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New York Criminal Law Newsletter

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NYSBA

Message from the Chair

Despite your impression of the State Legislature's agonizing pace in budget adoption and fiscal reform, one should not assume that it has been a do-nothing year. The Legislature is examining a number of criminal law-related bills / reforms that could ultimately impact the practice of every criminal lawyer.

New legislation under consideration includes adding the crimes of Strangulation in the First, Second and Third degrees, a C felony, D felony and misdemeanor respectively. The protection of children is under review, with crimes ranging from aggravated murder of a child to aggravated endangering the welfare of a child, and statutes pertaining to children under 14 are under consideration. To protect the public from unscrupulous politics, a proposed Public Corruption and Protection Act is under review. Also being considered is tightening reporting for sex offenders, expansion of crimes for which one must register and requiring level 2 offenders to be photographed annually. Bills are pending to authorize electronic service of orders of protection. Another issue being looked at is the creation of a State Commission for the Integrity of the Criminal Justice System to review wrongful convictions or adjudications and to recommend reforms to lessen the likelihood of similar wrongful convictions in the future. The proposed legislation, of course, is far broader than the brief description and you should really take the time to read it. Please also see bill A 6528 and Senate 4668 introduced by Assemblyman Lentol and Senator Schneiderman, respectively, to review them in their entirety.

The Section will be analyzing the proposed legislation and, as always, we invite your comments and suggestions. Due to the current legislative deadlock, it is unclear whether any of the proposed legislative initiatives will be acted upon in the near future. We will keep members advised of any new developments. I hope that all of our members had a pleasant and prosperous summer, and will continue to actively participate in our Fall and Winter activities. Our members are reminded that this year's Annual Meeting will be held on Thursday, January 27, 2011 at the Hilton Hotel in New York City. I hope to see many of you there. I thank you for your continued support.

James P. Subjack

Mark Your Calendars Now!

New York State Bar Association

ANNUAL MEETING

January 24-29, 2011

Hilton New York • New York, NY

Criminal Justice Section Meeting

Thursday, January 27, 2011

Message from the Editor

In this issue, we concentrate on recent developments in the United States Supreme Court. This year, as the Court ended its 2009-2010 term, it issued several important decisions in the criminal law area. Our first feature article deals with one of these issues, concerning the constitutionality of life imprisonment without parole for juvenile offenders who committed non-homicide crimes. This article is a follow-up to a discussion which appeared in our Fall 2009 issue. Our second feature article analyzes recent developments and trends in the United States Supreme Court, and discusses such matters as the growing influence of Chief Justice Roberts, Justice Sotomayor's first year in office, the chipping away at the Miranda principles, and a new kind of diversity. Summaries of the most important criminal law decisions issued by the Supreme Court in the last few months are also provided in our United States Supreme Court section.

We also provide a summary of the statistical report issued by the Clerk of the New York Court of Appeals with respect to the workload of the Court in 2009. Since the year 2009 was the first year of Judge Lippman's term as Chief Judge, the Clerk's report is unusually significant in highlighting any new procedures and trends emerging from the Court. Judge Lippman himself provides an introduction to the report, and the Clerk's report, as in the past, provides a valuable insight into our State's highest Court. This year the New York Court of Appeals decided more criminal cases than in the past, and the most significant decisions issued during the last few months are summarized in our New York Court of Appeals review.

In our "For Your Information" section, we continue to provide relevant information on various developments in the criminal law area, including the appointment of new judges and governmental officials, and the impact of the weakened economy on state and local governmental budgets. We also provide up-to-date information on the constitutionality of New York's Persistent Felony Offender Statute. Although a three-Judge panel of the Second Circuit recently declared the Statute unconstitutional, the matter has been re-argued before a full panel of the Court, and a decision is expected shortly. Since the New York Court of Appeals has upheld the Statute, any conflicting determination by the Second Circuit could result in the matter being decided by the U.S. Supreme Court. We continue to follow developments in this area. We also discuss the current controversy regarding the City of New York and 18-B attorneys regarding the City's efforts to curtail the 18-B program in favor of private contractors. In our "About Our Section" portion, we update our members on the pending activities of the Criminal Justice Section and developments affecting our members.

As usual, I encourage members to submit articles for possible publication, and invite your comments and suggestions regarding our *Newsletter*.

Spiros A. Tsimbinos

Request for Articles

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

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(718) 849-3599

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

www.nysba.org/CriminalLawNewsletter

United States Supreme Court Declares Unconstitutional Life-Without-Parole Sentences for Juvenile Offenders Who Committed Non-Homicide Crimes

By Spiros A. Tsimbinos

In our Fall 2009 issue, I discussed two Florida cases which were then pending before the United States Supreme Court, and which involved the issue of whether life imprisonment without parole imposed upon defendants who were juveniles at the time of the commission of the crimes, and who committed non-homicide crimes, constituted cruel and unusual punishment in violation of the Eighth Amendment. After discussing those cases, I analyzed the various factors which could be involved in the rendering of an eventual determination, and further attempted to predict the outcome of the cases.

I first stated that I thought that the Court would be sharply divided in rendering a decision and that the ultimate vote would either be 6-3 or 5-4. I also felt that the two key swing votes would be Justices Kennedy and Sotomayor. I further expressed the view that in reaching its decision, the Court would be greatly influenced by its prior precedent in *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court, by a 5-4 decision, held that the death penalty for juvenile offenders was unconstitutional. In counting Justice Kennedy as a possible vote for Florida, I greatly relied upon the fact that in the *Roper* decision, he specifically pointed to the possibility of life without parole as a sufficient alternative sanction to a death penalty sentence.

On May 17, 2010, more than six months after oral argument, the Court rendered its decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010). In *Graham*, the Court, with five Justices in agreement, specifically held that the cruel and unusual punishment clause of the Eighth Amendment does not permit a juvenile offender to be sentenced to life imprisonment without parole for a non-homicide crime. The opinion, written by Justice Kennedy, who also wrote the majority opinion in *Roper*, concluded that although a State is not required to guarantee eventual freedom to a juvenile offender, it must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. Justice Kennedy, in his opinion, just as he had in the *Roper* decision, relied upon evolving and current attitudes, both internationally and among the various states, regarding the imposition of life-without-parole sentences. The Court further emphasized that in dealing with youthful offenders, the personality traits of juveniles are more transitory and less fixed, and they are more susceptible to negative influences, based upon a lack of maturity and an undeveloped sense of responsibility. Under these circumstances, the majority opinion concluded that it was violative of the Eighth Amendment to bar any possibility of eventual release to youthful offenders, no matter how much they had rehabilitated themselves.

In reaching its conclusion, the majority opinion also relied upon certain statistical information which had been presented to the Court, which apparently concluded that nationwide, 129 juvenile offenders were currently serving life-without-parole sentences for non-homicide crimes. Seventy-seven of the offenders were sentences which were imposed in Florida. The balance of the offenders was distributed among 11 other states. From these statistics, Justice Kennedy concluded that in terms of absolute numbers, the sentence of life without parole for juvenile offenders was rare and not utilized by most of the states in the country, nor in any other foreign country. Resorting once again to the theme of changing standards of decency, Justice Kennedy also made reference to the fact that "additional support for the Court's conclusion lies in the fact that the sentencing practice at issue has been rejected the world over. The United States is the only nation that imposes this type of sentence. While judgments of other nations and the international community are not dispositive as to the meaning of the Eight Amendment, the Court has looked abroad to support its independent conclusion that a particular punishment is cruel and unusual."

Joining Justice Kennedy in the full scope of his opinion were Justices Stevens, Ginsburg, Breyer and Sotomayor. In my initial article, after indicating that Justices Kennedy and Sotomayor would be the swing votes on the issue, I concluded that they would possibly vote to uphold the Florida practice, and that the State of Florida would be upheld by either a 6-3 or a 5-4 vote. I was clearly wrong in making this prediction, since both of these Justices joined the traditional liberal group to declare the practice unconstitutional. Justice Kennedy was apparently persuaded by his earlier views in *Roper*, and it is interesting that he also authored the majority opinion in the case at bar.

The actual vote to nullify Graham's sentence was 6-3, since Justice Roberts, in somewhat a surprising move, concurred in the judgment, but only to the extent that he felt that under the particular facts of the instant case, the sentence imposed was unconstitutional. He reached this conclusion based upon the Defendant's juvenile status, the nature of his criminal conduct and the extraordinarily severe punishment which was imposed, since the Florida

Department of Corrections had recommended a four-year term, and the prosecutor's office had recommended a thirty-year term. Chief Judge Roberts argued that he would apply "the narrow proportionality framework principle to reach a result on a case by case basis." Justice Roberts concluded, "In short, our existing precedent already provides a sufficient framework for assessing the concerns outlined by the majority. Not every juvenile receiving a life sentence will prevail under this approach. Not every juvenile should. But all will receive the protection that the Eighth Amendment requires." Justice Roberts further criticized the sweep of the majority's decision, stating "I see no need to invent a new constitutional rule of dubious provenance, and such a course is unwise." Justice Roberts further observed, as I had pointed out in my earlier article, that Justice Kennedy's decision in *Roper* explicitly relied on the possible imposition of life without parole for some juvenile offenders.

A lengthy and sharp dissent was written by Justice Thomas, and was joined in by Justices Scalia and Alito. The dissenters, just as had been argued in *Roper*, argued that the majority's opinion had usurped a sentencing function which was traditionally left to the states and the people. The dissent pointed out that Congress, the District of Columbia, and 37 states, allow judges and juries to consider the imposition of life without parole in juvenile non-homicide cases. It was further up to those judges and juries to decide when to use the practice in question in the very worst cases that they have encountered. To have the Court impose its moral standard based upon alleged changing standards of decency violated principles of due deference to legislative authority. Justice Thomas specifically remarked, "The Court thus openly claims the power not only to approve or disapprove of democratic choices in penal policy based on evidence of how society's standards *have* evolved, but also on the basis of the Court's 'independent' perception of how those standards *should* evolve."

Based upon Justice Thomas's strong remarks, three of the Justices, in addition to joining Justice Kennedy's majority opinion, further saw fit to issue a separate, concurring opinion in which Justices Stevens, Ginsburg and Sotomayor specifically responded to Justice Thomas. After referring to Justice Thomas's rigid interpretation of the Eighth Amendment, they specifically stated, "While Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7-year old, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so."

Justice Thomas, in a clear response to this concurring opinion, further remarked in his dissenting opinion, "I agree with Justice Stevens that we learn sometimes from our mistakes. Perhaps one day the Court will learn from this one."

A further back-and-forth between the Justices was also evident by the issuance by Justice Alito of a separate dissenting opinion in which he apparently wished to respond to his usual ally, Justice Roberts, and apparently expressed some disappointment that the Chief Justice had concurred in the majority's judgment, rather than firmly joining the dissenters. Justice Alito thus stated, "The question of whether Petitioner's sentence violates the narrow, as-applied proportionality principle that applies to non-capital sentences is not properly before us in this case. Although Petitioner asserted an as-applied proportionality challenge to his sentence before the Florida Courts, he did not include an as-applied claim in his petition for certiorari or in his merits briefs before this Court. Because Petitioner abandoned his as-applied claim, I would not reach that issue."

Justice Alito's point emphasizes the fact that, in my original article, I had indicated that the State of Florida had raised certain procedural issues which it claimed precluded Supreme Court review. The Court, in fact, in the companion case of *Sullivan v. Florida*, dismissed the Writ of Certiorari which had previously been granted as being improvidently granted, and not reviewable on procedural grounds.

The Court's decision in *Graham* is another major step in the area of juvenile justice. The case continues to reflect the sharp division in the Court, but the movement, at least among the majority, appears to be against sentences of finality such as the death penalty and life without parole, which offer no possibility for rehabilitation and redemption. Whether states, now barred from imposing life without parole, will resort to long-term specific sentences, which Justice Alito pointed out are still constitutional, also remains to be seen. Just as the majority's logic in *Roper* was used to reach the result in *Graham*, the logic in *Graham* that the possibility for rehabilitation should be available to offer hope for eventual release, can also be extended from juvenile offenders to adult offenders. It appears that future cases will continue to deal with death penalty issues and sentences of life without parole, and that the Court will remain sharply divided on these issues for a long time to come.

Recent Developments in the United States Supreme Court

By Spiros A. Tsimbinos

The United States Supreme Court concluded its October 2009 term at the end of June 2010, and is commencing its new term on October 4, 2010. It is thus a good time to review developments which occurred in the past year, since an analysis of recent developments may also shed some light on what the future may bring.

The Growing Influence of Chief Justice Roberts

As Chief Judge Roberts completes his fifth year, it is becoming increasingly apparent that he has a growing influence on the Court, and that he is prepared on occasion to move to the middle, and to decide on narrow grounds, in an effort to achieve a consensus among the various members. During the past term, for the first time in many years, Justice Roberts was in the majority 92% of the time. He thus overtook Justice Kennedy, who held this position of importance for several years. This past year, Justice Kennedy came in second place, voting with the majority 90% of the time. Justice Roberts achieved this distinction by abandoning the so-called conservative coalition in a few cases, and voting with the liberal bloc. For example, he voted in favor of the defense position in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) regarding the obligation of defense counsel to advise immigrant defendants about the possibility of deportation, and voted to overturn the sentence of life without parole for a juvenile defendant in *Graham v. Florida*, 130 S. Ct. 2011 (2010), although basing his decision on narrow grounds and as applicable to the facts in the case.

Justice Kennedy as the Swing Vote

The impact of Justice Kennedy as the critical swing vote was somewhat diminished but was still potent during the last term. There were fewer 5-4 decisions, and in the criminal law area, he provided the critical fifth vote in *McDonald v. City of Chicago*, where he voted with the conservative bloc to declare that the Second Amendment also applies to state and local jurisdictions, and that under the Court's prior *Heller* decision, citizens cannot totally be denied the right to bear arms. Justice Kennedy was also a key vote in declaring life imprisonment without parole for juvenile offenders who committed non-homicide crimes to be unconstitutional. Although Chief Justice Roberts concurred in the judgment on narrow grounds, rendering a 6-3 decision, the actual vote regarding unconstitutionality was a 5-4 decision, and rested on Justice Kennedy's reliance on his prior decision in *Roper v. Simmons*, 543 U.S. 551 (2005). Justice Kennedy also provided a critical fifth vote in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), which resulted in a further chipping away of the Miranda principles.

More Consensus but Still a Very Divided Court on Major Issues

Largely due to Chief Judge Roberts' efforts, the Court did achieve a somewhat greater consensus during the last term over past years. It thus decided 56% of the cases during the past term by either a unanimous or an 8-1 vote. This was a significant increase over the 2008 term where just under 40% of the cases were decided in this manner. The sharp 5-4 split in the Court still appeared on many significant cases, as was the situation in the Campaign Finance Law matter, *Citizens United*, 130 S. Ct. 876 (2010), and the Chicago Gun Statute case, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Overall, the Court, in its most recent past term, issued a total of 84 substantive decisions.

It also appears that where in some cases the traditional groupings broke down, and some Judges sometimes moved from one side to the other, there still appears to be groupings of Justices who almost always vote together. Thus, Justice Scalia and Justice Thomas voted together approximately 92% of the time. Justices Breyer, Ginsburg and Sotomayor also were on the same side almost 90% of the time. Justice Sotomayor also appears to have been greatly influenced by Justice Stevens, who retired at the end of the term, and she alone joined Justice Stevens in dissent in a few cases where the decision was 7-2.

Justice Sotomayor's First Year on the Court

Although she was nominated by a liberal President to fill a seat vacated by a member of the liberal bloc, there were some who speculated that because Justice Sotomayor had served as a prosecutor and also had a high voting record for affirmances of criminal convictions while she was in the Federal Court of Appeals, she would turn out to be more moderate and middle-of-the-road than expected, and might not be sympathetic to defense positions in criminal cases. Based upon her voting record during the past year, any doubts by criminal defense lawyers have been completely dissipated. From a review of her decisions in 17 criminal matters, it appears clear that she is firmly imbedded in the liberal, pro-defense bloc. She voted, for example, to declare life without parole for juvenile defendants in non-homicide cases to be unconstitutional, and in favor of the defense in the mandate that defense

lawyers advise immigrant defendants of the possibility of deportation. As was indicated above, she also voted with Justices Breyer and Ginsburg almost 90% of the time, and voted with Justice Stevens in a dissenting opinion in *Michigan v. Fisher*, 130 S. Ct. 546 (2010) involving a search-and-seizure issue, which the Court upheld by a 7-2 vote.

Criminal Law

With respect to criminal decisions, the Court issued some 17 rulings of a substantive nature during its most recent past term. The Justice with the highest pro-prosecution rating was Justice Alito, who appears to now be firmly established as the most likely pro-prosecution vote on the Court. He voted in favor of the prosecution in 12 of the 17 matters, and only voted for the defense 5 times. On the other end, Justice Stevens, who just retired, was the most reliable pro-defense Justice, voting in favor of the defense in 12 out of 17 decisions. Justice Scalia and Justice Thomas still have a more favorable pro-prosecution rating, while Justices Breyer and Sotomayor favored the defense in a majority of their decisions.

One of the significant trends emerging from the Court in the area of criminal law during the last term is the apparent chipping away at the *Miranda* decision. In three cases involving the issue of confessions, the Court's majority scaled back the *Miranda* ruling and allowed law enforcement officials greater flexibility in conducting interrogations. In *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), the Court ruled that a Defendant's silence during interrogation was insufficient to invoke the right to remain silent. Further, in *Florida v. Powell*, 130 S. Ct. 1195 (2010), the Court upheld the use of statements made by a Defendant following the reading of Miranda warnings from a form which was technically defective because it did not state that a defendant had a right to have a lawyer present during questioning. Finally, in *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), the Court held that police investigators may resume questioning a suspect who invoked his Miranda rights to a lawyer after the suspect has been out of police custody for fourteen days.

The Changing Nature of the Court's Personnel: More Diversity in Some Areas and Less in Others

With the retirement of Justice Stevens and his replacement by Elena Kagan, the Court is achieving greater diversity in some areas, and is becoming less representative of the nation in others. When the Court opens its new term in October, the gender breakdown well be six males and three females, the highest number of female members in the Court's history. The Court will also have seven white Justices, one black and one Hispanic member. In terms of religion, the Court will have six Catholics and three Jewish members. For the first time in the Court's history, there will be no member of the Protestant religion on the Court, even though that religion is still the dominant religion in the country. The appointment of Justice Kagan will also include, for the first time in many years, a member of the Court who had no prior judicial experience. Historically, of the 111 people who served on the Court, 38 had no prior judicial experience.

The Court is also heavily loaded with Justices who have received their education in Ivy League Schools, especially Harvard and Yale. Most of the Court's members also come from the Northeastern section of the Country, and in fact, four have New York backgrounds. Justice Ginsburg is originally from Brooklyn, Justice Sotomayor from the Bronx, Justice Kagan grew up in Manhattan, and Justice Scalia lived for a period of time in Elmhurst, Queens. Currently, Justice Thomas is the only member of the Court who comes from the South, and there are no members who come from the Western portion of the Country. As was previously forecast, President Obama has already had the opportunity to select two new Justices of the Court, and it may very well be, since there has been some speculation regarding Justice Ginsburg's retirement, that he will be selecting a third.

Conclusion

Developments in the United States Supreme Court during the last year have been both significant and interesting. An understanding of what has occurred will make it possible to anticipate developments which may be occurring in the future. The significance of the Court in our legal system, and upon the daily lives of our citizens, is of great importance, and we should continue to follow developments in the Court.

A Summary of the 2009 Report of the Clerk of the New York Court of Appeals

By Spiros A. Tsimbinos

In late April 2010, Stuart M. Cohen, Clerk of the New York State Court of Appeals, issued the Annual Report for the year 2009. The Report covers the first year of Judge Lippman's term as Chief Judge, and provides detailed information regarding the workings of the Court during the year 2009. The Report states that in the year 2009, the Court decided 212 appeals, 146 of which involved civil cases, and 66 which involved criminal law matters. The number of cases decided was slightly less than the number in 2008, when the Court decided 225 appeals. The number of criminal law matters increased from 53 in 2008, while the number of civil cases declined from the 172 decided in 2008. The Court also decided 1,370 motions, which were 89 fewer than in 2008. It also considered 2,347 criminal leave applications, which were 340 less than in 2008. The overall volume of the Court's docket thus declined slightly in 2009 from the year 2008.

Despite the fact that in a few cases the Court exhibited sharp differences of opinion with 4-3 splits, the Court continued to have a high degree of consensus, with 161 appeals being decided without any dissenting opinions. Thus, approximately 75% of the Court's appeals were decided by unanimous vote. With respect to applications for leave to appeal, the Court granted leave in criminal cases in 81 matters, which was a significant increase from 53 in 2008 and 36 in 2007. The percentage rate for the granting of leave applications in 2009 was slightly over 3%, while in 2008, it was just about 2%. Chief Judge Lippman had specifically addressed the issue of the small percentage of cases which were granted leave in criminal matters, and it appears that the Court has made some effort to enlarge its criminal law docket. With respect to civil cases, the Court granted permission for leave to appeal in 7.2% of the matters, up from 6.8% in 2008.

The Court of Appeals continues to maintain a prompt and efficient method of handling its caseload. In 2009, the average time from argument or submission to disposition of an appeal decided in the normal course was 36 days; for all appeals, the average time from argument or submission to disposition was 29 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 7.5 months. The average period from readiness (all papers served and filed) to calendaring for oral argument was approximately three months. The average length of time from the filing of a notice of appeal or order granting leave to appeal to the release to the public of a decision in a normal-coursed appeal decided in 2009 was 275 days.

It was also reported that the total cost for the operation of the New York Court of Appeals and its ancillary agencies was slightly over $16 million in 2009. The Court's request for fiscal year 2010-2011 is $16,269,002, an increase of 1.2% over the current year's appropriation. In this year's Report, Chief Judge Lippman has provided an interesting forward, in which he expresses the view that to be a member of the New York Court of Appeals is both a challenge and a privilege of a lifetime. Following Judge Lippman's message is an introduction by the Clerk of the Court. The structure of this year's report is that it is basically divided into four sections. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes various functions of the Clerk's Office and summarizes administrative accomplishments in 2009. The third section highlights selected decisions of 2009. The fourth part consists of appendices with detailed statistics, a listing of the Court's personnel, both judicial and administrative, and other valuable information.

The Annual Report issued by the Clerk of the Court of Appeals provides a wealth of information regarding the activity of the New York Court of Appeals. It provides valuable and interesting reading and we are grateful to the Clerk and the Staff of the Court of Appeals for its annual production and with providing us with copies of the report each year.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from May 7, 2010 to September 7, 2010.

Discussion of Sex Offender Registration Requirement During Plea Colloquies

People v. Gravino

***People v. Ellsworth*, decided May 11, 2010 (N.Y.L.J., May 12, 2010, pp. 1, 17 and 50)**

In a 4-3 decision, the New York Court of Appeals ruled that a trial court was not mandated to inform a Defendant, during a plea colloquy, that he faced mandatory registration as a sex offender as a result of his plea. The Court held that this information constituted collateral consequences of conviction which a trial court is not obligated to discuss at a plea hearing. Judge Read, who wrote the majority opinion, stated that a trial court's neglect to mention the Sex Offender Registration Act, or to identify potential stipulations of probation during the plea colloquy, does not undermine the knowing, voluntarily and intelligent nature of a defendant's guilty plea. Judge Read was joined in the majority by Judges Graffeo, Smith and Pigott.

Judge Ciparick issued a vigorous dissent, arguing that the consequences of being listed on the Sex Offender Registry are quite significant. Judge Ciparick pointed to the recent United States Supreme Court decision in *Padilla v. Kentucky*, where the Court held that the possibility of deportation was so onerous that a defense attorney had an obligation to inform a Defendant regarding its possibility as a consequence of a guilty plea. Judge Ciparick was joined in dissent by Chief Judge Lippman and Judge Jones. Due to the sharp split in the Court, and the importance of the issue raised, it is possible that this matter may eventually see its way into the Federal Courts, and possibly the United States Supreme Court.

Resentencing of Defendant

***People v. Backus*, decided May 11, 2010 (N.Y.L.J., May 12, 2010, p. 52)**

In a unanimous decision, the New York Court of Appeals held that a County Court Judge was required to re-sentence a Defendant, and did not have the authority to vacate the conviction as an alternative disposition. In the case at bar, the Defendant's sentence had been vacated and the matter remitted to the County Court. The County Court instead entertained a motion to vacate the plea and set aside the conviction. The New York Court of Appeals found that in the case at bar, the County Court is required to re-sentence the Defendant and lacked the authority to vacate the conviction or the plea.

Constitutionality of Merger of Bronx Criminal Parts

People v. Correa

People v. Fernandez

***People v. Mack*, all decided June 3, 2010 (N.Y.L.J., June 4, 2010, pp. 1, 2 and 43)**

In a single opinion which covered the above-entitled cases, the New York Court of Appeals, in a 6-0 decision, upheld the authority of the Office of Court Administration to establish a merged criminal court in the Bronx with Supreme Court Justices presiding over misdemeanor cases as well as felonies, and an integrated domestic violence court in Brooklyn. The issue had arisen when the Appellate Division, First Department, in *Correa*, ruled that the handling of both felonies and misdemeanors in the merged Bronx Supreme Court Criminal Division was beyond the power of court administrators to decree.

The unanimous Panel in the Court of Appeals, however, determined that neither the State's Constitution, nor its Statutes, called into question the legality of the Courts which were established and held that they represented the kinds of action envisioned when the Legislature created a unified court system in 1962. The Court of Appeals' decision removes a serious cloud which had been placed over the legality of as many as 150,000 misdemeanor convictions. The decision of the New York Court of Appeals was widely expected, since it had granted a quick review of the cases in question and any contrary ruling could have created a serious crisis in the judicial system.

Concurrent Subject Matter Jurisdiction

***People v. Wilson*, decided June 3, 2010 (N.Y.L.J., June 4, 2010, p. 43)**

In a unanimous decision, the New York Court of Appeals held that after a non-jury trial, the Defendant was properly convicted of a misdemeanor charge and rejected the claim that since the case was tried in the Supreme Court, that Court lacked subject matter jurisdiction to adjudicate the matter because it was prosecuted on a misdemeanor information and not an indictment. The Defendant also challenged the sufficiency of the accusatory instrument. Referring to its decision in *People v. Correa*, the Court of Appeals held that the Supreme Court had the power to hear the case, and any transfer error was not jurisdictional in nature and was waived if not timely raised. In the instant matter, the Defendant did not object in the trial court to the transfer of her case to Supreme Court, and thus this appellate claim would not be considered by the Court of Appeals. In addition, the Court found that the accusatory instrument was sufficient, and that the Defendant's claim on this issue was without merit.

Corroboration of Accomplice Testimony

***People v. Reone*, decided June 17, 2010 (N.Y.L.J., June 18, 2010, p. 39)**

In a 6-1 decision, the Court of Appeals held that an accomplice's testimony was sufficiently corroborated, pursuant to CPL § 60.22(1), to establish the Defendant's conviction of participating in a rape with three other men. At the trial, the only witnesses for the prosecution were the victim, who was not able to identify any of the four men, and one of the accomplices, who testified that he participated in the crime with the Defendant and two others. In reaching its conclusion, the Court of Appeals stated that the victim and the accomplice gave detailed and very similar accounts of what occurred, and that although the issue was a close one, it concluded that the corroborative evidence tending to connect the Defendant with the commission of the offense was sufficient to support the conviction. Judge Jones issued a vigorous dissent, arguing that there was no independent corroborative evidence, as was required by the Statute and prior case law.

Insufficiency of Evidence

***People v. Valencia*, decided June 17, 2010 (N.Y.L.J., June 18, 2010, p. 40)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction for depraved indifference assault. The Court held that there was insufficient evidence to support such a conviction, since the trial evidence established only that the Defendant was intoxicated, and did not establish that he acted with the culpable mental state of depraved indifference. The incident involved a motor vehicle incident where the Defendant was driving at night at a high rate of speed and with a blood alcohol level of three times the legal limit. The action of the New York Court of Appeals resulted in the reduction of the Defendant's conviction to a class B felony of second degree assault, and the imposition of a five-year determinate prison sentence.

Post-Release Supervision

People v. Williams

***People v. Hassell*, decided June 17, 2010 (N.Y.L.J., June 18, 2010, p. 40)**

***People v. Jordan*, decided June 24, 2010 (N.Y.L.J., June 25, 2010, p. 37)**

In three separate cases, the New York Court of Appeals held that a sentencing court could not add a term of post-release supervision to a Defendant's sentence after the Defendant had been released from prison. The Court stated that the double jeopardy clause of the Federal Constitution precludes a Court from adding post-release supervision to a Defendant's sentence once the Defendant has already been released from imprisonment. The Court cited its most recent decision in *People v. Williams*, 14 N.Y.3d 198 (2010). The effects of the post-release supervision fiasco saga continue to plague the criminal justice system.

Commitment of Sex Offenders

People & c. ex rel. Joseph II v. Superintendent of Southport Correctional Facility

***State of New York v. Humberto G.*, decided June 15, 2010 (N.Y.L.J., June 16, 2010, pp. 1, 2 and 39)**

In two cases, the New York Court of Appeals determined that whether or not inmates are being held illegally in state prisons is irrelevant to the State's authority to commit them to secure mental hospitals as dangerous sexual offenders. In a 4-3 ruling, the majority held that the Civil Commitment Statute, Article 10 of the Mental Hygiene Law, applies to dangerous inmates who are detained sex offenders even if they are being held illegally. In the cases at bar, the inmates had been returned to prison on violations of terms of post-release supervision which were improperly added by the Department of Corrections. However, the majority in the Court of Appeals held that the State could proceed with involuntary commitment proceedings despite acknowledging that the two men were improperly in prison pursuant to prior decisions issued by the Court of Appeals. The majority opinion was written by Judge Smith, and was joined in by Judges Graffeo, Read and Pigott. Judge Ciparick issued a dissenting opinion, which was joined in by Chief Judge Lippman and Judge Jones. Judge Ciparick specifically asserted that a prisoner must be lawfully in custody in order to qualify as a detained sex offender as the term is defined in the Mental Hygiene Law.

Jurisdiction of Original Court Following Transfer of Case to Another County for Enforcement of Probation Conditions

***People v. Mitchell*, decided June 15, 2010 (N.Y.L.J., June 16, 2010, p. 40)**

In a unanimous decision, the New York Court of Appeals held that a receiving court is empowered to enforce the original terms and conditions of probation once the case is transferred from one county to the other. However, the original sentencing court still retains jurisdiction with respect to the filing of a 440 motion. In the case at bar, the Defendant had pleaded guilty in Essex County, and had been sentenced to weekends and a term of probation. His case was subsequently transferred to Franklin County, where the Defendant resided. The Defendant subsequently brought a 440 motion in Essex County, but that Court concluded that only the County Court of Franklin could exercise jurisdiction over the Defendant's claim. The Court of Appeals determined, however, that since the Defendant was seeking to overturn his Essex County conviction, that Court retained jurisdiction with respect to a 440 motion, and that the transfer provisions, pursuant to CPL § 410.80, were basically meant to deal with the authority of the receiving court to enforce conditions of probation.

Gravity Knife

***People v. Dreyden*, decided June 15, 2010 (N.Y.L.J., June 16, 2010, p. 40)**

In a 6-1 decision, the New York Court of Appeals held that a Defendant's accusatory instrument was jurisdictionally defective because it included no non-conclusatory allegations establishing the basis of the arresting officer's belief that the Defendant's knife was a gravity knife as defined in the Statute. The Court observed that not every knife is a weapon for purposes of applying the Penal Law Statute, and that a conclusatory statement alone is not sufficient to meet the reasonable cause requirement of the Statute. In the case at bar, the Court also held that even though the Defendant pled guilty, the lack of a sufficient accusatory instrument was a non-waivable jurisdictional requisite, and as such, the issue could be determined by the New York Court of Appeals. Judge Smith issued a dissenting opinion, and argued that the issue should not be treated as a jurisdictional defect which could not be waived by the Defendant's guilty plea.

Search and Seizure

People v. Saddiq Abdur-Rashid

***People v. Devone*, decided June 8, 2010, (N.Y.L.J., June 9, 2010, pp. 1, 12 and 39)**

In determining two cases, the New York Court of Appeals, in a 4-3 split, held that the use of police dogs without a warrant to sniff for concealed drugs in a motor vehicle was valid, as long as the officers making a traffic stop had a founded suspicion that a crime was afoot. In a majority opinion written by Judge Pigott, the Court balanced the degree of intrusion from a canine sniff of the car exterior, and its usefulness to law enforcement, and determined that the founded suspicion standard was more appropriate than a more rigid standard of reasonable suspicion. The Court noted that there is a diminished expectation of privacy attributed to individuals and their property when traveling in a car. Under these circumstances, Judge Pigott observed that "law enforcement need only meet a lesser standard before conducting a canine sniff of the exterior of a lawfully stopped vehicle." Joining Judge Pigott in the majority were Judges Graffeo, Read and Smith. Judge Ciparick issued a dissenting opinion, stating that the reasonable suspicion standard was the appropriate one to use. Judge Ciparick was joined in dissent by Chief Judge Lippman and Judge Jones.

Notice Pursuant to CPL § 250.10

***People v. Diaz*, decided June 8, 2010 (N.Y.L.J., June 9, 2010, p. 39)**

In a unanimous decision, the New York Court of Appeals determined that a defendant seeking to raise an extreme emotional disturbance defense is required to provide notice pursuant to CPL § 250.10, if the intent is to rely solely on lay testimony to prove the affirmative defense. Since the Defendant was not seeking to introduce expert testimony, he had argued that he was not required to provide notice. This issue had apparently been left open in *People v. Smith*, 1 N.Y.3d 610 (2004). The Court in the instant matter directly addressed the issue and determined that notice is required even if the Defendant relies solely on lay testimony. The Court concluded that the Statutory Notice Provision is grounded on principles of fairness, and that the People should be made aware of the Defendant's proffered defense so that they may have an opportunity to obtain evidence from experts or otherwise to refute the defense in question.

Predicate Felony

***People v. Ballman*, decided June 10, 2010 (N.Y.L.J., June 11, 2010, p. 36)**

In a unanimous decision, the New York Court of Appeals held that the Vehicle and Traffic Law § 1192(8) does not allow an out-of-state conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a charge of driving while intoxicated from a misdemeanor to a felony. The Court noted that the dispute centered on the meaning of the term convictions in the 2006 amendment. After reviewing the legislative history of the language of the Statue, the Court concluded that the most reasonable interpretation of the Statute and its enabling language is that out-of- state convictions from prior to November 1, 2006 cannot be used to elevate a DWI offense to a felony.

Right to Counsel

***People v. McLean*, decided June 10, 2010 (N.Y.L.J., June 11, 2010, pp. 1, 7 and 37)**

In a 4-3 decision, the New York Court of Appeals determined that a Defendant facing a murder conviction cannot raise on direct appeal a right to counsel claim. The four-judge majority held that an adequate record must be present for it to consider on direct appeal an otherwise unpreserved right to counsel claim under the State Constitution. In a majority opinion written by Judge Smith, the Court stated that simple fairness and respect for orderly procedure required it to take a hard line on the issue. For the issue to be considered on direct appeal, the trial court record must reflect in clear terms and irrefutably that a right to counsel violation has occurred. Joining Judge Smith in the majority opinion were Judges Graffeo, Read and Pigott. Judge Jones issued a dissent which was joined in by Chief Judge Lippman and Judge Ciparick.

Retrial

***People v. Frederick*, decided June 10, 2010 (N.Y.L.J., June 11, 2010, p. 38)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and determined that a retrial had properly gone forward, based upon a felony murder count in the original indictment, and that the only reason that the original indictment had been dismissed was that it had been superseded. Under these

circumstances, the action of the Trial Judge was deemed to be within his authority and discretion.

Murder Conviction

***People v. Johnson*, decided June 10, 2010 (N.Y.L.J., June 11, 2010, p. 38)**

In a unanimous decision, the Court upheld a Defendant's conviction for depraved indifference murder. The Court determined that the Appellate Division employed the proper legal standard when it rejected the Defendant's argument that the verdict convicting him of depraved indifference murder was against the weight of the evidence. The Appellate Division was not required to evaluate the elements of depraved indifference murder. The Defendant raised no objection to the Court's charge as given, and failed to request any specific judicial interpretation of the elements to be presented to the jury. Under these circumstances, the Appellate Division properly refused to consider such information when it weighed the evidence in light of the elements of the crime as charged to the jury.

Enforcement of Conditions of Plea

***People v. Murray*, decided June 24, 2010 (N.Y.L.J., June 25, 2010, p. 37)**

In a unanimous decision, the New York Court of Appeals held that a trial court had acted within its discretion to impose a more severe sentence, pursuant to the conditions of a plea agreement, when the Defendant had failed to abide by the terms of the agreement, which would have entitled him to a more lenient sentence. In the case at bar, a Defendant was told that he would be treated as a youthful offender and sentenced to a term of nine months, if, prior to sentence, he remained in school and received a favorable probation report. The Defendant did not appear on the sentencing date, and when he appeared months later, pursuant to a bench warrant, the Court imposed a sentence of two years and three years post-release supervision after being treated as an adult. The Defendant argued that the Court should not have been able to impose the sentence in question without a more detailed inquiry regarding the Defendant's non-appearance, and had also imposed a period of post-release supervision which went beyond the original discussions. The New York Court of Appeals held that, based upon the record before it, the Defendant had clearly violated the conditions of the original plea agreement where he could have received a more lenient sentence, and the Sentencing Court was within its discretion to impose the sentence in question. It also found that the Defendant's claim regarding the term of post-release supervision was not preserved, and therefore should not be considered by the Court.

Trial Court's Response to Jury Note

***People v. Simmons*, decided June 24, 2010 (N.Y.L.J., June 25, 2010, p. 37)**

In a unanimous decision, the Court upheld the Defendant's conviction and determined that a trial court's response to a jury note, although perhaps inartfully worded, did not deprive the Defendant of a fair trial. The jury note had inquired about the element of intent. The Court thereafter provided some supplemental instructions, which went outside of the standard jury instruction, and were somewhat inartfully phrased. The Court of Appeals determined, however, that when viewing the problematic language in the broader context of the supplemental instruction, and the jury charge as a whole, the court conveyed to the jury the proper legal standards and repeatedly advised the jury that it was the exclusive arbiter of the facts.

Identification

***People v. Perkins*, decided June 29, 2010 (N.Y.L.J., June 30, 2010, pp. 1, 6 and 43)**

In a unanimous decision, the New York Court of Appeals held that a victim's identification of the photograph of a Brooklyn shooting suspect was properly admitted at trial because the Defendant had physically refused to sit for a lineup at which the victim would have faced him on the same day. The Court held that a Defendant should not be allowed to take advantage of his own wrongdoing and that he effectively waived his right against the use of the photographic identification because of his own actions. The decision was written by Judge Read.

Search and Seizure

***People v. King*, decided June 29, 2010 (N.Y.L.J., June 30, 2010, p. 45)**

In a 4-3 decision, the New York Court of Appeals concluded that police officers had no cause to initially stop the Defendant, and that therefore a suppression motion should have been granted. The majority opinion was joined in by Chief Judge Lippman and Judges Ciparick, Pigott and Jones. Judge Smith dissented, finding that the officers had done nothing illegal or unreasonable in stopping the Defendants, and that therefore suppression should have not been granted. Judge Smith was joined in dissent by Judges Graffeo and Read.

Defendant's Right to Be Present

***People v. Williams*, decided June 29, 2010 (N.Y.L.J., June 30, 2010, p. 45)**

In a unanimous decision, the New York Court of Appeals concluded that a Defendant had waived his right to be present at sidebar conferences with potential jurors to explore issues of possible bias. In the case at bar, the record established that at a pretrial suppression hearing, defense counsel stated that he had informed the Defendant of his Antommarchi rights. The Defendant was also present in the Courtroom when the conferences in question were held, and made no effort to object or request to participate. Under these circumstances, the Court of Appeals concluded that the Defendant understood his rights and waived them.

Recent United States Supreme Court Decisions Dealing With Criminal Law

The United States Supreme Court issued several important decisions during the last several months in the area of Criminal Law. These cases are summarized below.

Renico v. Lett, 130 S. Ct. 1855 (May 3, 2010)

In a 6-3 decision, the United States Supreme Court held that the Michigan Supreme Court determination that double jeopardy did not bar a retrial would not warrant federal habeas corpus relief. In a decision written by Chief Judge Roberts, the Court held that the Michigan Supreme Court determination was not unreasonable, and that the failure to apply a Sixth Circuit precedent could not serve as an independent basis for granting habeas relief. Justice Roberts was joined in the majority by Justices Alito, Scalia, Thomas, Ginsburg and Kennedy. Justice Stevens issued a dissent in which Justices Sotomayor and Breyer joined.

Graham v. Florida, 130 S. Ct. 2011 (May 17, 2010)

In a 5-4 decision, the United States Supreme Court held that sentences of life imprisonment without parole for juvenile offenders who have committed non-homicide crimes was unconstitutional, as being violative of the Eighth Amendment's prohibition against cruel and unusual punishment. The majority opinion was written by Justice Kennedy, and was joined by Justices Stevens, Breyer, Ginsburg and Sotomayor. Justice Kennedy's opinion found that due to the nature of juvenile offenders, the States could not foreclose any possibility of release if the offender could eventually demonstrate rehabilitation and reform. The majority concluded that only a small number of States within the nation utilized the sentence in question, and that changing standards of decency should be considered in interpreting what constitutes cruel and unusual punishment.

Chief Justice Roberts concurred in the Judgment rendered by the majority, but restricted his opinion to the specific facts of the case, and he argued against the issuance of a blanket rule which would cover all juvenile offenders. Justices Thomas, Scalia and Alito dissented, basically arguing that the majority had improperly usurped legislative authority and the right of the states to determine sentencing policy.

United States v. Comstock, 130 S. Ct. 1949 (May 17, 2010)

In a 7-2 decision, the Supreme Court held that federal officials can indefinitely hold inmates considered sexually dangerous after their prison terms are complete. Justice Breyer, writing for the majority, stated that the Child Protection and Safety Act, which was enacted in 2006, is a necessary and proper means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, and to provide appropriately for those imprisoned. Justices Thomas and Scalia dissented, arguing that there was nothing in the Constitution that delegated to Congress the power to enact a civil commitment Statute.

Berghuis v. Thompkins, 130 S. Ct. 2250 (June 1, 2010)

In a 5-4 decision, the United States Supreme Court continued its recent trend of nibbling away at the *Miranda* decision. The five-Judge majority held that criminal defendants must affirmatively invoke their right to remain silent, and that the police can continue to question until the Defendant affirmatively states that he or she is invoking his right. In the case at bar, the Defendant was read his rights and indicated he understood them, but then remained silent during nearly three hours of questioning. Subsequently, an officer asked him if he hoped God would forgive him for shooting the victim. The Defendant, with tears in his eyes, then responded yes. The statement was thereafter introduced at trial, resulting in the Defendant's conviction. The majority opinion, which was written by Justice Kennedy, held that just as with the right to counsel, a suspect must invoke the right to remain silent expressly. A suspect who has received and understood the Miranda warnings and has not invoked his Miranda rights waives the right to remain silent by making an uncoerced statement to the police. Justice Kennedy, who, as in so many cases in the past, rendered the critical fifth vote, was joined in his opinion by Justices Alito, Thomas, Scalia, and Chief Judge Roberts.

Justice Sotomayor issued a dissenting opinion, arguing that the Court's decision represented a substantial retreat from the protection against compelled self-incrimination which was embodied in the 1966 *Miranda* ruling. Justice Sotomayor further pointed out that in the past, the burden of establishing that the Defendant had waived his or her right to remain silent rested upon the prosecution, and that the instant decision appears to have now altered that burden. Justice Sotomayor was joined by Justices Stevens, Ginsburg and Breyer.

Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (June 14, 2010)

In a unanimous decision, the United States Supreme Court blocked the federal government from automatically deporting legal immigrants for minor drug possession charges. The Court held that only serious or violent crimes justify removing otherwise law-abiding people from the Country. In the case at bar, the Defendant had been in the United States since the age of four, and his parents had become lawful permanent residents. He had been convicted of possessing a single tablet of an anti-anxiety drug, and

a single marijuana cigarette. Since this was his second conviction, the conviction was treated as an "aggravated felony" pursuant to a 1996 federal law. Prosecutors therefore moved for an immediate deportation. Justice Stevens, writing for a unanimous Court, rejected the prosecutor's position, and stated, "We do not usually think of a ten-day sentence for the unauthorized possession of a trivial amount of a prescription drug as an aggravated felony." The thrust of the Court's decision was that in these types of matters, automatic deportation should not be the result, but rather immigration judges should have the discretion to allow people to remain in the country.

Holland v. Florida, 130 S. Ct. 2549 (June 14, 2010)

In a 7-2 decision, a death row inmate in Florida was given a second chance to argue that an otherwise strict one-year filing deadline should not apply to him in light of his lawyer's inaccessibility and incompetence. The Defendant had been appointed an attorney by the State of Florida to handle a habeas corpus challenge to his murder conviction and death sentence. The Defendant claimed that he had not seen or spoken to his lawyer in over 14 months, and felt that he had been abandoned. In letters to the attorney, he also specifically raised the issue of the tight filing deadline in the Federal Courts for filing a habeas corpus petition. Subsequently, the Defendant discovered that the attorney had never filed the papers in time to seek review in the Federal Court. The Defendant argued that the attorney's conduct was sufficient to suspend the deadline, limiting death penalty litigation. The majority, in its opinion, referred the matter back to the Circuit Court of Appeals, and indicated that it had used too narrow a standard in saying that a lawyer's negligence was never enough to extend the deadline in question. The majority opinion was written by Justice Breyer, and was joined in by Chief Judge Roberts and Justices Stevens, Kennedy, Ginsburg and Sotomayor. Justice Alito voted with the majority, but issued his own concurring opinion. Justices Scalia and Thomas dissented, stating that although they sympathized with the Defendant's position, the statutory deadline was mandatory, and that they were powerless under the Constitution to re-write the law.

Skilling v. United States, 130 S. Ct. 2896 (June 24, 2010)

Black v. United States, 130 S. Ct. 2963 (June 24, 2010)

Weyhrauch v. United States, 130 S. Ct. 2896 (June 24, 2010)

In a 6-3 decision, the United States Supreme Court sharply curtailed the prosecution's use of an anti-fraud Statute that had been central in convicting several political officials and corporate executives with respect to provisions of the law dealing with "honest services." The Court held that prosecutors may continue to seek such convictions only in cases where they put forward evidence that defendants accepted bribes or kickbacks. The Court's majority opinion, which was written by Justice Ginsburg, referred the matters back to the trial courts for determination, in keeping with the majority opinion. Although weakening the federal Statute, the majority opinion refused to declare the law unconstitutional. Three Justices—Kennedy, Scalia and Thomas—issued dissenting opinions, stating that the entire Statute was unconstitutional.

Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (June 21, 2010)

In a 6-3 decision, the United States Supreme Court upheld a federal law that forbids providing training and advice to terrorist organizations, even about entirely peaceful and legal activities. The Court found that the law did not violate the free speech rights of individuals, and that Congress and the Executive Branch had legitimate reasons for barring material support to foreign organizations deemed to be terrorists, pursuant to the provision of the Patriot Act. Chief Justice Roberts issued the majority opinion, which was joined in by Justices Alito, Scalia, Thomas, Kennedy and Ginsburg. Justice Breyer issued a dissenting opinion in which Justices Stevens and Sotomayor joined.

Barber v. Thomas, 130 S. Ct. 2499 (June 7, 2010)

In a 6-3 decision, the United States Supreme Court gave its approval to a formula utilized by the U.S. Bureau of Prisons with respect to calculating good time credit. The Court endorsed the method of calculating good time credit based on the length of time actually served, and not the length of the time imposed by the sentencing judge. The Court's decision in effect results in federal prisoners having to serve more time. Justice Breyer issued the majority opinion. Justices Kennedy, Stevens and Ginsburg dissented.

McDonald v. City of Chicago, 130 S. Ct. 3020 (June 28, 2010)

In a 5-4 decision, the United States Supreme Court held that the Second Amendment, which allows citizens to bear arms, also applies to the states and local jurisdictions. In 2008, the Court had issued its landmark ruling in *Heller v. District of Columbia*, which determined that citizens had a constitutional right under the Second Amendment to possess weapons. Since the ruling in *Heller* applied to a federal jurisdiction, the question had arisen as to whether the Second Amendment was also applicable to the states, pursuant to the due process clause. The five-Judge majority in *McDonald* made clear that the fundamental right to bear arms also includes state and local jurisdictions. Justice Alito issued the majority ruling and was joined by Chief Justice Roberts and Justices Scalia, Thomas and Kennedy. In issuing the majority opinion, Justice Alito indicated, as was also indicated in *Heller*, that reasonable restraints on the use of handguns, such as involving felons or persons with mental problems, could pass constitutional muster, but that an arbitrary and total restriction violates constitutional principles. Dissenting opinions were issued by Justices Stevens, Breyer, Ginsburg and Sotomayor.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from May 2, 2010 to September 7, 2010.

People v. Thomas (N.Y.L.J., May 10, 2010, p. 38)

In a unanimous decision, the Appellate Division, Third Department, upheld the determination of a trial court Judge who refused to allow a Defendant to represent himself. In the case at bar, the Defendant had claimed at various times that he was the king of the United States, that he was Almighty God, and had engaged in numerous other ramblings. He stated that he was displeased with his attorneys and wished to represent himself. The Appellate Division found that at the time the Defendant made his application to proceed pro se, the record failed to establish that he did so intelligently. Further, if the Defendant had been allowed to proceed in his own defense, it appeared likely that a fair and orderly trial would not have been feasible. Under the circumstances, the County Court did not commit error in refusing to permit the Defendant to proceed pro se.

People v. DiGuglielmo (N.Y.L.J., May 28, 2010, p. 1, and June 1, 2010, p. 42)

In a unanimous decision, the Appellate Division, Second Department, ruled that a murder conviction of an off-duty New York City police officer for killing a man in a dispute over a parking space must be re-instated. In 2008, the Westchester County Court had vacated the 1997 conviction of the Defendant, finding that a key witness had been pressured by detectives into altering his initial statement which had supported the Defendant's justification defense. The Appellate Division found, however, that the witness's changed statement and the prosecution's failure to reveal exculpatory information about a series of custodial interviews in which the witness revised it to favor the prosecution, was of no legal consequence, because there was no reasonable probability that the jury would have come to a different conclusion based on the evidence taken as a whole.

People v. Acevedo

People v. Collado (N.Y.L.J., May 27, 2010, pp. 1, 6 and 25 and 42)

In a pair of decisions, the Appellate Division, First Department, by a 4-1 vote, held that a recent ruling by the New York Court of Appeals regarding the imposition of post-release supervision could have an effect on whether sentences based upon second felony offender status were properly imposed. In the case involving the Defendant Acevedo, he had been sentenced as a second felony offender, based upon a re-imposed sentence of post-release supervision. The majority pointed to the State's Second Felony Offender Law, which required that the predicate sentence must have been imposed before commission of the present felony. The majority further rejected the prosecution's argument that the re-sentencing required by *People v. Sparber*, 10 N.Y.3d 457 (2008), was only a procedural error. The panel stated instead that the Court of Appeals had made clear that the pronouncement of post-release supervision is an important component of a sentence, and has a substantial effect on a Defendant's sentencing. The matters were thus remanded to the trial courts to reconsider the sentences imposed. Justice Tom wrote the majority opinions and was joined by Justices Renwick, Freedman and Roman. Justice Nardelli dissented, stating, "I am at a loss to understand why the Court's oversight on a ministerial detail precludes a finding that he is a predicate felon after he committed another felony." It is unclear at the present time how many cases may be affected by the Appellate Division ruling, and whether any further appeal will be taken to the New York Court of Appeals. These cases are just another in the continuing saga of the post-release supervision fiasco.

People v. Foster (N.Y.L.J., May 12, 2010, pp. 1, 2 and 53)

The Appellate Division, Fourth Department, vacated a second degree murder conviction, and ordered a new trial, after finding that the trial court had committed reversible error in admitting statements made by the Defendant to a jailhouse informant. The Appellate Panel found that the Defendant had invoked his right to counsel when he told police officers at a correctional facility that he would not speak without an attorney present. The police subsequently used another prisoner, who was placed in the Defendant's cell, as an informant to obtain information from the Defendant. It was then claimed by the informant prisoner that the Defendant had admitted he had strangled the victim and wrapped the body in a carpet, and later discarded the body in a wooded area. The Appellate Division concluded that the Defendant's right to counsel had attached, and that the prisoner informant was acting as an agent of the police. Under these circumstances, the statements in question were inadmissible, and a new trial was required.

People v. White (N.Y.L.J., May 24, 2010, pp. 1, 3 and 17)

In a unanimous decision, the Appellate Division, Second Department, upheld the conviction for manslaughter and gun possession of a Long Island black man who shot a white teenager in a confrontation in front of the man's home. In the case at bar, the 17-year-old victim and four other teens had arrived at the Defendant's home, and had challenged his son to a fight. The Defendant had subsequently utilized an unlicensed gun and fired at the group. The Appellate Division upheld the jury's rejection of the Defendant's claim that the shooting was justified because he believed he was defending his family from a lynch mob. The panel found that the jury's rejection of the justification defense was not against the weight of the evidence. They noted that the Defendant testified that he had not observed any weapons in the hands of the teens, and that the teens had shouted that they were looking to fight the Defendant's son. The Panel further noted that the Defendant made no effort to call 911 for police assistance, and instead appeared to have overreacted to the situation at hand. The Defendant had been sentenced to 2 to 4 years, and the Appellate Division affirmed both the conviction and the sentence imposed.

People v. Holland (N.Y.L.J., June 11, 2010, pp. 1 and 7, and June 14, 2010, page 18)

In a 3-2 decision, the Appellate Division, First Department, concluded that police had properly stopped and questioned a Defendant, and his reaction provided an independent basis for a search that turned up drugs. The majority concluded that any illegal conduct in continuing questioning of the Defendant was attenuated by his calculated and aggressive conduct in punching one of the officers. The two dissenting Judges argued, however, that the Defendant's pushing of the officers was a proportionate response to an unlawful detention. Due to the sharp division in the Court, it appears likely that this case will reach the New York Court of Appeals.

People v. Battease (N.Y.L.J., June 22, 2010, p. 25)

In a unanimous decision, the Appellate Division, Third Department, modified a Defendant's conviction by reversing the convictions for rape in the third degree, and the commission of a criminal sex act in the third degree. The Court concluded that these charges were not supported by legally sufficient evidence. The Defendant had claimed there was a consensual relationship with the victim, and the Court found that the evidence failed to establish that the victim was incapable of consent. The Defendant also charged that he was improperly sentenced as a persistent felony offender, in light of the recent Second Circuit Court of Appeals ruling which declared the New York Statute unconstitutional. The Third Department, however, held that since the New York Court of Appeals had upheld the Statute and there was an apparent current conflict on the issue, the Court was bound to follow the New York Court of Appeals ruling. The Court upheld the conviction as to other lesser charges in the indictment and the matter was remitted to the County Court for resentencing.

State v. Henderson (N.Y.L.J., June 23, 2010, p. 39)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's murder conviction and ordered a new trial on the grounds that the trial Judge did not properly inquire about a sworn juror's ability to render an impartial ruling. In the case at bar, the juror had informed the Judge that about 3 or 4 years earlier, he had been in the house where the victim was fatally stabbed. The juror, however, stated he could remain impartial. The Judge dismissed the juror over the Defendant's objections, and the Appellate Division found that the trial Judge had failed to conduct a more probing inquiry regarding the juror's state of mind, the assurances of impartiality, and the influence that his prior visit might have had. Since the trial court had failed to apply the correct principles, a new trial was required.

People v. Sanchez (N.Y.L.J., June 18, 2010, pp. 1, 4 and 41)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction for depraved indifference murder. The Defendant had argued that his trial counsel had provided ineffective assistance of counsel because the attorney had not raised issues regarding depraved indifference, which were enunciated by the New York Court of Appeals in recent years. The Appellate Division found that the Defendant was relying on a legal standard that was not established until 2006, and that therefore his attorney was not in a position to raise these matters at a trial which occurred in 2004. The claim of ineffective assistance of counsel was therefore not warranted.

People v. Fernandez (N.Y.L.J., June 4, 2010, pp. 25 and 45)

In a 4-1 decision, the Appellate Division, Third Department, reversed and dismissed a count of the indictment charging the Defendant with sexual abuse in the second degree. The Court found that this was an inconclusory, concurrent count with sexual abuse in the first degree. In addition, the Court found that the Defendant was improperly precluded from presenting testimony of two family members regarding the Complainant's reputation in the family for untruthfulness. Thus, in addition to the dismissal of the one count, a new trial was also required and the matter was remitted to the County Court.

People v. Fortunato (N.Y.L.J., July 16, 2010, p. 37, and July 19, 2010, p. 1)

In a unanimous decision, the Appellate Division, Second Department, upheld manslaughter as a hate crime conviction of a 21-year-old bisexual male who lured a gay man to his death in 2006. The Defendant had coaxed the victim to an area in Sheepshead Bay, where the Defendant's friends attempted to rob the victim. The victim fled, and was struck and killed by a car on Bell Parkway. The Defendant had argued that the crime should not have been charged as a hate crime which resulted in sentence of 7 to 21 years. The Appellate Division ruled, however, that when viewing the evidence in the light most favorable to the prosecution, there was legally sufficient evidence to establish the Defendant's guilt of the crime in question beyond a reasonable doubt.

People v. Lagas (N.Y.L.J., July 21, 2010, pp. 25 and 29)

In a unanimous decision, the Appellate Division, Third Department, affirmed a Defendant's conviction and the sentence imposed thereon. The Defendant had pleaded guilty to burglary and related charges, and had executed a detailed plea agreement which recommended a concurrent prison term of ten years plus five years post-release supervision The agreement, however, acknowledged the County Court's freedom to deviate from the recommended sentence. The sentence which was actually imposed was made to run consecutively to a prior undischarged prison term, and the Defendant argued that this situation rendered his guilty plea involuntary. The Appellate Division found, however, that since the Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, his claim was unpreserved and could not be considered by the Appellate Court. The Appellate Division relied upon a Court of Appeals determination in *People ex rel Gill v. Greene*, 12 N.Y.3d 1 (2009), which interpreted the provisions of Penal Law Section 70.25 (2-a).

For Your Information

The Race for New York State Attorney General

Following Attorney General Cuomo's decision to run for the office of Governor, several candidates emerged to fill the position of Attorney General. Candidates who entered the Democratic primary which was held on September 14, 2010, were Kathleen A. Rice, the current District Attorney of Nassau County; Richard L. Brodsky, a longtime Assemblyman from Westchester County; Eric T. Schneiderman, a State Senator from Manhattan and the current Chair of the Senate Codes Committee; Attorney Sean Coffey, and former Insurance Superintendent Eric Dinallo. Kathleen Rice was viewed as the frontrunner for the Democratic nomination, since she had a big lead in fundraising and poll numbers. Ms. Rice was re-elected as District Attorney of Nassau County last year, and was serving her second term. She is a graduate of the Touro Law Center, and she previously served as an Assistant U.S. Attorney for the Eastern District of Pennsylvania. She also was an Assistant District Attorney in the Kings County Office from 1992 to 1999. As a result of the September primary, Eric Schneiderman was designated as the official Democratic candidate, narrowly defeating Rice.

The candidate on the Republican line is Daniel M. Donovan, Jr., the current District Attorney from Staten Island. Mr. Donovan received the Republican nomination without any opposition. He is serving his second term as Staten Island District Attorney, and recently served as the President of the New York State District Attorney's Association. Both candidates have extensive experience in government, and have made the issue of public safety and weeding out corruption in government as major parts of their platforms. Both candidates are highly regarded, and it appears that this may be the closest of the statewide races. We will report on the winner in our Winter issue.

New York Court of Appeals Determines Legality of Bronx Court Merger

On May 5, 2010, the New York Court of Appeals heard arguments in several cases which involved the legality of court mergers in the Bronx, and the creation of specialized parts in other sections of the State. In the case of *People v. Correa*, the Appellate Division, First Department, had ruled that the Office of Court Administration lacked legal authority to have merged the Bronx Supreme Court with the Bronx Criminal Court. In the case of *People v. Fernandez*, the Second Department had upheld the establishment of domestic violence courts. The Court of Appeals considered these cases, and in late June issued its decision on the matters. The Court found in a 6-0 decision that the Office of Court Administration under the Constitution and relevant Statutes had the authority to order the merger in question and to establish specialized trial parts. The Court relied upon legislative action which had created the Unified Court System. The Court of Appeals decision alleviates any serious problem which could have affected the legality of hundreds of thousands of criminal cases. Further details regarding the decision are included in our Court of Appeals section.

Legislature Moves to Increase Court Filing Fees

In early June the Governor and legislative officials raised the issue that due to the serious state budget crisis, it might be necessary to increase court filing fees. The New York State Bar Association has expressed opposition to this proposal. The Governor's initial plan is to hike filing fees in the Supreme Court from $165 to $215, and in the City and District Courts to $60 from $45. The Governor has also suggested raising the filing fees of motions in the Supreme Court, including the Appellate Divisions, from $45 to $120. The Governor stated that the proposed increases would raise about $25 million, which could be used to subsidize legal services for indigent litigants. We will report on any final action regarding this matter in our next issue.

Local Jail Population Dropping

The U.S. Bureau of Justice statistics recently announced that for the first time since 1982, the nation's local jail population is declining. The number of inmates in County and City Jails was placed at 767,600 as of the end of June 2009. This was a reduction of nearly 18,000 inmates from a year earlier. The decline in the local jail population is attributed to a general decline in crime rates throughout the country. Violent crime fell by 5.5% last year and property crime was down by 4.9%. The decline in local jail population also appears to be well spread out across the nation, and not concentrated in one particular section. The report found population declines at about 114 of the 171 jail jurisdictions which hold over 1,000 or more inmates on an average day. The recent reports on declining jail populations are good news, but with the economic downturn and some indications of significant renewed drug trafficking, it is hoped that the crime rates do not once again begin to escalate in future years.

Hybrid Judges

The Office of Court Administration recently announced a new initiative in an effort to expedite backlogs of criminal cases within the City of New York. Six Judges who have been sitting full-time in Criminal Court were promoted to acting Supreme Court Judges and they will continue some of their lower court duties as well as handling Supreme Court matters. The new approach is aimed to give court administrators flexibility to help courts bursting with cases—misdemeanors in Criminal Court and felonies in the Criminal Term of the Supreme Court. Each of the boroughs of Manhattan, Brooklyn and Queens will receive two of the new hybrid Judges, who will be serving as acting Supreme Court Justices with a salary of $136,700. In announcing the new program, the Office of Court Administration also listed the number of pending criminal cases in the City of New York as of April 25, 2010, as follows:

Felonies

Manhattan	3,963
Bronx	4,757
Brooklyn	3,159
Queens	1,727
Staten Island	117
Total	13,718

Misdemeanors

Manhattan	16,743
Bronx	N / A
Brooklyn	15,559
Queens	10,087
Staten Island	3,208
Total	45,597

President Obama Nominates Susan L. Carney to Second Circuit Court of Appeals

In late May, President Obama announced that he was nominating Susan L. Carney, who presently is House Counsel to Yale University, to serve on the U.S. Court of Appeals for the Second Circuit. Ms. Carney has been with Yale University since 1998. She previously served with a private law firm in Washington, D.C., and also served for a period of time as Associate Counsel General for the Peace Corps. She is a graduate of Harvard Law School. Ms. Carney is President Obama's fifth appointment to the Second Circuit. Her nomination, as well as those of Raymond Lohier and Robert Chatigny, now requires Senate confirmation, which is expected in the coming months.

New York Listed Among Highest Property Tax States

A recent survey conducted by the American Community Survey Corporation, and reported on in the *AARP Bulletin* of June 2010, reported that New York State is among one of the five highest property tax states. New York was listed as fourth with respect to the median real estate taxes paid. The five highest taxed States appear all to be concentrated in the Northeast, while the five lowest are all in the South. The actual listing which appeared in the survey is indicated below:

Highest and lowest five States in median real estate taxes paid:

Highest		Lowest	
N.J.	$6,320	Ark.	$534
Conn.	4,603	Miss.	464
N.H.	4,501	W.Va	457
N.Y.	3,622	Ala.	383
R.I.	3,534	La.	188

Provisions of Sentencing Reform Act of 1995 Extended to September 1, 2011

As part of a budget bill which was passed last summer, the State Legislature acted to extend provisions of the Sentencing Reform Act of 1995, which were set to expire on September 1, 2009. The extension was granted to September 1, 2011. Legislative action was required, since the original provisions of the Sentencing Reform Act had a Sunset clause and were set to expire in 2005. The Legislature, in that year, provided for an extension until September 1, 2009, and now has further granted an extension to September 1, 2011. The most recent extension affects various provisions of the Penal Law, the Criminal Procedure Law and the Corrections Law. The Sentencing Reform Act and subsequent additional legislation created the categories of violent felony offenders, second felony offenders and persistent felony offenders, and dramatically increased the length of sentences, while limiting judicial discretion. The fact that this year the Legislature provided only a brief extension of the provisions in question indicates that at least some consideration may be given to an overall review of the original legislation which is now almost 15 years old. We will keep our readers advised of any future developments.

New York City 18-B Attorneys Commence Lawsuit

In early June, five County Bar groups filed a lawsuit against the City of New York, *New York County Lawyers Association et al. v. Michael R. Bloomberg*, to stop the City from moving forward with plans to give most of the indigent criminal defense work now done by private lawyers

under the 18-B program to institutional providers. The City, several months ago, moved to solicit proposals from institutional providers to take over a large portion of the cases which have, for many years, been traditionally handled by 18-B attorneys under a plan which was adopted in 1965, and which involved the County Bar Associations. The lawsuit alleges that the City's actions violate provisions of County Law Section 722(3), which only permits the use of private attorneys for indigent defense as part of a Bar Association-created plan. The five bar groups have commenced an Article 78 proceeding on behalf of the more than 1,000 18-B lawyers who have been handling approximately 45,000 cases for indigent defendants per year. The five Bar Associations include the New York County Lawyers Association, and the Bronx, Queens, Brooklyn and Staten Island Bar Associations.

In late June, the Bar Associations also added additional legal claims and filed a federal lawsuit, arguing that the City's plan would violate the rights of indigent Defendants to due process, equal protection and access to counsel, as well as the Doctrine of Separation of Powers. This case is designated *NCLA v. Bloomberg*, and has been assigned to Judge Deborah A. Batts in the Southern District of New York. These lawsuits will have a direct effect on many criminal lawyers, and the operation of the Criminal Justice System. The City has responded to the litigation by accusing the Bar Associations of attempting to protect the pecuniary interests of their members. We will keep our readers fully advised of developments.

New York State Bar Association Submits Criminal Law Proposals for Legislative Action

In early June, the New York State Bar Association announced its support for several legislative bills which are pending in Albany, and which involve criminal law issues. The Association announced its specific support of six proposed bills as follows:

- A5213 / 7877, to require an electronic record of the entire custodial interrogation of a suspect.
- A11123 / 7867, to provide a mechanism for a person who has pleaded guilty to seek to vacate his or her plea when new DNA evidence is discovered post-conviction.
- S7893, to speed up the provision of exculpatory Brady materials to defendants.
- A11089 / S7873, to require that an informant's testimony be corroborated by other witnesses before it can be admitted at trial and that prosecutors disclose at trial any benefits informants are getting for their testimony.
- A11150 / S7868, to set in Court of Claims actions compensation of $75,000 for each year an innocent defendant spent imprisoned.
- A11052 / W7842, to change eyewitness identification procedures by, in part, requiring authorities who conduct police lineups or photo arrays not know the identify of the suspect before the eyewitness.

The Bar Association's proposals were issued in conjunction with the recommendations of its Task Force on Wrongful Convictions, and Bar Association officials stated that the adoption of the recommended proposals would assist in reducing wrongful convictions, and should be carefully considered by legislative leaders. Since the Legislature has been basically deadlocked for several months and crippled by budgetary problems, it appears highly unlikely that any of the Bar Association's recommendations have a good chance of passage in the coming session. In addition to the State Bar proposals, several other pieces of legislation involving the Criminal Justice System are also awaiting consideration by the State Legislature. These include a measure supported by Governor Paterson to create an independent board to oversee issues involving juveniles accused of crimes. Another bill calls for the expansion of DNA testing, and several other bills seek to provide an increase in the number of judgeships. The possibility of any significant criminal law legislation being enacted this year is slight, due to the political deadlock in Albany, and the fact that the Legislature's attention appears more focused on the economic crisis facing the State. We will report, however, on any enacted legislation which affects criminal law matters in our next issue.

U.S. Colleges See Rise in Enrollments

A recent study by the Pew Research Center indicates that the nation's colleges are attracting record numbers of new students. Freshman enrollment in 2008 had risen six percent to a record 2.6 million. The increase is attributed to the weak economic situation resulting in a weak job market, which has led to many young adults choosing to attend college rather than to immediately enter the workforce. In addition, the study reveals that there has been a huge increase in the number of young adults from minority groups entering college. It is estimated that almost three-quarters of the 6% increase in 2008 was attributed to minority members, with the largest share coming from the Hispanic group. The Hispanic community is now leading the enrollment increase, with most of the Hispanic members attending large public universities or community colleges.

Federal Trial Judges Question Sentencing Mandates

A recent survey conducted by the U.S. Sentencing Commission among federal trial judges reveals that many of them have serious concerns about the present federal sentencing structure. The survey, which covered 639 of 942 District Judges, found that 62% of the Judges felt that mandatory minimums were too high. 76% felt that sen-

tences for crack cocaine were too high. 71% reported that terms of imprisonment for child pornography were too strict, and 54% indicated that they felt sentences for marijuana convictions should be lowered. Even though the United States Supreme Court decision in *Booker*, 543 U.S. 220 (2005), gave federal judges some greater discretion in imposing sentence, it appears that many of the federal judges still feel that additional changes are required, and that the current system of federal sentencing may be too restrictive and too severe. In addition to conducting the survey, the Commission has also been holding public hearings on sentencing practices, providing some indication that it may be considering new recommendations in the future.

Paterson Bill Would Restrict Confinement of Juveniles

In the waning hours of the legislative session, Governor Paterson introduced a bill which would curb the discretion of Family Court Judges to place seven-to-fifteen-year-old lawbreakers with the Office of Children and Family Services. The bill is aimed at limiting confinement to the State's youth prisons to only the most dangerous juvenile delinquents. Some critics have argued that many of the juveniles now in state youth institutions have committed only minor crimes and do not belong in facilities where they are often mistreated and do not receive the proper services. Due to the deep divisions and deadlock in the State Legislature, it is unclear what, if any, criminal law legislation will be passed, and Governor Paterson's declining political clout makes it uncertain whether the legislation in question will be approved. We will keep our readers advised of developments.

OCA's Bid to Supervise Juvenile Probation Fails to Achieve Legislative Approval

The proposal made by Chief Judge Lippman and the Office of Court Administration to oversee juvenile probation failed to receive legislative approval at this year's session. The bill had aimed to shift oversight of juvenile probation to the Judiciary from the Executive Branch. The legislative deadlock and the budget crisis, however, combined to shift attention away from the Chief Judge's initiative, and the matter was set aside at least for the coming year. Chief Judge Lippman indicated that the proposal had received serious attention and broad support, and that he hoped some progress would be made in the effort at future legislative sessions.

Federal Courts Issue Caseload Statistics

The Administrative Office for the United States Courts recently issued caseload statistics for the various District Courts and Courts of Appeals for the period October 1, 2008 to September 30, 2009. The report indicated that filings in the Second Circuit Court of Appeals amounted to 5,747, a drop of nearly 1,200 from the prior year. With respect to filings in the various District Courts within New York State, filings for all four District Courts amounted to 25,500, an increase of just under 700 from the prior year. The Southern District of New York registered 13,705 filings, almost exactly the same as last year. Filings in the Eastern District were 6,816, up from 6,547 in 2008. The Northern District had filings of 2,119, up from 1,957 in 2008, and the Western District of New York had filings of 2,860, up from 2,636 in 2008.

Despite the heavy filings in the federal courts, the report indicated that many of the Courts had been able to reduce their backlogs, and had improved the time required to process cases. The Second Circuit Court of Appeals, for example, which at the end of 2005 had a backlog of almost 10,000 cases, finished 2009 with only 5,000 pending cases. The case processing time in all four District Courts in the State was also reduced. It was also reported that a significant portion of the caseload in the District Courts is the increasing number of federal felonies which are being filed.

New State Office Established to Study Indigent Legal Defense

After years of discussion, a bill recently signed by Governor Paterson included a section establishing a statewide office of indigent legal services. The new office would study and make recommendations for improvements in the current indigent defense system. The legislation creates a nine-member Board, chaired by Chief Judge Lippman. Our State Bar Association has been active in seeking a standardized statewide office to supervise indigent defense services, and President Stephen P. Younger called the new office a good first step in the achievement of the ultimate goal.

Settlement Reached with Federal Justice Department Regarding New York Youth Prisons

It was announced in early July that four state-run Juvenile Detention Centers which had been the subject of a federal investigation by the Justice Department will receive federal oversight and new restrictions on the physical restraint of juveniles. The agreement was reached between the Governor's Office and the Department of Justice, and involves a retraining of staff and the hiring of additional personnel. The four Juvenile Detention Centers are located in various parts of upstate New York, but most of the juveniles sent to the facilities come from New York City. Recent complaints regarding the operation of those facilities have led to the call for reforms and resulted in the settlement recently reached.

Constitutionality of New York's Persistent Felony Offender Statute Receives Re-Argument in Second Circuit

After a recent three-Judge ruling by the Second Circuit Court of Appeals, which declared New York's Persistent Felony Offender Statute unconstitutional, created a direct conflict with an opposing determination by the New York Court of Appeals, the Second Circuit granted re-argument en banc. A full panel of the Second Circuit heard re-argument on July 11, 2010, with the Judges appearing largely split. The initial Second Circuit ruling was based upon U.S. Supreme Court cases which determined that any factor which increases a Defendant's sentence must be determined beyond a reasonable doubt by a jury. The New York Statute, which allows a judge to impose a greater sentence if the Court is of the opinion that the history and character of the defendant warrants it, was held to be violative of the Supreme Court cases. The fact that the Court can only impose such a sentence if the defendant had committed two prior felonies led the Court of Appeals in *People v. Rivera*, 5 N.Y. 3d 61 (2005), *People v. Rosen*, 96 N.Y. 2d 329 (2005), and *People v. Quinones*, 12 N.Y. 3d 116 (2009), to conclude that the *Apprendi* rulings did not apply, and that the Statute was constitutional.

The ruling by the full panel of the Second Circuit is expected within the coming months, and it appears that, based upon its decision, an ultimate resolution may have to be determined by the United States Supreme Court. According to Correction Department statistics, New York had approximately 2,500 inmates who were serving prison sentences as persistent felony offenders as of March 31, 2010. We will keep our readers advised of developments.

Special Narcotics Prosecutor Issues Report on Effects of Recent Drug Law Modifications

Bridget Brennan, the City's Special Narcotics Prosecutor, recently reported that the rollback effect of the State's strict Rockefeller drug laws which occurred last year is having a shocking side effect. Fewer city addicts are seeking treatment and rehabilitation. It was reported that rehabilitation admissions in cases handled by her office are down 10% from last year and 40% from 2008. New admissions are declining at state-run rehabilitation centers in the City, despite a surge in the number of low-level drug offenders who could seek treatment instead of jail. State records reveal that 7,768 arrested addicts went to state out-patient treatment in the six months after the law took effect, a 2% drop from the same period a year earlier. According to the report, many defendants are making a simple choice. They're rather take a relatively short jail stint than spend the time and energy needed to kick their addiction by entering a rehabilitation program.

Seniors Overtake Teenagers in Workforce

According to a recent study conducted by Bloomberg News, and based upon Labor Department Statistics, senior citizens, for the first time on record, outnumber teenagers in the labor force. The report concluded that there were 6.6 million people over 65 who were working or looking for work during the first six months of 2010. This compared to 5.9 million teenagers between the age of 16 to 19 who were working or looking for work. According to the study, in 1948, when statistical records in this area were first kept, there were 4.4 million teens in the labor force compared with 2.9 million people older than 65.

The dramatic shift is attributed to the recent hard economic times and to the fact that many older citizens have been forced to return to part-time or full-time work as a means of supplementing their incomes. Persons over 65 in the last few years have seen their stock portfolios plunge, the value of their homes sharply drop, and interest on savings accounts greatly diminished. They have thus turned to returning to work or delaying retirement. Many of today's senior citizens are apparently taking jobs in areas that were traditionally viewed as places of employment for teenagers. The study reports that in the area of food preparation and serving, a strong teenage job sector, the number of teenagers employed from 2000 to 2009 fell by 242,000 jobs, while the number of older workers working in this sector increased by 128,000.

New Legislation Modifies Crack-Cocaine Sentencing

In March, 2010, the United States Senate passed new legislation which narrows the sentencing disparities between crack and powder cocaine convictions. At the end of July, the House of Representatives approved a similar bill, and in late August, President Obama signed the new legislation. The new modifications raised, from five grams to 28 grams, the amount of crack-cocaine which must be possessed in order to trigger a five-year mandatory minimum sentence. Previously, only possession of five grams of crack-cocaine was required to trigger the mandatory sentence. The prior legislation had been attacked on the basis that someone convicted of crack possession received the same mandatory sentence as someone convicted of possessing 100 times the amount of powder cocaine. Civil rights groups had attacked the prior legislation as leading to the conviction of more black defendants. A 2009 report indicated, for example, that approximately 80% of the crack-cocaine defendants who were serving time in federal prison were black, while only 8.8% were white. The reduced sentences for crack cocaine convictions were also recently supported by a majority of Federal District Court Judges who were polled as part of a Sentencing Commission study. The new legislation modifying the sentences in question becomes effective immediately.

About Our Section and Members

Annual Meeting

The date for the Section's Annual Meeting has been set for Thursday, January 27, 2011. The meeting will be3 held at the Hilton Hotel in New York City, located at 1335 Avenue of the Americas (6th Avenue). This year, the CLE Program will be held in the morning, beginning at 9:00 a.m. This is a change from prior years, when the CLE Program was held in the afternoon, following the luncheon. The details regarding the CLE Program, as well as the luncheon and awards ceremonies, will be provided to the members under separate cover. We hope that we will have a large turnout of our members at our Annual Meeting, and we encourage an active participation to make this year's programs even more successful than last year.

Section Input into Sentencing Commission Recommendations

Last year, the Sentencing Commission, which was originally established by former Governor Spitzer, and continued by Governor Paterson, issued a detailed report, outlining several recommendations for improving the sentencing structure established in New York's Penal Law. Several members of our Criminal Justice Section served on various subcommittees of the Commission, and the Section provided substantial input while the Commission was performing its task. Our 2008 CLE Program, during our Annual Meeting, was specifically focused on a consideration of the Commission's recommendations. Unfortunately, only one of the areas, involving reform of the Rockefeller Drug Laws, was dealt with by the Governor and Legislature, and many other worthy recommendations were apparently cast aside. One of the most important recommendations of the Commission was the simplification of the sentencing statutes. Hopefully, with a new Governor and Attorney General taking office, and the legislative deadlock coming to an end, attention can once again be focused upon needed changes in the sentencing area, and our Section and its members should re-assert themselves in order to play a major role in any forthcoming changes.

The Criminal Justice Section Welcomes New Members

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

Vache Edward Bahadurian
Renee L. Behrens
Joshua Phillip Benfey
Zachary Michael Beriloff
Henderson Orlando Brathwaite
Valerie A. Bruce
Tracey A. Brunecz
Cindy Chavkin
Lora Erin Como
Bruce Robert Connolly
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Joseph William Cummings
Samantha E. Fahy
Christina J. Falcone
John P. Fazzio
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Glen Stewart Hammond
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Thomas Samuel Kajubi
Christopher Raymond Kelly
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Adam Neal Lepzelter
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Jessica Lauren Naclerio
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NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

I wish to become a member of the committee(s) checked below:

Name:_____

Daytime phone: _____Fax: _____

E-mail: _____

Select up to three and rank them by placing the appropriate number by each.

____ Appellate Practice
____ Awards
____ Capital Crimes
____ Comparative Law
____ Continuing Legal Education
____ Correctional System
____ Defense
____ Drug Law and Policy
____ Ethics and Professional Responsibility
____ Evidence
____ Judiciary
____ Juvenile and Family Justice
____ Legal Representation of Indigents in the Criminal Process
____ Legislation
____ Membership
____ Nominating
____ Prosecution
____ Sentencing and Sentencing Alternatives
____ Traffic Safety
____ Transition from Prison to Community
____ Victims' Rights

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For ease of publication, articles should be submitted on a 3½" floppy disk or CD preferably in WordPerfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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