Appeals found unconstitutional a key provision of the Death Penalty Statute, making it necessary for the legislature to amend the death penalty legislation in order to restore capital punishment to New York. The Court held that the statutory requirement that jurors in the penalty phase be advised that a deadlock would make the defendant eligible for parole someday acted as an unconstitutional coercive element on the jury. Reciting that New York's statute was unique in its coercive effect, Judge Bundy Smith, writing for the four-judge majority, held that the deadlock instruction gives rise to an unconstitutional risk that one or more jurors, who cannot bear the thought that the defendant may walk the streets after serving 20 to 25 years, would join jurors favoring death in order to avoid the deadlock sentence. Judge Robert Smith, writing for the dissenters, which also included Judges Graffeo and Read, attacked the majority decision by stating that it was substituting its own preferences for those of the legislature and that its decision was based on nothing more than its own poli-

cy judgment. The sharp 4-3 split within the Court largely reflected the political divide, which has long existed with respect to the death penalty issue. Within the four-judge majority were Chief Judge Kaye, Judge Bundy Smith, and Judge Ciparick, all appointees of former Governor Cuomo, who vigorously opposed the death penalty. Judges Smith, Graffeo, and Read, who constituted the dissenting position, are all recent appointees of Governor Pataki, who has strongly advocated the death penalty.

The Court of Appeals decision will likely lead to new legislation to correct the alleged defect and legislative leaders have already indicated that they are prepared to take quick and appropriate action. It is anticipated that the statute could be amended so juries would be told that in the event of a deadlock, the defendant would get life without parole. We will report any new developments in this area to our readers in our next issue.

Waiver of Right to Counsel

***People v. Providence*, decided June 29, 2004 (N.Y.L.J., June 30, 2004, p. 18)**

In a unanimous decision, the Court of Appeals found that there was a reliable basis to conclude that the defendant's request to proceed pro se and without counsel was accompanied by a knowing, voluntary, and intelligent waiver of his right to counsel. The Court of Appeals, in reviewing the record, found that the trial court repeatedly and adequately warned the defendant of the dangers of self-representation and gave him several opportunities to change his opinion. The Court thus concluded that a searching inquiry was undertaken and that the defendant had no right to challenge his waiver on appeal.

Some Police Records Subject to FOIL Request

***New York Civil Liberties Union v. City of Schenectady*, decided June 29, 2004 (N.Y.L.J., June 30, 2004, p. 18)**

In a civil proceeding, which may have an impact on criminal law, the Court of Appeals ruled in a unanimous decision that police records on the use of force were subject to a request under the Freedom of Information Law (FOIL). The records were sought by the New York Civil Liberties Union. The Court of Appeals chastised the city of Schenectady for the lengthy "runaround" which has existed with respect to the matter and remitted the matter to the Supreme Court for further disclosure proceedings against the city consistent with its opinion.

Recent U.S. Supreme Court Decisions Dealing with Criminal Law

This term, the United States Supreme Court rendered several decisions in the criminal law area, which are of great importance and which have already caused a great deal of confusion and upheaval in the criminal justice system. These decisions deal with the areas of a defendant's right to confront witnesses, a police officer's right to obtain a person's identification, and a judge's authority to consider factors in sentencing a defendant which have not been determined by a jury. The Court also addressed the very important issue of due process rights under the Patriot Act and the authority of the President to detain both citizens and foreign nationals. Discussed in detail below are these significant decisions.

Defendant Entitled to Right of Confrontation With Respect to Testimonial Statements

Crawford v. Washington, 124 S. Ct. 1354 (March 8, 2004)

In a 6-3 decision, the Supreme Court recently ruled that an out-of-court testimonial statement of a witness is per se inadmissible unless a witness is unavailable and the defendant has had a prior opportunity to cross-examine him. The decision applies to the use of plea allocutions of co-defendants, which have routinely been allowed in federal trials. In a recent article in the *New York Law Journal* (June 23, 2004, pages 2 and 6) by Paul Shechtman, the author observed that "no doubt *Crawford* will keep prosecutors and courts busy responding to new trial claims in cases where co-defendant plea allocutions have been introduced into evidence."

The Supreme Court's decision effectively overruled its prior holding in *Ohio v. Roberts*, 448 U.S. 56 (1980). The decision has already caused a great deal of concern in pending federal and state cases and there is currently considerable confusion as to whether the Supreme Court decision would apply to such situations as 911 calls. *Crawford* clearly held that no testimonial statement can be used at a criminal trial unless the witness was cross-examined beforehand or would take the stand. What is less clear is what is covered under the category of testimonial statements. Various state and federal decisions are now struggling to deal with the ramifications of the *Crawford* decision.

Police Have Right to Demand Identification

Hiibel v. Sixth Judicial District Court of Nevada, Humboldt Cty., 124 S. Ct. 2451 (June 21, 2004)

In a 5-4 decision, the Supreme Court ruled that a person does not have a constitutional right to refuse to tell police their name. A Nevada cattle rancher had been convicted of a misdemeanor based upon an arrest after he had failed to reveal his name or show identification during an encounter with a deputy sheriff. The majority ruled that neither the Fourth Amendment nor the Fifth Amendment right to self-incrimination had been violated and that obtaining a suspect's name in the course of a stop serves important governmental interests. Justice Stevens, writing for the dissenters, argued that requiring a person to give his or her name is a direct violation of the *Miranda* ruling. Justice Stevens was joined in dissent by Justices Ginsburg, Breyer and Souter.

Sentencing Courts Cannot Enhance Punishment on Factors Not Considered by Juries

Blakely v. Washington, 124 S. Ct. 2531, 2004 WL 1402697 (June 24, 2004)

In a 5-4 ruling, the Supreme Court held that a judge cannot increase a defendant's prison sentence based upon factors which have not been considered by the jury during the defendant's trial or otherwise admitted by the defendant. The *Blakely* decision, which has long been anticipated, is a follow-up to the Court's prior decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). Recently, by a 5-4 vote, the Supreme Court held that its 2002 ruling in *Ring v. Arizona* could not be applied retroactively to defendants who had exhausted all their direct appeals (*see Schriro v. Summerlin*, 124 S. Ct. 2519 (June 24, 2004)).

In *Blakely*, the Supreme Court reversed a 90-month sentence for a Washington State defendant who under state guidelines would normally have received no more than 53 months. The judge imposed the additional time based upon his own findings that the defendant had acted with deliberate cruelty. The majority opinion, written by Justice Scalia, held that the judge's actions violated the defendant's right to a trial by jury under the Sixth Amendment, which requires that any facts essential to a sentence be proved to a jury beyond a reasonable doubt.

In rendering its decision, the majority specifically stated that the Court was not passing upon the validity of the federal sentencing guidelines. The dissenting opinion, however, strongly argued that the Court's decision would be a disastrous blow to decades of efforts to make sentences uniform. Justice O'Connor, who has traditionally been the swing vote on numerous decisions, stated in her dissent that "over 20 years of sentencing reform are all but lost and tens of thousands of criminal judgments are in jeopardy."

Despite the majority's expression that the issue of the federal sentencing guidelines was not before the Court, the logic of the opinion indicates that it could equally be applied to the federal system, where the sentencing court is given authority to deviate from the sentencing guidelines by considering other factors and in rendering either upward or downward departures. The *Blakely* decision is also being used by some defendants to attack New York's persistent felony offender statute, where the court is given discretion to impose an enhanced sentence based upon the history and character of the defendant and the nature and circumstances of his criminal conduct. Our Court of Appeals, in *People v. Rosen*, 96 N.Y.2d 329 (1991), has upheld the persistent felony offender provisions. The *Blakely* decision has reignited attacks on its constitutionality.

As a result of the *Blakely* decision, several federal courts have already refused to apply the sentencing guidelines. The U.S. Second Circuit Court of Appeals, in *United States v. Penaranda*, certified the question of whether *Blakely* applies to the federal sentencing guidelines and urged the Supreme Court to issue a speedy ruling in the matter so as to avoid a major disruption in the administration of criminal justice.

The situation is considered so serious that the Senate recently passed a resolution urging the Justices of the Supreme Court "to act expeditiously to end the inconsistency in the sentencing system triggered by *Blakely*." The Justice Department has sought to have the matter placed on the calendar as soon as the Court begins its new term, and the Court recently announced it will hear oral arguments on two cases involving the issue on October 4, 2004.

Search and Seizure

Thornton v. United States, 124 S. Ct. 2127 (May 24, 2004)

At the end of May 2004, the Supreme Court by a vote of 7-2 ruled on an important case in the area of search and seizure. In previous decisions by the Court, police officers have been permitted to conduct searches of occupants of a vehicle out of concern for the officers' safety. The issue in the new case, *Thornton v. United States*, was whether the same rule would apply if the occupant was outside of the car at the time of the initial contact with the police.

In the facts of the instant case, a man was stopped by Norfolk, Virginia, police for driving with a license tag that belonged to another car, and a gun was then found under the driver's seat. The man however, had parked his car and had left it before the search occurred. The majority opinion held that the arrest of the suspect who was next to a vehicle presents identical concerns regarding the officer's safety and the destruction of evidence as the arrest of one who is inside the vehicle. Both situations can be viewed as being "highly volatile." Under these circumstances the police actions were deemed reasonable and appropriate. Justices Stevens and Souter dissented from the majority opinion.

The Court Determines Patriot Act Due Process Rights

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (June 28, 2004); *Rasul v. Bush*, 124 S. Ct. 2686 (June 28, 2004)

In a pair of historic decisions regarding the Supreme Court's interpretation of the recently enacted Patriot Act provisions, the Court held, in 6-3 decisions, that due process rights could not be totally bypassed even in a time of war and that detainees are entitled to hearings and the assistance of counsel in determining their status as enemy combatants or persons subject to detention. The Court rejected the Bush administration's position that enemy combatants and detainees can be held indefinitely without access to federal habeas corpus review. The *Hamdi* case involved the detention of a U.S. citizen, and the *Rasul* matter involved detainees at the Guantanamo naval base in Cuba. Although the Justice Department has sought to make a clear distinction between the rights of citizens and those of foreign detainees, the Supreme Court held that even in the case of foreign nationals, there must be a minimum review by the Courts as a check upon executive power. The decision to a large extent revisited the area of separation of powers and the feeling of the Court that under our system of checks and balances, there must be a final arbiter of claims of excessive authority and that arbiter should be the federal courts.

In a related matter, *Rumsfeld v. Padilla*, 124 S. Ct. 2711, a Second Circuit case which involved the detention of a citizen, the Supreme Court sidestepped making a substantive ruling by finding that Mr. Padilla's habeas corpus petition has been wrongly filed in the Southern District of New York instead of in South Carolina, where he is being held at a Navy facility.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions, which were decided between April 30 and August 3, 2004.

People v. Caruso, (N.Y.L.J., April 30, 2004, p. 4)

The Appellate Division, Third Department, in a unanimous decision, reversed a first-degree murder conviction and remitted the matter back for a new trial where the trial judge had failed to charge lesser included counts of first- and second-degree manslaughter.

The case involved the conviction of an Army deserter for shooting his step-uncle. The Appellate panel held that there was enough evidence to indicate that the defendant may have been surprised at the sound of his step-uncle at the door and fired in his direction, killing him accidentally, rather than planning to shoot him. The jurors should therefore have been allowed to consider the lesser charges.

People v. Clark, (N.Y.L.J., May 6, 2004, p. 1)

The Appellate Division, Fourth Department, in a 3-2 decision, reduced a defendant's sentence from 15 to 7 years in a kidnapping matter on the grounds that a co-defendant and the alleged mastermind of the scheme had received only a 5-year sentence because of his cooperation with the prosecution. The three-judge majority emphasized that the defendant had no prior felony convictions, no history of violent crime, and had been offered a term of 3½ years as part of a plea disposition. The co-defendant, on the other hand, who had received a 5-year sentence, had a long history of criminal conduct. The dissenting justices argued that the sentencing judge acted within his discretion to impose the original 15-year sentence.

People v. Wilson, (N.Y.L.J., May 5, 2004, p. 1)

The Appellate Division, Second Department, in a unanimous decision, reversed a defendant's burglary conviction and ordered a new trial on the grounds that a juror had not established her impartiality and should have been excused from sitting on the panel. During voir dire, the juror acknowledged that she and her family had been victims of wrongdoing by people of color but then stated "that she should be able to overcome her racial bias to participate in a black defendant's trial." The Appellate Division found that without a specific, unequivocal assurance of her impartiality, the trial court had committed reversible error in rejecting defense counsel's request to have the juror replaced.

People v. Cotterell, (N.Y.L.J., May 28, 2004, p. 1, June 1, 2004, p. 29)

In a unanimous decision, the Appellate Division, Second Department, reversed a conviction and ordered a new trial because the trial judge had failed to provide basic instructions on some fundamental legal issues in his charge to the jury. The court had failed to provide an instruction regarding the prosecution's burden of proving guilt beyond a reasonable doubt as well as correct definitions relating to the elements of the crimes charged, and also the defense of justification. Although defense counsel had failed to preserve the arguments for appeal by proper objections, the Appellate Court exercised its "interest of justice discretion" in ordering the reversal, deeming the trial court's error to be so fundamental as to have denied the defendant a fair trial.

People v. Levandowski, (N.Y.L.J., July 16, 2004, p. 18)

In a unanimous decision, the Appellate Division, Third Department, reversed a rape conviction on the grounds of prosecutorial misconduct. The court cited a faulty grand jury presentation and a repeated failure to follow the trial court's rulings with respect to the proper questioning of witnesses. The Appellate panel also faulted the prosecutor for prejudicing the case with a number of gratuitous and misleading remarks.

People v. Rogers, (N.Y.L.J., June, 28, 2004, pp. 1 and 9)

In another ruling by the Appellate Division, Third Department, the court reversed a rape conviction based upon the improper admission of a blood test taken to indicate intoxication. The Appellate Court ruled that since the report of the blood test was generated at the request of law enforcement and for the purposes of prosecution, admission of the results was improper since the defense had no opportunity to confront those who prepared the report. The blood test had been admitted to indicate that the alleged rape victim was intoxicated and therefore incapable of consenting to the alleged sexual activity.

***People v. Martin*, (N.Y.L.J., June, 28, 2004, pp. 1 and 9)**

In another Third Department decision, the Court applied the recent Court of Appeals decision in *People v. Gonzalez*, 1 N.Y.3d 464 (2004), and found that despite the Court of Appeals' determination, the defendant's conviction for depraved indifference murder could be upheld. The Third Department concluded that the jury could reasonably have found that the defendant did not intend to cause the victim's death, but rather intended to injure him or to use the knife to impress his friends.

***People v. Woods*, (N.Y.L.J., July 13, 2004, pp. 1 and 4)**

In a unanimous decision, the Appellate Division, First Department, vacated a conviction on the basis of the recent United States Supreme Court decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), discussed herein. The Appellate Court ruled that the admission of a co-defendant's plea allocution denied the defendant's right of confrontation and cross-examination under the *Crawford* ruling and that the error could not be considered harmless. The First Department relied on its interest of justice discretion in making its ruling.

For Your Information

New York State Crime Rate Continues to Fall

The FBI recently released its crime rate statistics for the year 2003. Major crimes in New York State fell for the tenth consecutive year in a row. Overall, serious crimes in the state fell by 3.5% from last year's statistics. Crimes classified as violent felony offenses dropped by 5.6%. The number of murders in the state grew, however, by 1.9%. Property thefts in the state dropped by 3%. Since 1994, crime in the state decreased overall by 45% and violent crimes have dropped by 50%.

Nationally violent crime in the United States dropped by 3.2%. Good news for New York City residents is the fact that crime there dropped by 5.8% in 2003. On the basis of the 2003 figures of the nation's 230 cities with populations greater than 100,000, New York now ranks 211 in the crime rate, an improvement from being ranked 203 last year. Thus, contrary to general impression, New York is, in fact, one of the safest large cities in the country. The 2003 FBI statistics positively supplement the recent remarks of Chauncey Parker, New York State Director of Criminal Justice, whose statistical information on the status of New York's crime statistics was published in our Summer issue.

New Modifications in Jury Service Procedures

The legislature recently enacted a change relating to jury service. The length of time in which a juror is exempt from being recalled for service has been extended to 6 years from the current 4-year period. In addition, if a juror has sat in a trial for more than 10 days, he or she will be eligible for an 8-year break before their next appearance.

In addition to the enacted legislation, Judge Kaye, on the basis of her Commission Report, announced several other administrative changes which would affect the jury service process. A "standby system" will be implemented which will allow unoccupied jurors to leave the courthouse if they agree to a two-hour notice via cell phone or beeper. Efforts will also be increased to provide a more comfortable environment for prospective jurors. Recent changes have also raised the daily pay for jurors from $15 to $40. In addition, greater judicial oversight of the jury selection process will be enacted and attorneys who are repeatedly late in appearing for jury selection will be subject to sanctions.

Interestingly, the Commission gained from its survey of jurors several suggestions made by the jurors themselves. These suggestions for improvement included "a smile from the staff," "heat in the winter," "air conditioning in the summer," "free coffee," "clean bathrooms," and in keeping with modern technology, "requests for large screen digital televisions."

Despite Judge Kaye's express preference for either eliminating or limiting the number of peremptory challenges, her Jury Commission made no recommendations on this topic and as indicated in our prior issue, our State Bar Association and numerous attorney groups have opposed any changes in the concept of peremptory challenges.

Legislature Passes New Anti-Terrorism Act

In July, both houses of the state legislature passed a new anti-terrorism statute, which creates several new terrorism crimes and eliminates the statute of limitations with respect to terrorism acts. The bill creates a new crime of possession and use of chemical or biological weapons, which carries a life without parole sentence. The statute also increased penalties for money laundering in support of terrorism. Terrorism offenders are also required to provide DNA samples. It is expected that Governor Pataki will shortly sign the bill and that it would become effective in the fall.

New York State Bar Association Passes Resolution With Respect to Mandatory Videotaping of Interrogations

At the June meeting of the Bar Association's House of Delegates, the Criminal Justice Section and the New York County Lawyers' Association requested the endorsement of a proposal that would mandate the recording and videotaping of police interrogations in certain circumstances. The resolution proposed urges all law enforcement agencies to videotape custodial interrogations and calls for the legislature to adopt regulations requiring such a practice. The mandate would be imposed, however, only for the most serious of matters. The Section's resolution was presented to the House of Delegates by Jack Litman after lengthy consideration by the Criminal Justice Section. The Criminal Justice Section's resolution was passed by the House of Delegates

despite strong opposition from the New York State District Attorneys Association.

The movement toward required taping of custodial interrogations has been growing in recent years and a number of police departments have adopted the measure either voluntarily or through legislative or judicial orders. Illinois and the District of Columbia recently joined Alaska and Minnesota in requiring such recordings. In addition to legislative proposals which are presently pending in New York, similar proposals are also pending in Oregon, Missouri, and Connecticut. According to a recent study, law enforcement authorities are supportive of the taping process once they have gotten used to the idea.

In New York, however, prosecutors have basically opposed the proposal largely citing economic situations and concerns regarding administrative oversight. The New York State District Attorneys Association has opposed the Criminal Justice Section proposal and its current president, District Attorney Michael Arcuri of Oneida County, recently stated that prosecutors are unconvinced that taping interrogations will cut down on unlawful convictions and worry instead that it will provide a loophole to allow some guilty defendants to escape conviction.

After significant debate on the Criminal Justice Section's proposal, the House of Delegates voted to adopt the resolution. We will report on any subsequent legislation passed as a result of the Bar Association's resolution in our future issues.

Appellate Division Upholds Ban on Cameras in Courtroom

In a recent ruling, the Appellate Division, First Department, upheld as constitutional New York's law prohibiting televised trials. The court ruled that even if the law restricts speech within the meaning of the First Amendment, it is sufficiently tailored to further the state's interest in the preservation of the value and integrity of live witness testimony in state tribunals. From 1987 to 1997, the legislature had authorized an experimental program of allowing cameras in the courtroom under certain rules and regulations. In its unanimous ruling, the Appellate panel noted that it was up to the legislature to review the matter and to determine whether cameras should be introduced into the courtroom.

Death Penalty Ban for Juvenile Offenders Sought in United States Supreme Court

In its upcoming term, the United States Supreme Court will be requested to declare that it is unconstitutional to execute people for crimes they committed before turning 18. New York Attorney General Eliot Spitzer has recently filed an amicus curiae brief in support of the proposed ban, and the case pending before the Supreme Court is expected to be argued in October and to be decided sometime in November or December. The issue is being raised in a Missouri case, *Roper v. Simmons*. The *Roper* case seeks to extend the Supreme Court's ruling in 2002, barring the execution of mentally retarded persons under the Eighth Amendment. In addition to New York, several other states are seeking the proposed ban. Six states—Virginia, Alabama, Delaware, Oklahoma, Texas, and Utah—are supporting Missouri's contention that the death penalty is appropriate for some teen-age killers.

About Our Section and Members

Martin B. Adelman, a stalwart member of our Section, was recently honored at the Annual Dinner of the New York Criminal Bar Association. The dinner was held on June 2, 2004 at Tavern on the Green in Central Park in New York City. Among his many accomplishments, Martin was recently responsible for the passage of an amendment to CPLR section 2307, which now makes it clear that the requirement for serving a copy of a subpoena duces tecum on an adverse party is only applicable to civil proceedings and not to criminal matters.

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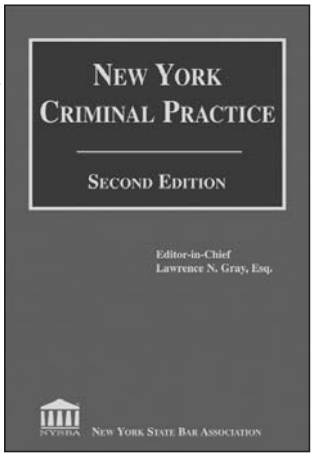

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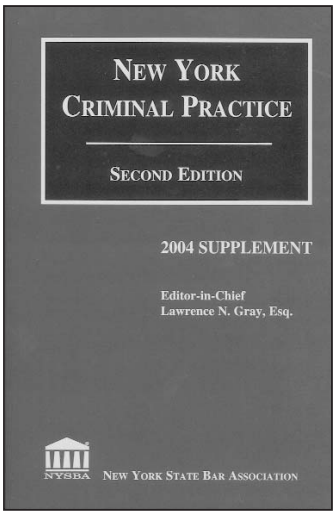

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120-12 85th Avenue
Kew Gardens, NY 11415
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Section Officers

Chair
Michael T. Kelly
1217 Delaware Avenue, Suite 1003
Buffalo, NY 14209

Vice-Chair
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New York, NY 10007

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162-21 Powells Cove Boulevard
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AIDS and the Criminal Law
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Edward J. Nowak
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Barry Kamins
16 Court Street, Suite 3301
Brooklyn, NY 11241

Hon. Leon B. Polsky
667 Madison Avenue
New York, NY 10021

Evaluate Office of the Special Prosecutor
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488 Madison Avenue, 8th Floor
New York, NY 10022

Federal Criminal Practice
William I. Aronwald
81 Main Street, Unit 450
White Plains, NY 10601

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Mark J. Mahoney
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169 Morrison Avenue
Staten Island, NY 10310

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Ithaca, NY 14851

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New York, NY 10007

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Brooklyn, NY 11201

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152 West 57th Street, 24th Floor
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Nominating Committee
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225 Broadway, Suite 1804
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NEW YORK CRIMINAL LAW NEWSLETTER

Editor
Spiros A. Tsimbinos
120-12 85th Avenue
Kew Gardens, NY 11415
(718) 849-3599

Section Officers

Chair
Michael T. Kelly
1217 Delaware Avenue, Suite 1003
Buffalo, NY 14209

Vice-Chair
Roger B. Adler
225 Broadway
New York, NY 10007

Secretary
Jean T. Walsh
162-21 Powells Cove Boulevard
Beechhurst, NY 11357

Criminal Justice Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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