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New York Criminal Law Newsletter

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Inside

NYSBA

Message from the Chair

The agenda for the June 1, 2007 meeting of the Executive Committee of the Criminal Justice Section ("CJS") was ripe with hot topics to be discussed in anticipation of the House of Delegates meeting that took place on June 20th, 2007, and the final State legislative session before the summer break. The first topic on the agenda was a presentation by members of NYSBA's Special Committee to Ensure Quality of Indigent Defense regarding the Committee's Report and Recommendations on a report drafted by Judge Kaye's Commission on the Future of Indigent Defense. After a thorough discussion on the topic, the Executive Committee voted in favor of the Special Committee's Report, which included certain revisions formulated by members of the Executive Committee and adopted by the Special Committee. Thereafter, on June 30, 2007, the House of Delegates overwhelmingly voted in favor of the Special Committee's Report and Recommendations of the Kaye Commission Report.

The second topic on the Executive Committee agenda was a discussion of two competing legislative bills proposing several amendments to the criminal procedure law, the judiciary law and the executive law in relation to: 1) the creation of a statewide criminal exoneration office that would be run by the New York State Department of Criminal Justice Services and 2) an independent statewide "Commission for the Integrity of the Criminal Justice System." (See S.5848, A.3687, A.4317, A.8046, A.8047 and A.8084.) The proposed bills included provisions for the handling and maintenance of DNA samples and the use of the DNA database and the implementation of electronic recording of interrogations. After a lengthy debate on the proposed bills, the Executive Committee voted on a resolution in support of the creation of an independent "Innocence Commission" and opposition to any legislation that would unduly limit a defendant's right to appeal a conviction. In response to a request by the NYSBA leadership, the Executive Committee has formed a sub-committee to study these competing bills and to report its findings to the CJS Executive Committee and the NYSBA Executive Committee in late September 2007.

The last large item on the agenda included the Executive Committee's review of NYSBA's recent support of a legislative bill sponsored by Governor Spitzer on "Cameras in the Courtroom" (See DeFrancisco/Weprin Bill: S.2067/A.3950). In general, the bill provides for cameras in the courtroom without requiring the consent of the parties to the criminal proceeding. Our Section is largely opposed to cameras in the courtroom, believing that this type of publicity is damaging to the legal process and the rights of the victim and the defendant. In 2001, NYSBA took the position that cameras should be allowed in the courtroom, but conditioned its approval of such media coverage on a series of preconditions and protections outlined in its report to the House of Delegates (March 31, 2001). At the June 1 meeting, our Section unanimously voted in favor of a resolution requesting the NYSBA leadership to reconsider its support of the DeFrancisco/Weprin bill as it appeared substantially inconsistent with NYSBA's formal position. As a result of the resolution, NYSBA leadership requested our Executive Committee to form a sub-committee to compare NYSBA's original position with the DeFranciso/Weprin bill and report its findings to the NYSBA Executive Committee in late September 2007.

Last but not least, Malvina Nathanson, a longtime member of the CJS Executive Committee, was elected Treasurer of our Section. Congratulations Malvina!

I hope that all of our Section members have enjoyed their summer and will participate in our Fall and Winter programs. With warmest regards,

Jean Walsh

Message from the Editor

We are pleased to present an issue jam-packed with both practical and informative information for the benefit of practicing criminal attorneys. Our first feature article, dealing with important tips on how to present an effective summation, is written by two outstanding criminal law practitioners. Herald Price Fahringer has become a legend in the criminal law field, having tried cases in 27 states and having argued more than 400 appeals, including 15 in the United States Supreme Court. His partner, Erica Dubno, has received several awards for appellate advocacy and has co-authored numerous articles with Herald Fahringer.

As a follow-up to an article in our last issue, an interesting analysis is also presented on the voting record of each of the justices in the United States Supreme Court with respect to criminal law cases. My last article on Judge Alito has prompted some inquiries from members as to the track record of other justices, so I have provided an up to date statistical scorecard covering decisions which came down through the end of June, to wit the close of the 2006-2007 term.

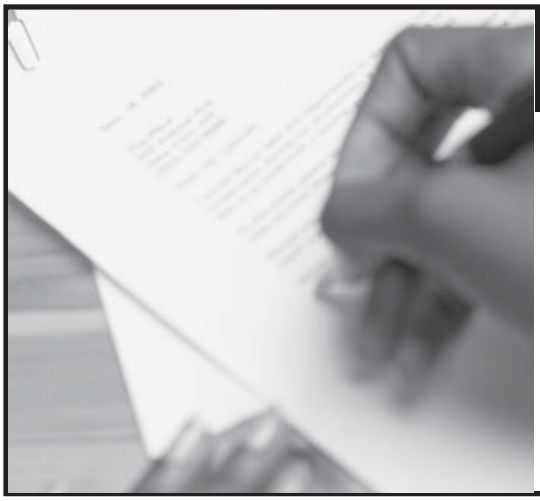
Significantly, many of the criminal law decisions which have come down from the United States Supreme Court in the last several months have involved sharp 5-4 splits with two discernable blocks on either side and Justice Kennedy supplying the critical swing vote. This sharp split is evidenced in several of the rulings discussed in our Supreme Court section and is further analyzed in my Supreme Court article.

As always, we have also provided important summaries of recent Court of Appeals cases and have highlighted some interesting decisions from the various Appellate divisions. In keeping with our aim to provide our readers with information on the latest developments in the criminal justice system, we also cover the recent appointment of Jonathan Lippman as the new Presiding Justice of the Appellate Division, First Department, and have reported on the passage of recent legislation regarding criminal law issues.

A new sentencing commission has been established by Governor Spitzer to make recommendations regarding changes in our sentencing laws. We report on the makeup and mission of this Commission and also include a proposal from leading criminal law practitioner Paul Shechtman advocating a simplified sentencing structure.

We also continue to advise our readers of the various programs and activities presented by our Criminal Justice Section and the new initiatives instituted by our new Section officers. We thank you for your continued support of our publication and hope you enjoy this issue.

Spiros Tsimbinos



Request for Articles

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

Spiros A. Tsimbinos
857 Cambridge Court
Dunedin, FL 34698
(718) 849-3599

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

Final Argument in a Criminal Case

By Herald P. Fahringer and Erica T. Dubno

The Importance of Summation in Trial Work

A major premise of our profession is that the presence of a skillful and devoted attorney will have some influence on the outcome of a controversy. This influence is exerted through our powers of persuasion. In a trial, we begin persuading during jury selection and that effort continues through to the summation. It is at that final critical moment, when we stand and face the jury, that all our skills and powers are brought to bear on the case.

It has been said that summation is to trial work what an infantry assault is to warfare. It is when both sides meet at full strength, and victory or defeat often hang in the balance. The analogy is apt because summation is the last chance for counsel to exploit the gains made during the trial, as well as to explain away any losses suffered. For that reason, many believe that it is *the* most important part of a trial.

Building a Good Summation Begins When the Client First Walks into Your Office

The creation of a summation actually begins at the very first meeting with the client, when you learn of his marriage; his five children; an excellent work record and, perhaps, even a distinguished military record, as well as any other outstanding accomplishments. The planning starts right then and there, concerning how to exploit this positive proof and, ultimately, mount it in your final argument to the jury.

Consider designating a folder in your trial file, entitled "Summation," where an inventory of facts, notes, ideas, phrases and random thoughts can be stored. In addition, the "opening" and "closing" of the summation can be prepared in advance of trial. Also, based upon what you already know about the case, you should be able to outline arguments devoted to any defenses, such as identification, self-defense, the credibility of a cooperating witness or any other subjects that can be anticipated in advance of trial.

Then, as the trial gets underway, a good practice is to review your trial notes at each day's end and to record an abbreviated list—*on a single page*, if possible—of the most important facts, both good and bad. As the trial progresses, continue these daily reports and add any other facts and ideas that might be suitable for your summation.

In this way, by the end of the trial, a running account will exist of the testimony and exhibits that can be quickly mobilized and integrated with the other arguments previously prepared. Ideally, if this strategy is successfully followed, the night before you deliver your summation, all there is left to do is organize and embellish the materials that are assembled and ready to go.

The Imperative of Accuracy

No effort should be spared in making certain that your facts are *accurate*. The key component of persuasion is credibility. If the jury doesn't believe you, all the colorful language, metaphors and demonstrative devices in the world will not help. Credibility is established by a ruthless attention to detail. Particularities are the primary force behind the truth. Thus, conscientious attention to *every* relevant fact will give your argument authenticity and inspire confidence in the jury.[1]

Imagination Applied to a Summation

Try to be imaginative in planning your summation. Don't be afraid to take chances. Think of ways to dramatize your arguments in order to sear them into the jurors' minds so that they are more memorable. We must remember that language is still the most powerful of all human forces. And, no other profession uses words in such a meaningful way. Because our speech is acted upon, the way we speak takes on added importance.

It is good language that lifts a summation from a mere collection of facts to that which is stirring and persuasive. Nourish your arguments with strong words, not long words. Emotionally charged words that ignite your argument with a sense of urgency are preferable over those that are more passive or anemic.

For instance, a piece of evidence may be a "*decisive* disclosure"; a cooperating witness's oath could be described as a "*profanity*"; or you may stress that there is not a "*shred*" of evidence that supports the prosecution's claim. One can also depict the "terrible" history of the case; a witness's "defiant" demeanor; the "broken shards" of memory; a cooperating witness who "defected" to the prosecution; or the "heavy quiet" that followed in the wake of the prosecution witness's faulty identification of the defendant.

Locating a good word for a particular argument often requires the help of a competent thesaurus and use of an authoritative dictionary.[2] In short, verbal prowess is a product of just plain hard work, not a trick of grammar. Alexander Dumas, the famous French author, said, "If the public only knew how hard we worked at our masterpieces, they wouldn't think them masterful at all." On a much lesser scale, the same is true of a great summation.

Opening the Summation—When the Lights Dim

In the theater, it is generally acknowledged that the most electric moment is when the lights dim and the curtain slowly rises. At that instant, the audience's expectations are at their highest. A similar moment occurs when you rise to deliver your final argument. Don't squander that precious opportunity. Strive to launch your summation on a high note.

You may wish to consider some of these examples:

> It has been my privilege to represent Howard Littlefield in the most important moment of his life.
>
> This case, more than any other, demonstrates the terrible dangers inherent in circumstantial evidence.
>
> If someone were to write a book about this case, the title would have to be, "The Case of the Missing Witness."

Each of these openings sets the theme of the summation. It is worth remembering that, when structuring your final argument, studies have shown that people recall best what they hear *first* and what they hear *last*. Therefore, your strongest arguments should be deployed in keeping with this principle.

Using Metaphors

A single, well-selected metaphor can be worth a thousand words. It allows counsel to introduce a point quickly and, at the same time, make it unforgettable. As one writer put it, "metaphors nudge the brain along well worn paths." Abraham Lincoln used metaphors extensively: "A house divided against itself cannot stand." And, Shakespeare wrote almost exclusively in metaphors. We, too, can use metaphors to reinforce our arguments.

The Tainted Beef Stew

In virtually every case the judge charges the jurors that if they find a witness falsely stated a material fact, they can disregard *that* portion of the witness's testimony—*or all of it*. Defense lawyers usually want the jury to disregard a government witness's *entire* testimony. To strengthen this argument, consider using the example of a person who ordered a dish of beef stew, but when she tasted her first bite of meat, it was spoiled. Would that person pick through the rest of the stew in an effort to find an unspoiled piece of meat—*or*, would she push the entire dish away and refuse to have any more of it? Of course, the answer is obvious.

Counsel can then argue that the jurors should do likewise with the tainted testimony of a witness who has lied. They should not try to pick through his testimony to determine what is true and what is untrue. They should reject *all* the witness's testimony! This bold and striking metaphor says more than all the evidentiary reasons a lawyer might mount to support this important rule of law. Such a metaphor animates the rule *and* makes it meaningful to the average juror.

The Silver Thread of Truth

For years, lawyers have argued the imaginary "silver thread of truth" that runs through every trial. In the metaphoric sense, it represents the *true* facts of the case that are preeminent. This device can be used to weave together all the strong facts that make up the silver thread of truth. Thus, the argument is made, "Here is just one more fact that forms the '*silver thread of truth*,'"—and should inevitably lead the jury to the verdict the lawyer seeks. In sum, the figurative force of a well-chosen metaphor can lend significant strength to your summation.

The Use of the Rhetorical Question

One of the dynamics of a good summation is the use of rhetorical questions to encourage the jurors to reflect on certain facts. Clarence Darrow posed more than *50 rhetorical* questions in his legendary summation in *People v. Ossian Sweet*, where he represented an African-American doctor who defended himself against a white mob that tried to force him from his new home.

You might consider asking the jurors, "Do you know what the most important exhibit offered in this case is?" Hesitate for a moment to let them think about it. Then, pick up the document upon which you rely so heavily, and explain why *it* is the most important exhibit in the case. The rhetorical question piques the jury's interest and sets the stage for the arguments concerning that exhibit.

Other rhetorical questions you may wish to exploit are,

> Do you know what the most important testimony in this case was?
>
> What does it mean?
>
> What kind of man is Howard Littlefield?
>
> What is the true mystery in this case?

Another effective means of highlighting a piece of testimony or exhibit is to startle the jurors. For example, consider:

> Something extraordinary happened during this trial and I sensed you experienced it when I did. It was when the complaining witness, on cross-examination, said . . .

The Lure of the Quotation

Biblical and literary allusions are an authentic part of our craft. When listening to a speech or a lecture, remember how your interest is elevated when the speaker says, "It was Franklin Delano Roosevelt who said . . . " Our curiosity is excited because the words are no longer those of the speaker but, instead, are the words of a great American President!

A quotation, if properly selected, can give an argument a special force because of the stature of the person being quoted. For instance, to emphasize the importance of a specific document, consider quoting Carl Sandburg, who said, "The best witness is a written paper." And then argue, "How true that is! Here is the statement that this case turns on."

"The Cruelest Lies Are Often Told in Silence"

If a significant piece of testimony is conspicuously omitted from your opponent's case, you may remind the jurors that Robert Louis Stevenson said, "The cruelest lies are often told in silence."

In impressing upon the jury the importance of the character witnesses who testified about the defendant's good reputation, counsel can argue:

> It was Shakespeare who wrote, "He who steals my purse takes nothing, but he that filches from me my good name robs me of that which doth not enrich him, but leaves me poor indeed."

Then, urge, "In moments of crisis, as serious as the one facing Howard Littlefield, often all a person has to fall back upon is his reputation for honesty."

The over-aggressive act of entrapment by a law enforcement officer may warrant reference to, "The serpent beguiled me, and I did eat." Genesis 3:13.

For the dying declaration, consider Shakespeare's "He who breathes his words in pain, breathes the truth."

By simply consulting *Bartlett's Familiar Quotations*, you can find an appropriate quotation for almost any circumstance.

Graphics and Demonstrative Techniques

Today, we live in a culture of images. In fact, the image is slowly, but surely, replacing the word. Photographs or charts remain in the jurors' memory much longer than what they hear. For instance, studies have shown that over a 72-hour period, the average person only retains *10%* of what she *hears*. However, over that same time period, the average person retains *65%* of what she *sees*. Therefore, *showing* jurors an argument is much more impressive than merely having them hear it in words. As a consequence, try to employ a graphic strategy in your final argument. Of course, the use of a chart, blowup or enlarged picture may require court approval.

Blackboards, Blowups and Bullets

A chart is an economical way of delivering a large amount of information quickly and efficiently to the jury. They can be used for conveying a crucial chronology, an outline of an alleged conspiracy, the blueprint of a building, the scene of a drug sale or figures in a tax prosecution. In addition, other subjects that are difficult to explain in words, including time sequences involving significant events, are better understood if they are presented in a simple diagram.

An important exhibit, such as a letter, police report, written statement or contract, can be enlarged to poster size with the key language highlighted in yellow. Color photographs or reproductions—such as ballistics images—can be particularly influential. A decisive page of cross-examination can be enlarged to make it more memorable.

In virtually every courtroom there is a blackboard upon which a message can be written that will be etched in your jurors' memory. For example, a blackboard easily can be used to show discrepancies in a witness's faulty identification, or to list all the factors that will contribute to a reasonable doubt.

Most jurors welcome graphic devices as a relief from the tedious humdrum of words. Because the average person relishes visual details, find ways to *illustrate* what you want to convey to the jury. Finally, one quick, but relevant aside, the integrity of the visual aide must be maintained at all costs. And, always keep in mind how your adversary may take your chart or diagram and use it against you.

Demonstrations During Summation

You can demonstrate a point, during summation, by using the courtroom as a stage. For example, you can show how a fight took place by partially acting it out. Or, demonstrate how the witness could not identify the defendant by pointing out the distances in the courtroom. Using the tables and chairs, or the well of the courtroom, it may be possible to demonstrate what happened at the scene of the accident or crime.

There is a certain amount of stagecraft in all of this that requires an element of good judgment. Be certain that you rehearse the demonstration or portrayal so that it goes smoothly and does not backfire.

The Delivery of the Summation

A summation is a speech. It is the one occasion that you can argue directly to the jury in an uninterrupted fashion. Therefore, all of the devices and techniques, which have been so successfully used by great speakers, should be cultivated. The transforming powers of voice and gestures are all present in a summation. The depth of your personal commitment to the client's cause is also conveyed then more than any other place in the trial.

Daniel Webster reportedly said, "There is no such thing as a good extemporaneous speech." And, how true that is. A good speech takes a considerable amount of planning and preparation. Interestingly, after Webster's electrifying, "Seventh of March Speech" in Boston—that some say ignited the Civil War—he was asked by a member of the audience, "How long did it take to prepare that speech?" to which Mr. Webster answered, "*All my life*." He meant, of course, that we pour a lifetime of experience into a good speech or summation.

You must rehearse your summation so that you become fluent with all the arguments. Some lawyers are reluctant to actually stand up in a room and rehearse the closing. But, only by running through the arguments will you become comfortable with them and develop a fluency that will greatly improve the presentation.

Today, as the public's attention span continues to shrink, one cannot afford to dawdle. If you are to hold the jury's attention, your argument should have a brisk pace. Once again, that form of acceleration can only be acquired by constant rehearsal.

Using Notes During a Summation

There are lawyers who deliver closing arguments without any notes. That certainly *is* dramatic—*but*, it is also hazardous. With the strict time limitations regularly placed upon summations today, a written outline gives the summation structure and cohesion. In other words, notes should act as a roadmap to be glanced at only periodically, merely to keep your summation on course. Sometimes a summation is interrupted by objections followed by sidebar conferences. The outline helps you regain your bearings. Notes also ensure that each and every point of your summation is accounted for, and that nothing important is left out.

The Power of the Pause

Try stopping at a planned point in your argument and just pause for several seconds. It may seem like an eternity, but nothing can attract a jury's attention more. Then, put to them a rhetorical question. It can be powerful if used once or twice during a summation. But remember, nothing in your summation should happen by chance. Everything should have a purpose and should be planned.

Summation Should Have a Strong Closing

Strive to prepare an uplifting and dynamic finish to your summation. As you head into that "clubhouse turn," so to speak, you should have the throttle all the way out! To achieve such a dramatic effect, the closing must be virtually committed to memory.

Clarence Darrow ended his rousing summation in the *Sweet* case with the following compelling words:

> Gentlemen, you twelve whites, with such intellects as have been given you, with such prejudices as have been forced upon you, with such sympathies as you have, and with such judgment as I can urge upon you, I ask you to understand my clients, and I ask in the name of the race, in the name of the past and the hope of the future, in justice to black and white alike, that you shall render a verdict of not guilty in this case.

When Do the Prosecutor's Remarks in Summation Exceed the Bounds of Propriety and Fair Response to the Defense?

No discussion of the subject of summation would be complete without at least identifying certain arguments made by prosecutors that courts have held to be impermissible and, thus, are subject to objection. Among the more prominent, a prosecutor:

> (1) must not comment on a defendant's *silence* or exercise of his Fifth Amendment privilege not to testify. *Griffin v. California*, 380 U.S. 609 (1965); *People v. Crimmins*, 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 218 (1975);
>
> (2) should not suggest that the defendant has any burden of proof, or shift that burden to the defendant. *People v. Spruill*, 299 A.D.2d 374, 750 N.Y.S.2d 312, 313 (2d Dept. 2002) (improper for the prosecutor to imply during summation that the defendant should have called his brothers as witnesses);[3]
>
> (3) cannot misstate facts to a jury. *People v. Rudd*, 125 A.D.2d 422, 509 N.Y.S.2d 143 (2d Dept. 1986);
>
> (4) should not denigrate a defendant or his counsel. *People v. Hernandez*, 159 A.D.2d 722, 553 N.Y.S.2d 205 (2d Dept. 1990); and

(5) must not vouch for prosecution witnesses or accuse the defendant of lying. *See People v. Goldstein*, 196 Misc. 2d 741, 763 N.Y.S.2d 390 (App. Term 2003).

There are other objectionable arguments, which are less categorical and more fact specific. However, if an argument seems wrong or unfair, object *immediately*, otherwise you may be deemed to have waived your complaint. And, of course, be as specific as possible in registering your objection because the courts hold that a "general objection" may not preserve an issue. *See People v. Dien*, 77 N.Y.2d 885, 568 N.Y.S.2d 899 (1991).

Most important, a motion for a mistrial at the end of a prosecutor's summation will not preserve a claim concerning prejudicial comments to the jury. Significantly, in *People v. LaValle*, 2 N.Y.3d 88, 783 N.Y.S.2d 485 (2004), the defense claimed that the prosecutor's summation was inflammatory. However, defense counsel *did not object during the summation*. Instead, counsel *moved for a mistrial* after the prosecution's summation was completed.

The Court of Appeals concluded that the motion for a mistrial was insufficient to preserve his complaints. Thus, if a prosecutor exceeds the bounds of proper argument, counsel must instantly object and articulate the precise reasons for her objection.

Finally, defense counsel must be careful not to open the door to certain claims in summation. Significantly, in *United States v. Young*, 470 U.S. 1 (1985), the Supreme Court held that defense counsel's comments in final argument, that the prosecution deliberately withheld exculpatory evidence and knew that the defendant was not guilty, invited the prosecutor's expression of his personal opinion that, in effect, he believed the defendant was guilty.[4]

The Supreme Court acknowledged that the prosecutor's statements were impermissible and went beyond the bounds of proper argument. Nevertheless, the divided court concluded that the statements were authorized to counter defense counsel's repeated attacks on the prosecution's integrity. *See also People v. Seit*, 86 N.Y.2d 92, 629 N.Y.S.2d 998 (1995) (prosecutor's comments, in a murder case, about no one seeing a gun in the decedent's hands and urging that the defendant did not really believe that the decedent was armed, were "fair response" to defense counsel's suggestions as to why the police never found a weapon that the decedent allegedly possessed).

Conclusion

Creating and delivering a good summation is an acutely ambitious undertaking and places enormous demands upon a lawyer's intellect, ingenuity, and discipline. But, when those solemn commitments are successfully fulfilled, it can be one of our greatest and most rewarding of achievements. We hope, in some small way, that this outline will help each of you experience that success and satisfaction.

Endnotes

1. Significantly, a prosecutor's "gross distortion of the trial testimony" can deprive a defendant of his right to a fair trial. *See People v. Rudd*, 125 A.D.2d 422, 426, 509 N.Y.S.2d 143, 146 (2d Dept. 1986).
2. We prefer *The Synonym Finder*, published by Rodale Books, as a dependable thesaurus, and *Webster's New World College Dictionary* as a reliable source of definitions.
3. There are exceptions where the defendant has an affirmative duty to prove certain defenses. But, even in most of these cases, once the defense is properly asserted, the prosecution must overcome that defense beyond a reasonable doubt.
4. Essentially, he argued "I think they did what they are accused of." And, "I call it fraud."

Herald Price Fahringer has tried cases in 27 states and has briefed and/or argued more than 400 appeals, including 15 in the United States Supreme Court. He is recognized as one of the outstanding criminal law attorneys in the country. In 1999, he received the Outstanding Practitioner Award from our Criminal Justice Section. He is currently a partner in the firm of Fahringer & Dubno.

Erica Dubno has worked with Herald Fahringer for more than 12 years. She is admitted to 13 state and federal courts throughout the country. She has received several awards for Appellate advocacy. She has co-authored numerous articles with Herald Fahringer and is a partner in the firm of Fahringer & Dubno.

Sentencing Reform: A Modest Proposal for a Simplified Code

By Paul Shechtman

As has been widely reported, Governor Eliot Spitzer has established a Sentencing Commission to review New York's sentencing laws. One goal of the Commission should be simplification. As Justice William Donnino has written, "the sentencing statutes have become a labyrinth not easily traversed by even the most experienced practitioner of the criminal law." Those words were written in 1995, and the law has grown even more byzantine in recent years. (As the State's Director of Criminal Justice from 1995 to 1997, I bear responsibility for some of the growth.) This article is a modest proposal for reform.

When the Penal Law became effective in 1967, there were five classes of felonies—A through E—and all imprisonment sentences were indeterminate. There were no violent felonies (that classification was added in 1978), and the only recidivist provision was what is now the persistent felony offender provision for three-time offenders (§ 70.10). What we now have is a crazy quilt: indeterminate sentences for first non-violent, non-drug, non-sex felony offenders (§ 70.00); determinate sentences for most first violent felony offenders; stiffer determinate sentences for second felony offenders whose present offense is a violent felony and whose predicate offense is a non-violent felony (§ 70.06(6)); still stiffer determinate sentences for violent felony offenders whose predicate offense is a violent felony (§ 70.04); even stiffer, mostly determinate sentences for second child sexual assault felony offenders (§ 70.07); a separate indeterminate sentencing provision for certain violent offenders whose crimes are the product of domestic violence (§ 60.12); indeterminate sentences for second non-violent, non-drug, non-sex felony offenders (§ 70.06(3)); a separate sentencing scheme for felony drug offenders in which all sentences are determinate and their length turns on whether the offender has no prior felonies, a prior non-violent felony, or a prior violent felony (§§ 70.70 & 70.71); determinate sentences for "non-violent" sex offenders (§ 70.80); a separate sentencing scheme for hate crimes (§ 485.10); and two persistent felony offender provisions, one for three-time (or more) violent felons (§ 70.08) and one for all other persistent offenders (§ 70.10). And to add to the complexity there are exceptions to most rules: the authorized maximum sentence for a class E non-violent, non-drug felony offense for a second felony offender is an indeterminate term of 2 to 4 years' imprisonment, except if the crime is harassment of a correctional employee by an inmate in which event the maximum is 2½ to 5 years.

Where to begin if simplification is a goal? The first question one might ask is whether it makes sense to have both determinate sentences (e.g., 5 years) and indeterminate sentences (e.g., 2 to 6 years) in the same code. Indeterminate sentencing was premised on a "medical model" of sentencing, in which parole authorities were seen as better situated to determine if a defendant had been rehabilitated and therefore should be released. Our faith in rehabilitation (and in parole authorities) has waned since 1967, and with it has gone a preference for indeterminate sentencing. In 1995, determinate sentences were authorized for second felony offenders facing sentencing for violent offenses, and since then determinate sentencing has spread like Topsy. Now, only sentences for class A felonies, for non-violent, non-drug offenders and for some second child assault offenders remain indeterminate. The critical question then is this: is there a sound sentencing philosophy that would have indeterminate sentencing for grand larceny and bribery and determinate sentencing for kidnapping and drug distribution? If the answer is "no," as I suspect it is, then New York should move to a fully determinate scheme. (I will come back later to the issue of sentences for murder, terrorism, recidivist sex offenders and persistent offenders.)

The second step toward simplification begins with the realization that we now have 10 categories of felony offenses—A-I, A-II, violent B, non-violent B, violent C, non-violent C, etc. Thus, for example, Robbery in the Second Degree is a violent C, and Grand Larceny in the First Degree is a non-violent B. Ten categories is too many. A modest revision would be to reduce the number of categories to six by eliminating the violent felony classification. If Robbery in the Second Degree should be treated the same for sentencing purposes as Grand Larceny in the First Degree, then both should be denominated as Class B felonies.

Which brings me to a revised sentencing chart. For first-time felony offenders, the authorized sentences might look as follows:

First-Time Felony Offenders

	Shortest Term	Longest Term
Class A-II	5	20
Class B	3	15
Class C	1½*	10
Class D	1½*	7
Class E	1½*	4

*Probation sentences and definite sentences would be available for Class C through E felonies.

It bears note that to achieve sentences for drug offenses comparable to those under the 2004 reforms, most drug offenses would have to be reclassified as class D and E felonies. That is not a bad result. Selling drugs on a street corner is not the moral equivalent of rape and hence should not be designated a class B felony. Moreover, at present the A-II category is limited to certain drug crimes and a few sex offenses. The idea would be to elevate what are now B violent felonies to A-II status as part of the elimination of the violent felony classification. That would make the sentencing range for Robbery in the First Degree 5 to 20 years, much as it is under existing law.

For second felony offenders, the chart might look like this:

Instant Offense	Prior Offense	Shortest Term	Longest Term
Class A-II	Any class	8	25
Class B	B, C	7½	20
Class B	D, E	6	17½
Class C	A-I, A-II, B, C	5	15
Class C	D, E	3½	12
Class D	Any class	2½	7
Class E	Any class	1½	5

That leaves the question of sentences for murder, terrorism, repeat sex offenders, and persistent offenders. For those crimes (which would be A-I felonies), there is a compelling argument for indeterminate sentencing with a parole authority determining whether release from incarceration is appropriate. Taking a human life could warrant life in prison, but rehabilitation or old age may militate in favor of release. A provision that makes the punishment for murder 15 years to life to 25 years to life (and treats terrorists, repeat sex offenders, and persistent offenders presumptively the same as murderers) has much to commend it. (There would still be a sentence of life without parole for aggravated murder as defined in Penal Law § 125.27.)

Two more points: The sentence for a first violent felony offender is now a determinate term of between 2 to 7 years for a class D felony, but 2 to 8 years if the class D felony is menacing a police officer. (That is a result of the Crimes Against Police Act of 2005.) Similarly, the sentence for a class B felony for a first felony drug offender is a determinate term of between 1 to 9 years, but 2 to 9 if the sale occurs near a school ground. These subtle differences may make for good politics, but they needlessly complicate New York's sentencing law. If a crime warrants a stiffer sentence, it should be elevated to a higher felony class. That principle is the Occam's razor of sentencing reform.

Finally, the Sentencing Commission should give consideration to eliminating the plea bargaining restrictions that have proliferated since the Penal Law was enacted. Under current law, for example, where an indictment charges a class B violent felony offense which is also an armed felony offense, a plea must be to a class C violent felony offense. These restrictions can be circumvented by negotiating a deal pre-indictment or in other creative ways. A rule requiring a prosecutor to explain on the record her reasons for agreeing to a disposition that is two or more classes below the top charge (e.g., from a class B to a class D felony) seems far preferable to one that precludes such a disposition from occurring when it is warranted.

I have no doubt that experienced practitioners can find fault in the scheme advanced above. It is put forward as a starting point for discussion and nothing more. Simplification should not be the only goal of sentencing reform, but it is surely an estimable one given the labyrinthine complexity of current law.

Paul Shechtman is a partner at Stillman, Friedman & Shechtman and an adjunct professor of criminal procedure and evidence at Columbia Law School. He also served for several years as the New York State Commissioner of Criminal Justices Services under former Governor Pataki.

Is the United States Supreme Court Pro-Prosecution or Pro-Defense? An Analysis of 27 Recent Criminal Law Decisions

By Spiros A. Tsimbinos

Introduction

Appellate lawyers dealing with criminal law cases usually gauge their chances of success on appeal by looking to start out with a core group of judges on the appellate panel which they categorize as either pro-prosecution or pro-defense. They then battle to convince "the swing votes" of the merits of their case. The question arises based upon this long utilized strategy: is there really a pro-prosecution or pro-defense predilection by some of the judges on the appellate courts? To test this long-held theory, especially as it applies to the United States Supreme Court, I conducted an analysis of 29[1] recent criminal law decisions covering the period May 1, 2006 to June 30, 2007. This time period coincides with the appointment of Justice Samuel Alito to the Court and thus covers the Court's outlook with its full complement of justices. My analysis revealed some interesting results as follows:

A High Percentage of 5-4 Decisions and a Small Number of Unanimous Results

The first significant observation which emerged from the analysis was that there were a high number of 5-4 decisions. Of the 27 decisions 10 or 37% were 5-4 votes. The number of 5-4 results in criminal cases was somewhat higher than in civil cases. A recent report on the Court's caseload for the prior term stated that of the total number of 70 decisions issued 19 or 27% resulted in 5-4 decisions.

Further, with respect to the criminal cases in almost every situation the composition of the 5-4 breakdown was the same. The analysis also revealed that of the 27 results only 7 involved unanimous rulings or just about 26% of the total. This situation clearly indicates that when viewing the present composition of the United States Supreme Court, we do start off with two blocks of justices, one group having a pro-prosecution bent and the other significantly more favorable to the defense.

The Pro-Prosecution Group

Five justices of the Court have a pro-prosecution decision rate of over 60%. This group consists of Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas. Of the 27 decisions considered, Justice Alito issued a pro-prosecution ruling in 21 cases for a 77.8% rating. Justice Alito, during his first few months on the Court, voted in favor of the defense in several cases. Toward the end of the current term, however, his number of pro-prosecution decisions greatly increased and he continually became part of the 5-4 majority. Chief Justice Roberts and Justice Thomas had the second highest pro-prosecution rating, each with 74%. Justice Kennedy had issued a pro-prosecution result in 19 cases for a 70% rating and Justice Scalia had 17 pro-prosecution decisions for a pro-prosecution rating of 63%. Overall, largely as a result of the consistent voting of the five pro-prosecution Justices, the Court as a whole has rendered 18 pro-prosecution decisions and nine which were favorable to the defense for a pro-prosecution rating of slightly over 66%.

The Pro-Defense Group

A group of four justices, to wit, Ginsburg, Souter, Stevens, and Breyer manifest a pro-defense inclination. Each of these justices had a pro-defense vote of over 73% and a pro-prosecution rating of less than 27%. Justices Ginsburg and Breyer issued a pro-prosecution decision in only 7 of the 27 decisions for a rating of 26%. Justice Stevens voted for the prosecution 6 times out of 27 for a rating of 23.3% and Justice Souter voted for the prosecution only 5 times out of 27 for a rating of 18.5%.

The huge disparity between the two groups can be seen from the fact that even between the lowest pro-prosecution Justice (Scalia) and the highest pro-prosecution Justice in the defense group (Ginsburg and Breyer) there is a 37% gap. Between the highest percentage justice in the pro-prosecution group (Alito) and the lowest in the pro-defense group (Souter), there is a gap of 59%.

Justice Kennedy Is the Key Swing Vote

Of the nine Supreme Court Justices, Justice Anthony Kennedy has clearly emerged as the Court's swing voter whose decision can make the case go one way or another. Justice Kennedy was in the majority in 24 of the 27 decisions, or nearly 90% of the time. His high pro-prosecution rating of slightly over 70% was largely responsible for a pro-prosecution majority in many decisions. His importance to the pro-prosecution block is illustrated by the fact that when he broke with his pro-prosecution brethren on an issue it usually led to a different result. Thus Justice Kennedy sided with the pro-defense group in four cases[2] involving the Texas death penalty, resulting in a 5-4 pro-defense vote in those matters.

Justices Scalia and Ginsburg—Less Predictable Than Expected

Many criminal law practitioners might have the tendency to immediately pigeon-hole Justice Scalia as strongly pro-prosecution and likewise Justice Ginsburg as strongly pro-defense. Although both of these justices fall within their respective camps, they have a tendency to deviate on occasion and to cross over to the other side with respect to certain issues and circumstances. Thus Justice Scalia, among the five pro-prosecution justices, has the lowest pro-prosecution rating and during the last few years he has taken strong pro-defense positions that have carried the Court on pro-defense issues, most notably the *Crawford* line of cases with respect to the right of confrontation and the *Apprendi* sentencing cases, which have led to changes with respect to the federal sentencing guidelines and the nullification of many state sentencing procedures. Among the 27 decisions Justice Scalia broke with his pro-prosecution colleagues Justice Alito and Kennedy to vote on the side of the defense in *Cunningham v. California*, 127 S. Ct. 856 (2007), which struck down California's persistent offender's sentencing statute.

Similarly, Justice Ginsburg had the highest pro-prosecution rating among the pro-defense group and sided with the pro-prosecution majority in *Dixon v. United States*, 126 S. Ct. 2437 (June 22, 2006), where the Court held that jury instructions did not run afoul of the due process cause when they placed the burden on a defendant to establish a duress defense by a preponderance of the evidence. Justice Ginsburg has also, on occasion, joined the pro-prosecution group with respect to certain search issue cases (see for example, *Brigham City Utah v. Stuart*, 126 S. Ct. 1943 (2006)).

All Five Pro-Prosecution Justices Were Nominated by Republican Presidents

It is an accepted premise that in making their selection for United States Supreme Court Justices, Presidents will usually select someone who is compatible with their political and judicial philosophy. Thus it is not surprising that the five justices who were in the pro-prosecution group were selected by Republican Presidents who expressed a law and order viewpoint and tended to fall within a Republican-Conservative philosophy. Chief Justice Roberts and Justice Alito were selected by George W. Bush, our current President. Justices Scalia and Kennedy were selected by President Ronald Reagan and Justice Thomas was picked by former President George H.W. Bush.

However, among the group of four pro-defense justices some surprises and unexpected results have occurred. Although Justices Ginsburg and Breyer were selected by President Bill Clinton, a Democrat, and might be expected to manifest a pro-defendant and pro-civil liberties viewpoint, Justice Stevens was nominated by Republican President Gerald Ford and Justice Souter by Republican President George H.W. Bush. Both of these justices appear to have departed quite a bit from the positions they may have been expected to take. It is therefore not surprising that many Conservative and Republican voters are somewhat disappointed in the positions taken by Justice Stevens and Justice Souter with possible regrets regarding their selection.

Conclusion

I hope that this analysis regarding the voting record of the various justices of the Supreme Court with respect to criminal law decisions has provided some valuable insight for criminal law practitioners. With the opening of the Court's new term in October 2007, we look forward to future decisions. As we look to the future and attempt to predict results, it is important to have an understanding of what has occurred in the past.

Endnotes

1. Three of the cases involved the same issue concerning the Texas death penalty procedures. They were all decided by 5-4 votes and involved the same breakdown of justices. Thus for analytical purposes these three cases were counted as one so as not to distort the overall analysis.
2. The cases are *Smith v. Texas*, 127 S. Ct. 1686; *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654; and *Brewer v. Quarteman*, 127 S. Ct. 1706 (all decided April 25, 2007); *Panetti v.Quarterman*, 127 S. Ct. 2842 (June 28, 2007).

Spiros A. Tsimbinos is a Past President of the Queens County Bar Association and the Editor of the New York State Bar Association's *New York Criminal Law Newsletter*.

A Summary of the 2006 Annual Report of the Clerk of the New York Court of Appeals

By Spiros Tsimbinos

In late March 2007, Stuart M. Cohen, Clerk of the New York State Court of Appeals, issued the Annual Report for the year 2006 providing detailed information regarding the workings of the Court during the past year. A total of 293 notices of appeal and orders granting leave to appeal were filed in 2006, an increase of 9 over 2005. Of these filings, 226 involve civil matters and 67 involve criminal cases. During the year 2006, 2,458 applications were made to the court for leave to appeal in criminal cases. Of this number only 52 or slightly over 2% were granted. The number of leave applications granted in criminal cases increased by 10 over 2005. The Court decided 1,117 motions for leave to appeal in civil cases in 2006, 56 more than in 2005. Of these 6% (down from 6.4% in 2005) were granted.

In 2006 the court decided 189 appeals of which 127 involved civil cases and 62 involved criminal matters. This compared with 137 civil cases and 59 criminal cases decided in 2005. Of the 189 appeals, 150 were decided unanimously and without dissent. The court also reported that it continues to expeditiously process and decide appeals. The average time from argument or submission to disposition of an appeal was 35 days. The average period from the filing of a notice of appeal or an order granting leave to appeal to the calendaring for oral argument was approximately 6 months. These time periods were roughly the same as in 2005.

In addition, to the number of full appeals decided the Court of Appeals also decided 1,397 motions in 2006—108 more than in 2005. The court also noted that with respect to capital appeals since the death penalty was declared invalid in 2004, no capital appeals were filed in 2006. However, the case of *People v. John Taylor*, involving the imposition of a death penalty sentence with respect to killings which occurred in a Wendy's restaurant in Queens, is on the court's docket for oral argument on September 10th with a decision expected sometime in October.

The Court also reported that expenditures for the operation of the Court and ancillary agencies in 2006 amounted to $14,681,024. This included all judicial and non-judicial salaries and all other cost factors. The Court also reported that for the fiscal year 2007-2008 it had requested an increase of 1.6% to cover its operating costs.

The 2006 report is the 11th Annual Report issued by the Clerk of the Court. This year's report also includes a special forward written by Judge Robert S. Smith. The Annual Reports issued by the Court of Appeals are extremely interesting and helpful for practitioners to understand the various workings of the court. As in the past, this year's report also includes a very useful review of the important cases decided by the Court of Appeals during the year 2006. The review is broken down by subject matter such as Constitutional Law, Criminal Law and Evidence. Those members wishing to obtain a complete copy of the Court of Appeals report can contact the Clerk's office or can log on to the Court of Appeals website <http://www.nycourts.gov/ctapps.

New York Court of Appeals Review

Discussed below are two Court of Appeals cases that were decided on March 27, 2007 and which were inadvertently left out of our last issue. In addition, we are including recent significant decisions in the field of criminal law that were issued by the New York Court of Appeals from May 1, 2007 to September 4, 2007.

EXPERT EVIDENCE ON IDENTIFICATION

***People v. LeGrand*, decided March 27, 2007**
(N.Y.L.J., Mar. 28, 2007, pp. 1, 7 and 18)

In a unanimous decision, the Court of Appeals held that it is an abuse of the Trial Judge's discretion to preclude qualified expert testimony on the reliability of eyewitness identifications in cases where there is little or no corroborating evidence. The Court's ruling was a further extension of its decisions in *People v. Lee*, 96 N.Y.2d 157 (2001) and *People v. Young*, 7 N.Y.3d 40 (2006). The entire Court of Appeals basically adopted a view that was first expressed by Chief Judge Kaye when she dissented in the 1990 case of *People v. Mooney*.

The Court's ruling in *LeGrand* reversed a defendant's homicide conviction and will require the holding of a new trial. The decision was written by Judge Theodore T. Jones and is his first written opinion for the Court since he joined the Court of Appeals on February 12, 2007. Judge Jones emphasized in his ruling that allowing the expert testimony in question would have benefited the jury in evaluating the accuracy of the eyewitness identifications. The trial judge's failure to allow the expert testimony in question thus constituted an abuse of discretion which denied the defendant a fair trial and which requires a new trial.

SEARCH AND SEIZURE

***People v. Gomcin*, decided March 27, 2007**
(N.Y.L.J., Mar. 28, 2007, p. 21)

In a unanimous decision, the Court of Appeals determined that drugs and a gun which were found as part of a police search had been validly suppressed and that there was no basis to overturn the determination of the Appellate Division since that Court's determination was based upon a mixed question of law and fact which was supported by the record. In the case at bar, the police had conducted an undercover "buy operation" in Queens. Approximately six hours later, they proceeded to the location where the buy had occurred and searched various patrons inside the premises including the defendant. The police recovered a packet of cocaine and a .38 caliber gun. At the Mapp hearing, the detective who was the only People's witness recounted the information he had received from the undercover officer but the Court ruled that his testimony was legally insufficient to establish probable cause. The Appellate Division had affirmed the determination to suppress the drugs and gun by a 3-2 vote.

The New York Court of Appeals held that there was a basis in the record to support the Appellate Division's determination, since that Court had concluded that the defendant's inquiry in the absence of any context did not support the inference that he was the one who possessed the cocaine.

IMPROPER DISMISSAL OF JUROR

***People v. Dukes*, decided May 1, 2007**
(N.Y.L.J., May 2, 2007, pp. 7 and 21)

In a unanimous decision, the New York Court of Appeals reversed a defendant's conviction and ordered a new trial. The Court found that the trial judge had improperly dismissed a sworn juror over the defendant's objection. The Court of Appeals emphasized that pursuant to CPL Section 270.35 (1), a Court may not dismiss a sworn juror unless it has determined that he or she is grossly unqualified to serve. This occurs only when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict.

In the case at bar, a juror informed the Court after the complainant had testified at trial, that she and the complainant may have worked in the same nursing center and that although she was unsure she had some recollection that the complainant was fired for an incident involving a gun. She told the Court however that she was 100% sure she could remain impartial and would not allow this information to influence her decision. The People sought the juror's removal and over the defendant's objection, the Court dismissed the juror and replaced her with an alternate.

The Court of Appeals determined that based upon the record in the case at bar, the juror's dismissal was improper and the defendant was entitled to a new trial. The Trial Court had failed to determine that the juror was grossly unqualified and based upon the CPL provision and the case of *People v. Buford*, 69 N.Y.2d, 290 (1987), the trial court's actions constituted a reversible error.

WHAT CONSTITUTES SUBSTANTIAL PAIN

***People v. Chiddick*, decided May 1, 2007**
(N.Y.L.J., May 2, 2007, pp. 7 and 18)

In a unanimous decision, the New York Court of Appeals held that there was sufficient evidence in the case at bar to support the jury's findings that the defendant caused the victim substantial pain and therefore

inflicted physical injury so as to justify a conviction for assault in the second degree and burglary in the second degree. In the case at bar, the defendant was in the process of burglarizing a building when he was confronted by the victim. The two scuffled and the defendant bit the victim on the left ring finger and fled. The bite caused the victim's fingernail to crack and his finger to bleed. The victim was taken to a hospital where he later received a tetanus shot and a bandage. At the trial, the victim testified that as a result of his injury, he experienced moderate pain.

Under the Penal Law, it is an element of both second degree burglary and second degree assault that the defendant caused physical injury to the victim and physical injury is further defined in the Penal Law as impairment of physical condition or substantial pain. Based upon the circumstances in the case at bar, the Court of Appeals held that the record clearly supported a finding of substantial pain. The instant matter is another in a long line of Court of Appeals cases which have sought to provide a definition of substantial pain going back to its decision in *In re Philip A.*, 49 N.Y.2d 198 (1980).

The Court's decision was issued by Judge Smith who stated that although substantial pain cannot be defined precisely, it is more than slight or trivial pain but it need not be severe or intense to be substantial.

NECESSITY OF INTOXICATION CHARGE

***People v. Newton, Jr.*, decided May 1, 2007**
(N.Y.L.J., May 2, 2007, p. 18)

In a unanimous decision, the New York Court of Appeals upheld the defendant's conviction for sodomy in the third degree. Evidence was established at the trial that the defendant had been consuming beer for several hours before the alleged incident. The defendant argued that the trial court should have instructed the jury to consider intoxication in connection with the third degree sodomy charge. The Court, after examining the provisions of Penal Law Section 130.40 (3) and Penal Law Section 130.05 (2)(d), concluded that a defendant's subjective mental state is not an element of the crime of third degree sodomy and therefore evidence of intoxication at the time of the sexual act is irrelevant. The trial judge thus properly declined to instruct the jury on an intoxication defense with respect to the charge in question.

NECESSITY OF MAPP/DUNAWAY HEARING

***People v. Bryant*, decided May 3, 2007**
(N.Y.L.J., May 4, 2007, pp. 6 and 23)

In a unanimous decision, the New York Court of Appeals ordered that a guilty plea for second degree murder which was entered by the defendant had to be vacated and a Mapp/Dunaway hearing held at the trial court level on the issue of whether an identification by a purported witness to a stabbing gave police probable cause to arrest. In the case at bar, the defendant was picked up by police in a Manhattan vicinity where a killing had occurred earlier in the day. Based upon information supplied by a witness, a photograph of the defendant was utilized. After the defendant's arrest, and before any trial had been held, the police refused to provide the identity of the witness, who the witness was, and what exactly the witness had seen. The defendant claimed that not having this information gave him no basis upon which to challenge if the police had probable cause to arrest him.

The defendant subsequently pleaded guilty and was sentenced to 16 years to life. In the Court of Appeals, however, in an opinion written by Judge Theodore T. Jones, the Court held that a hearing had to be held. The Court of Appeals noted that since the information on the witness was not given to the defendant, he was not in a position to allege facts disputing the basis of his arrest. Therefore, the trial court should not have denied his request for a Mapp/Dunaway hearing. The defendant's lack of access to the information requested precluded more specific factual allegations and created factual disputes, the resolution of which required a hearing.

VACATION OF GUILTY PLEA

***People v. Castillo*, decided May 3, 2007**
(N.Y.L.J., May 4, 2007, p. 24)

In a unanimous decision, the Court of Appeals held that a defendant's plea of guilty to robbery in the first degree under Penal Law Section 160.15(2) as a lesser included offense of Penal Law Section 160.15(4) was jurisdictionally improper and the plea in question had to be vacated. The defendant had been indicted for robbery in the first degree under Penal Law Section 160.15(4) arising out of a robbery of a known drug dealer. That section requires the display of what appears to be a firearm.

Pursuant to a plea agreement, the defendant pleaded guilty to robbery in the first degree under Penal Law Section 160.15(2), which requires that the defendant forcibly steal property while armed with a deadly weapon. This crime was not charged in the indictment and during the allocution, the defendant made no mention of the display element of the Penal Law Section.

The Court of Appeals determined that under the CPL requirements in Article 220, the crime to which the defendant pled was not a lesser included offense of the crime charged in the indictment. Although the subsections of Penal Law Section 160.15 share the common elements of forcible stealing, each encompasses a distinct additional element. Under the circumstances herein, the entered plea was jurisdictionally defective and had to be vacated.

CONSECUTIVE SENTENCES

***People v. Rosas*, decided May 8, 2007**
(N.Y.L.J., May 9, 2007, pp. 1, 2 and 18)

In a 4-3 decision, the Court of Appeals held that a defendant who broke into his ex-girlfriend's house and shot both her and her husband, committed one criminal act under the first-degree murder statute and thus could not be sentenced to consecutive life terms. The majority opinion, which was written by Judge Ciparick, relied upon the Court's earlier ruling in *People v. Laureano*, 87 N.Y.2d 640 (1996). The Court stated that Penal Law Section 70.25 specifies that sentences must run concurrently when two or more offenses are committed through a single act or omission. Judge Ciparick wrote that in the instant case, the same acts committed by the defendant constituted both crimes. The majority opinion also pointed to the fact that the first-degree murder counts lodged against the defendant were identical except for the order of the names. Joining Judge Ciparick in the 4-judge majority were Chief Judge Judith S. Kaye, and Associate Judges Robert S. Smith and Theodore T. Jones.

Judge Graffeo issued a written dissent which was joined in by Judges Reed and Piggot. The dissenting opinion argued that two distinct acts had occurred to wit the shooting of two individuals. The dissent argued that each shooting was a separate act and that the People were required to prove each offense separately.

LACK OF PRESERVATION

***People v. Person*, decided May 8, 2007**
(N.Y.L.J., May 9, 2007, p. 20)

In a unanimous decision, the Court of Appeals upheld a defendant's robbery conviction and denied the defendant's claim that the failure of the trial judge to allow the introduction of video-taped interviews which were taken of the defendant's accomplices. In the case at bar, accomplices gave video-taped statements to the police incriminating themselves but exculpating the defendant. Later, however, the accomplices entered into cooperation agreements with the police and gave testimony at the trial detailing the defendant's role in planning the robbery. During cross examination of the accomplices, the defense counsel used the transcripts of the video-taped interviews to impeach the credibility of the witnesses. The accomplices acknowledged that they had made the prior inconsistent statements. Defense counsel thereafter sought to also introduce the video-taped interviews into evidence. The trial court denied this request, stating that the accomplices had already admitted they made the statements on the videos.

On appeal, the defendant claimed that the preclusion of the video-taped statements was reversible error as a matter of law because the trial court had failed to recognize that the jury could not reliably gauge the credibility of the witnesses without viewing their demeanor and hearing their voices during the police interview. The Court of Appeals held that the defendant did not make the specific argument to the trial judge at the time of the occurrence. Thus, the defendant failed to explain to the Trial Court how the videotapes would have conveyed information beyond that provided by the verbatim transcripts of the statements. As a result, the Court of Appeals ruled that the defendant had not preserved his current contention and that, therefore, the judgment of conviction was affirmed.

TIME FRAME SPECIFIED IN ACCUSATORY INSTRUMENT TOO BROAD

***People v. Sedlock*, decided June 4, 2007**
(N.Y.L.J., June 6, 2007, pp. 1, 15 and 19)

In a unanimous decision, the New York Court of Appeals held that a 7-month period specified in a criminal information alleging that a scoutmaster once touched a teenage boy in his Boy Scout troop was unreasonably long and unfairly burdened the defendant's ability to mount a defense. In an opinion written by Judge Ciparick, the Court held that the 7-month time period which the prosecution specified as the period during which the criminal act occurred, was too broad a time frame to provide sufficient notice to the defendant to prepare an adequate defense. Relying upon its earlier decisions in *People v. Keindel*, 68 N.Y.2d 410 (1986), *People v. Watt*, 81 N.Y.2d 772 (1993), the Court limited the decision to the circumstances of the instant case and rejected establishing a "bright line rule" for establishing what time frames are acceptable for alleging criminal behavior in accusatory instruments.

In determining what decision should be reached on a case-by-case basis, the Court stated that among the factors to be considered are whether the prosecution acted in good faith when investigating the accusations and made efforts to come up with the most accurate date possible.

In addition, the Court must also take into consideration the age and intelligence of the victims and the nature of the crimes that are being alleged.

POST-RELEASE SUPERVISION

***People v. Louree*, decided June 5, 2007**
(N.Y.L.J., June 6, 2007, pp. 1, 15 and 19)

In a 5-2 decision, the Court of Appeals again had an opportunity to comment on the situation where the sentencing court after imposing sentence failed to advise the defendant about the service of the post-release supervision period. Reiterating its position expressed in *People v. Catu*, 4 N.Y.3d 242 (2005), the Court held that the post-release supervision periods that are mandated by statute must be told to defendants at the time of their sentence

and reversals are mandatory in cases where defendants have not been informed of the post-release consequences. The Court further specified that defendants do not need to preserve for review on appeal the error committed by a sentencing judge when he or she fails to provide the required information regarding the post-release supervision period.

The majority opinion was written by Judge Read and was joined in by Chief Judge Kaye and Judges Ciparick, Graffeo and Jones.

Judge Pigott issued a dissenting opinion stating that preservation was required for appellate review in the case at bar and that the defendant could have raised an objection to the sentencing judge at the time of sentence. Judge Pigott was joined in dissent by Judge Robert S. Smith.

CONSPIRACY

***People v. Washington*, decided June 7, 2007 (N.Y.L.J., June 8, 2007, pp. 5 and 22)**

In a unanimous decision, the Court of Appeals upheld a second degree murder conspiracy conviction of a defendant who wanted to kill his rival pimp. The defendant had discussed his desire to kill his rival with a fellow inmate at Rikers Island who turned out to be a police informant. Authorities then arranged for an undercover police officer to meet with the defendant to work out details of the crime. During the meeting, the defendant insisted that nothing be done until the defendant got out of jail and put his hands on some money. On appeal, defendant contended that the talk of a hit was conditioned on his getting out of jail and thus the evidence was insufficient for a conspiracy conviction since a condition was never met.

The Court, however, unanimously disagreed and ruled that the determinative factor in proving the conspiracy charge was that the defendant had made an agreement with the supposed hit man. The Court concluded that the contingencies imposed did not negate the existence of a conspiratorial agreement which was the heart of the conspiracy crime.

INVALID ARREST BY PAROLE OFFICER

***People v. Bratton*, decided June 12, 2007 (N.Y.L.J., June 13, 2007, p. 19)**

In a unanimous decision, the New York Court of Appeals determined that a parole officer had invalidly arrested the defendant for a non-Penal Law offense to wit: refusing to agree to a urine test. In the case at bar, the defendant was on parole and had consented in writing to permit parole officers to visit his residence and to submit to substance abuse testing. On an occasion in February 2005, when the parole officer visited the defendant, the defendant balked at submitting to a urine test. The parole officer then proceeded to arrest the defendant and charged him with obstructing governmental administration in the second degree and resisting arrest. The Court of Appeals found that the parole officer had testified that he arrested the defendant for not following his order to submit to a urine test which is not an offense within the meaning of Section 10.00 (1) of the Penal Law. Thus, there was no basis to support a warrantless arrest and the parole officer's actions were unsupported by the arrest provisions of Criminal Procedure Law 140.25. The Court of Appeals thus ordered a reversal of the defendant's conviction and a dismissal of the accusatory instrument.

STATUTE OF LIMITATIONS

***People v. Parilla*, decided June 12, 2007 (N.Y.L.J., June 13, 2007, p. 20)**

In a unanimous decision, the Court of Appeals held that defendant had waived his right to appellate review regarding a statute of limitations issue because he had entered a guilty plea and had never contested the matter. In the case at bar, a defendant had initially filed a pro se motion to dismiss the indictment on statute of limitations grounds. The Court, however, had refused to consider the motion since the defendant was represented by counsel. Subsequently, without the issue ever being advanced, the defendant pleaded guilty to one count of first degree rape and one count of first degree sodomy in satisfaction of the indictment. As part of the plea agreement, he waived his right to appeal. In accepting the plea agreement, the Court had a lengthy colloquy with the defendant, fully advising him of the waiver of certain rights as part of the plea agreement.

The Court of Appeals found that the defendant had waived any statute of limitations claims by pleading guilty and refused to overturn his conviction. The Court of Appeals relied upon its prior decision in *People v. Hansen*, 95 N.Y.2d 227 (2000). The Court of Appeals emphasized that the defendant was fully aware of the possible statute of limitations defense but after weighing all his options, he declined to proceed and accepted the plea bargaining agreement.

DENIAL OF MAPP/DUNAWAY HEARING

***People v. Long*, decided June 12, 2007 (N.Y.L.J., June 13, 2007, p. 21)**

In a unanimous decision, the New York Court of Appeals affirmed the denial of a defendant's motion for a Mapp/Dunaway hearing. The Court found that the defendant had failed to raise a factual dispute as to the

reasonable suspicion for her detention and subsequent arrest. The Court further reiterated that in dealing with the issue in question, insufficiency of a defendant's factual allegations should be evaluated 1) by the face of the pleading, 2) in conjunction with the context of the motion, and 3) in regard to defendant's access to information. The Court found that under the circumstances of the instant case, the defendant had ample access to relevant information regarding the factual predicate for her arrest, including access to the People's "write up" of her conduct. The defendant, however, failed to specifically challenge the identified informant's basis of knowledge in her suppression motion. In rendering its decision, the Court of Appeals relied upon its prior decisions in *People v. Mendoza*, 82 N.Y.2d 415 (1993) and *People v. Lopez*, 5 N.Y.3d 753 (2005).

DWI LAW NOT APPLICABLE TO CHEMICAL INHALANTS

***People v. Litto*, decided June 27, 2007**
(N.Y.L.J., June 28, 2007, pp. 1, 4 and 18)

In a unanimous decision, the New York Court of Appeals held that the intoxication required under New York's Vehicle and Traffic Law involves the disorientation caused by drinking alcohol and not by "highs" produced by sniffing chemicals from aerosol cans. In the case at bar, a 19-year-old defendant was convicted of vehicular manslaughter on the grounds that he was intoxicated after inhaling a mouthful of the aerosol "Dust-off" while driving with three 13-year olds. His car smashed into another car, killing one person and seriously injuring several others. Vehicle and Traffic Law Section 1192 (3) states that no person shall operate a motor vehicle while in an intoxicated condition. The statute, however, does not define what "intoxicated" means. The defense argued that the statute did not apply to chemical inhalants and only related to alcohol consumption.

In rendering the unanimous opinion of the Court, Chief Judge Kaye analyzed the 97-year history of the Legislature's attempt to punish drivers who are impaired by alcohol. The Court concluded that the statutory provision in question related only to intoxication by alcohol and did not apply to chemical inhalants. The Court also noted that the Legislature in 1960 enacted a separate VTL Section, to wit 1192(4), which made it a misdemeanor to operate a vehicle while impaired by use of a drug. The Legislature's use of separate statutory provisions to cover drug use indicated to the Court that 1192(3) was meant only to apply to alcohol consumption.

Under the circumstances, the Court dismissed those counts of the indictment against the defendant which involved driving while intoxicated under Vehicle and Traffic Law Section 1192(3) and Second Degree Vehicular Manslaughter under Penal Law Section 125.12.

LACK OF PRESERVATION

***People v. Charache*, decided June 27, 2007**
(N.Y.L.J., June 28, 2007, p. 21)

In a unanimous decision, the Court of Appeals affirmed a determination that classified the defendant as a Level 3 sex offender. On appeal, the defendant had argued that the people had failed to provide him with the statutory 10-day notice when they sought to obtain a higher risk level classification from the Board's original recommendation. In the Court of Appeals, the Court determined that the defendant had raised this argument for the first time and that as a result, he had failed to preserve the issue for review by the Appellate Courts.

CRAWFORD ISSUE

***People v. Nieves-Andino*, decided June 28, 2007**
(N.Y.L.J., June 29, 2007, pp. 1, 5 and 24)

In yet another Crawford issue case, the Court of Appeals held that a victim's statements to police identifying a man who had just shot him three times were excited utterances and their admission at trial did not violate the defendant's Sixth Amendment right to confront his accuser. In an opinion written by Judge Pigott, the Court ruled that the statements in question were not testimonial under the United States Supreme Court decision in *Davis v. Washington*, 126 S. Ct. 2266 (2006). The judges concluded that it could be reasonably assumed that the officers were responding to an emergency and that the statements were obtained in the course of that situation. Joining the decision in the majority view were Chief Judge Kaye and Judges Graffeo and Reid. Judge Jones, while agreeing with the Court's result to uphold the conviction, based his conclusion on the harmless error doctrine rather than accepting the majority view that the statements in question were excited utterances. The concurring opinion of Judge Jones was joined by Judges Ciparik and Smith.

ESCAPE CONVICTION

***People v. Antwine*, decided June 28, 2007**
(N.Y.L.J., June 29, 2007, pp. 5 and 22)

In a unanimous decision, the Court held that the defendant was properly convicted of escape in the second degree under Penal Law Section 205.10(2). In the case at bar, the defendant had been taken to the hospital for treatment after his arrest for stealing a car. While in the hospital, the defendant attempted to break away but was caught and subdued before he could leave the hospital premises. The defendant claimed that these facts did not constitute escape in the second degree since he was never able to totally break away and get free before his apprehension. The defendant relied on a Court of Appeals ruling in *People v. Hutchinson*, 56 N.Y.2d 868. The Court of Appeals, however, found that the defendant had removed

himself from the control of the officers and that the ensuing chase placed both the officers and the public at risk. Under these circumstances, the elements of the Penal Law Section were sufficiently met. The majority decision was written by Judge Ciparik.

DOUBLE JEOPARDY

***Polito and Fortunato v. Walsh*, decided June 28, 2007 (N.Y.L.J., June 29, 2007, pp. 5 and 23)**

In an Article 78 proceeding, the New York Court of Appeals unanimously determined that the Brooklyn District Attorney's office was entitled to proceed with a murder case against two defendants who were allegedly members of the Genovese crime family. The two defendants had been convicted of a host of charges in the federal courts, including murder and racketeering but their convictions were later overturned by the U.S. Court of Appeals. The defendants thus claimed that the dismissal of their federal prosecutions prohibited the New York indictment based upon double jeopardy grounds. The Court of Appeals unanimously concluded that the state prosecution did not violate CPL Section 40.20(1), which incorporates New York's double jeopardy standards.

The Court of Appeals found that CPL Section 40.20(2)(f) expressly exempts the instant state prosecution from the double jeopardy prohibition. An exemption is specifically provided for prosecutions in other jurisdictions which have been terminated by Court order because of insufficient evidence to establish some element of the offense that is not an element of the state's description of the crime.

SEX OFFENDER REGISTRATION ACT

***North v. Board of Examiners of Sex Offenders of State of New York*, decided July 2, 2007 (N.Y.L.J., July 3, 2007, pp. 7 and 22)**

In a unanimous decision, the New York Court of Appeals held that a conviction in a foreign jurisdiction required that the defendant register under New York's Sex Offender Registration Act. In the case at bar, the defendant had pleaded in 2004 to a federal possession of child pornography offense. The Board of Examiners of Sex Offenders determined that the defendant had been convicted of a sex offense as defined in the Correction Law which addresses when a person convicted in another jurisdiction must register in New York. The Court of Appeals concluded that the defendant's guilty plea under the federal statute was equivalent to the state's child pornography possession statute. Although the defendant had argued that the two laws were different because the federal statute deals with images of children under 18, while the state statute prohibits images of children under age 16, the Court concluded that the Board could review the conduct in question to determine if it fell within the scope of the New York offense. Under these circumstances, the defendant's federal conviction subjected him to the requirements of New York's registration statute.

BURGLARY CONVICTION

***People v. Lapetina*, decided July 2, 2007 (N.Y.L.J., July 3, 2007, p. 24)**

In a unanimous decision, the New York Court of Appeals upheld a defendant's conviction for burglary in the second degree. The defendant had originally been convicted of burglary in the first degree and two counts of assault in the third degree. The Appellate Division reduced the offense to burglary in the second degree after dismissing the assault charges, but refused to grant a new trial based upon the defendant's claim that the trial court had failed to provide the jury with a "choice of evils instruction." The Court determined that this issue had not been adequately preserved for review by the Court of Appeals and that the dismissal of the assault charges against the defendant did not undermine the burglary count so as to require a new trial.

LACK OF PRESERVATION

***People v. Liner*, decided July 2, 2007 (N.Y.L.J., July 3, 2007, p. 24)**

In a unanimous decision, the Court of Appeals determined that the defendant's right of confrontation claim was not properly raised by the defendant at trial and thus the issue was not preserved for appellate review. At trial, the People introduced into evidence two trespass notices revoking defendant's privilege to enter a grainery store. The defendant, however, failed to assert that the admission of the notices violated his right of confrontation. Relying upon *People v. Gray*, 86 N.Y.2d 10 (1995), the Court of Appeals held that therefore the issue was not properly preserved for Court of Appeals review.

Recent United States Supreme Court Decisions Dealing with Criminal Law

In the three months prior to the end of its summer recess, the United States Supreme Court issued a series of important decisions in the area of criminal law as follows:

James v. United States, 127 S. Ct. 1586 (April 18, 2007)

In a 5-4 decision, the United States Supreme Court held that a prior Florida attempted burglary conviction qualified as a "violent felony" for the purposes of imposing an enhanced sentence under the Federal Armed Career Criminal Act. In a decision written by Justice Alito, the Court held that attempted burglary involves conduct that presents a serious potential risk of physical injury and therefore qualifies as a violent felony within the meaning of the federal statute. Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Souter and Breyer to form the 5-judge majority.

Justice Scalia dissented in an opinion joined in by Justices Stevens and Ginsburg. Justice Thomas filed a separate dissenting opinion arguing that the *Apprendi* line of cases made the enhancement statute unconstitutional.

Smith v. Texas, 127 S. Ct. 1686, *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, *Brewer v. Quarterman*, 127 S. Ct. 1706 (all decided April 25, 2007)

In a trilogy of cases involving the Texas death penalty procedures, the Court determined that the Texas courts had misapplied federal law and that the Texas capital sentencing instructions prevented juries from giving meaningful consideration to mitigating factors. All three cases were thus remanded for further proceedings. Interestingly, Justice Kennedy, who has often voted on the prosecution side in criminal cases, cast the deciding vote in these three cases in favor of the defense. All three cases were decided by a 5-4 vote, with Justices Stevens, Souter, Ginsburg and Breyer also joining the majority. Justices Roberts, Alito, Scalia and Thomas dissented.

Schriro v. Landrigan, 127 S. Ct. 1933 (May 14, 2007)

On May 14, 2007, the United States Supreme Court held that a death row inmate who directed his attorney not to present certain litigating evidence which could have spared him the death penalty could not then argue on appeal that his attorney was ineffective. The defendant who was sentenced to death in Arizona in 1990 argued that he did not get a chance to present evidence about his tormented childhood that could have changed the outcome of his sentence. A review of the trial record made it clear, however, that the defendant at trial stated he did not want his attorney to introduce this evidence. The Circuit Court of Appeals for the Ninth Circuit had ruled that the defendant was entitled to a hearing on the defendant's claim and that the attorney did not do enough to ward off the death sentence despite the defendant's actions at the trial level.

The United States Supreme Court, however, in a 5-4 decision written by Justice Thomas, held that no hearing was required based upon the defendant's decision to prevent his attorney from introducing the evidence in question. Joining Justice Thomas in the majority vote were Chief Justice Roberts, and Justices Alito, Scalia and Kennedy. Justices Ginsburg, Souter, Breyer and Stevens dissented.

Uttecht v. Brown, 127 S. Ct. 2218 (June 4, 2007)

In a 5-4 decision, the United States Supreme Court held that a state trial court had the right to excuse jurors for cause who indicated that their ability to impose a death penalty in a capital case was substantially impaired. The Court held that when the federal courts are reviewing claims of error, especially when the issue of federal habeas corpus is involved, they are obligated to give due deference to the trial court which is in a superior position to determine a potential juror's demeanor and qualifications. In the case at bar, the Court found that in balancing the interests of the criminal defendant and the state in a death penalty case, the state trial court was within its discretion to remove jurors who indicated a reluctance to impose a death penalty sentence. The majority opinion was written by Justice Kennedy and his opinion was joined in by Justices Roberts, Scalia, Thomas and Alito. Justices Stevens, Souter, Ginsburg and Breyer dissented.

Fry v. Pliler, 127 S. Ct. 2321 (June 11, 2007)

The Court unanimously agreed that on collateral review by federal habeas corpus of state court judgments, the federal courts must apply the more forgiving standard in favor of the states of whether the error had a substantial and injurious effect rather than the harmless error standard on the *Chapman*. After agreeing on the standard to be used, the Court split on whether under the facts of the case the defendant had demonstrated that his state conviction should be reversed. In the state trial court, the testimony of a defense witness had been excluded and other evidentiary rulings were made which the defendant claimed violated his right to due process.

The Supreme Court, by a majority vote that consisted of Justices Roberts, Scalia, Thomas, Alito and Kennedy, upheld the denial of the defendant's habeas corpus petition. Justices Stevens, Souter and Ginsburg voted to reverse and Justice Breyer voted to remit the matter to the Circuit Court of Appeals for further review.

Bowles v. Russell, 127 S. Ct. 2360 (June 14, 2007)

In a 5-4 decision, the Supreme Court held that a defendant could not bring a federal habeas corpus action because he was two days late in filing an appeal back in 2004. Under the procedure for federal habeas corpus relief, a defendant has 30 days to appeal after such relief has been initially denied. The Rules of Federal Appellate Procedure, however, allow for a 14-day extension to file an appeal. In the case at bar, involving an Ohio murderer, the federal judge gave the defendant 17 days to file, instead of 14. He then appealed on the 16th day. The Supreme Court held that filing deadlines are jurisdictional, which means there is no means to provide an extension beyond the designated period. The majority opinion written by Justice Thomas held that the Court has no authority to create equitable exceptions to jurisdictional requirements. Justice Thomas was joined in the majority by Chief Justice Roberts, and Justices Scalia, Alito and Kennedy.

Justice David Souter issued a vigorous dissent, arguing that it was intolerable for the judicial system to condone a situation where the defendant was led to believe by the lower Court that he actually had 17 days to file, rather than the 14 specified in the statute. Justice Souter was joined in dissent by Justices Stevens, Ginsburg and Breyer. Again, as in many other criminal law cases, the Court seems to have divided into two blocks with Justice Kennedy providing the critical swing vote.

Brendlin v. California, 127 S. Ct. 2400 (June 18, 2007)

In a unanimous decision, the United States Supreme Court ruled that passengers, just like drivers, have a constitutional right to challenge the legality of police decisions to stop vehicles in which they are traveling. The defendant, who was a passenger in a vehicle, had been convicted of drug possession which was found on him after sheriff's deputies had stopped the car in California. Although prosecutors had conceded that the stop of the vehicle was illegal, they argued that the Fourth Amendment did not apply to Brendlin since he was only a passenger and not the driver of the vehicle.

The Supreme Court, however, in an opinion written by Justice David Souter, stated that under the circumstances any reasonable passenger would have understood that the police officers were exercising control over the vehicle and that no one in the car was free to leave without police permission. Therefore, a traffic stop necessarily curtails the traveler or the passenger as much as the driver, and the Fourth Amendment protections against unreasonable search and seizure must apply to passengers as well as drivers of a vehicle.

Rita v. United States, 127 S. Ct. 2456 (June 21, 2007)

In an 8-1 decision the United States Supreme Court held that the sentencing guidelines, which were determined to be advisory pursuant to the *Booker* and *FanFan* decisions 543 U.S. 220 (2006), can serve as presumptions of reasonableness when the Circuit Court of Appeals is exercising appellate review of the sentence imposed. The Court stressed that the presumption of reasonableness is not mandatory but it is within the discretion of the Circuit Court to apply. In the case at bar, the Fourth Circuit Court of Appeals had adopted a presumption of reasonableness when reviewing a District Court sentence if the sentence imposed fell within the sentencing guidelines. The United States Supreme Court found that the presumption of reasonableness on appellate review is consistent with the *Booker* decision. The presumption, however, does not apply to the District Court but is only applicable on the appellate level. Justice Breyer, who also wrote the *Booker* decision and who many years ago had a hand in drawing the sentencing guidelines, wrote the majority opinion. Justices Stevens and Scalia, who agreed with the result, issued concurring opinions and Justice Souter issued a dissenting opinion.

Panetti v. Quarterman, 127 S. Ct. 2842 (June 28, 2007)

In another 5-4 decision, the Supreme Court blocked the execution of a mentally ill Texas murder defendant because the lower courts had failed to consider whether he had a rational understanding of why he was to be killed. The defendant was convicted and sentenced to death for shooting his in-laws in front of his wife and children in 1992. In the case at bar, the defendant suffered from delusions which his attorneys claimed kept him from comprehending the reason or purpose of the death sentence. The majority opinion, which was written by Justice Kennedy, concluded that this information should have been considered during the death penalty phase. Joining Justice Kennedy in the majority were Justices Stevens, Souter, Ginsburg and Breyer. Constituting the 4-judge dissent were Justices Thomas, Scalia, Roberts and Alito. Justice Kennedy continues to be the swing vote in many criminal law decisions with his position usually constituting the majority view of the Court.

After-Effects of *Cunningham v. California*

In the several months following the Court's nullification of California's tier system of sentencing for violent felony offenders based upon a judicial finding of enhancement factors, the Supreme Court has remanded numerous cases (now totaling at least 20) for reconsideration in light of *Cunningham v. California*, 127 S. Ct. 856 (Jan. 22, 2007). In that case, the Supreme Court struck down a provision of California's sentencing law because it gave judges too much power to increase sentences based on facts not found by the jury. The Court, in a 6-3 decision, continued to strictly apply the *Apprendi* line of cases. The decision has created havoc in California with thousands of prisoners facing possible re-sentencing and numerous cases being remanded for reconsideration.

Federal Cocaine Sentencing Rules to Be Reviewed

In an interesting development, the Supreme Court in early June agreed for the first time to consider the long prison terms meted out to defendants convicted of selling crack cocaine. Under the federal sentencing structure and the sentencing guidelines, approximately 25,000 defendants per year are sent to federal prisons on crack cocaine charges and their prison terms are substantially longer than drug dealers who sell powdered cocaine. In granting certiorari to review several cases involving crack cocaine sentences, the Justices of the Supreme Court indicated that they wished to decide whether trial judges should have more leeway to impose some lighter sentences in crack cocaine cases, rather than the severe terms currently mandated. No decision on these matters is expected until some time at the end of the year when the Court resumes its session in early October. We will keep our readers advised of any new developments as they occur.

Court to Consider Rights of Guantanamo Detainees

In an apparent shift of opinion, the Supreme Court, on June 30, 2007, the last day before its summer recess, announced that the justices will consider whether detainees at Guantanamo Bay have been unfairly barred from the federal courts. The case will appear on the Court's docket for the next term and will address the issue of whether subjecting the detainees to military commissions instead of allowing them access to federal courts violates the Constitution.

In April, the Court had declined to hear this appeal but three of the Justices: Souter, Ginsberg and Breyer, had voted to hear the matter. It appears that in late June, at least one additional Justice had reached the view that the Court should address the issue and the Court announced that it was reversing its earlier position and would consider the matter. This case, *Boumediene v. Bush*, could be one of the most important on the Court's October docket and we will keep our readers advised of developments.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from May 2, 2007 to August 1, 2007.

People v. Cabrera (N.Y.L.J., May 7, 2007, pp. 1 and 6 and May 8, 2007, pp. 22 and 28)

In a 3-2 decision, the Appellate Division, Third Department, held that a young driver's criminally negligent homicide conviction was legally sufficient and supported by the trial evidence. The defendant was a 17-year old high school student who was driving at a dangerous but not excessive rate of speed while he was on his way to a swimming outing. Along the way, he was involved in a car crash which killed 3 of his passenger friends. The accident had occurred on a rural road in Sullivan County where the posted speed limit was 55 miles per hour in some locations and 40 miles per hour in others. A traffic accident expert testified at the trial that the vehicle driven by the defendant was going between 70 and 72 miles per hour when it crashed. During the trial, the jury was allowed to consider that the defendant had recent violations of a program imposing new restrictions on licenses given to 16- and 17-year old drivers. The majority opinion held that the speed limit in which the defendant was driving was sufficient to sustain defendant's conviction for criminally negligent homicide and the jury could also consider the violations of the terms of the defendant's junior license. The defendant's actions constituted "blameworthy conduct creating or contributing to a substantial and justifiable risk of death or serious injury." The Court's majority opinion was written by Judge Mercure and was joined in by Judges Cardona and Crew III. Judges Mugglin and Lahtinen dissented, arguing that under prior appellate divisions, excessive speed must be shown to establish criminally negligent homicide and that the violations of the defendant's junior license were irrelevant to the manner in which he drove the vehicle at the time of the incident.

People v. Rivera (N.Y.L.J., May 23, 2007, p. 18)

In a unanimous decision, the Appellate Division, First Department, held that the Trial Court had committed error in denying defendant's motion to suppress evidence without affording him a hearing. The defendant had denied participation in the alleged drug sale and the court below had refused to grant a hearing on the grounds that the moving papers had not alleged factual claims so as to satisfy the requirements of the CPL section.

The Appellate Division, however, relied upon its prior decision in *People v. Muhammed*, 290 A.D.2d 248 (2002) and the New York Court of Appeals decision *People v. Mendoza*, 82 N.Y.2d 415 (1993), which held that it has now been firmly established that it is unreasonable to construe the Criminal Procedure Law as requiring precise factual averments from the defendant when the defendant does not have access to or awareness of the facts necessary to support suppression. The Court further found that the interests of judicial economy also militate in favor of the Court's conducting the hearing on the suppression motion in the exercise of discretion despite a perceived pleading deficiency. The matter was thus remanded for a hearing on the suppression motion and the appeal is being held in abeyance pending the results of the hearing.

People v. Conway (N.Y.L.J., May 25, 2007, pp. 1 and 2 and May 29, 2007, p. 18)

In a 3-1 decision, the Appellate Division again reversed an assault conviction of a police officer for shooting an unarmed Bronx teenager. This case was previously dismissed by the Appellate Division on a finding that there was legal insufficiency to establish criminal negligence on the part of the police officer. The New York Court of Appeals, in May of 2006, reversed that determination but remitted the matter back to the Appellate Division for a factual review, which is within the Appellate Division's authority on the question of whether the determination was against the weight of the evidence.

In the case at bar, the officer had chased the suspect and while simultaneously pointing a gun at the suspect and trying to drive his vehicle, he lost control of the weapon and it discharged, seriously wounding the defendant. Under a weight of the evidence review, the Court must consider credibility and the competing evidence to determine whether the jury was justified in finding the defendant guilty beyond a reasonable doubt. The Appellate Division, after conducting a weight of the evidence review on remand from the Court of Appeals, came to the conclusion that the conviction still had to be reversed. The Court emphasized that the teenager had reached into the car and that a scuffle ensued, resulting in the discharge of the weapon. Under these circumstances, the majority took the opinion that under the weight of evidence analysis, a conviction could not be sustained.

Justice Milton Williams again dissented as he had done in the previous Appellate Division ruling. Justice Williams, in his dissent, concluded that every detail of the defendant's pursuit smacked of a wanton, inhuman disregard for public safety. The Court's majority opinion was joined in by Justices Mazzarelli, Catterson and Saxe.

People v. Dickerson (N.Y.L.J., June 6, 2007, pp. 1 and 4 and June 11, 2007, p. 22)

In a unanimous decision, the Appellate Division, First Department, upheld the depraved indifference murder conviction of a defendant for his role in letting his daughter starve to death 19 days before her 5th birthday. Police officers found the emaciated remains of the child at her parents' Manhattan apartment. She weighed 15 pounds at the time of her death. The defendant, on appeal, contended that the evidence was legally insufficient to establish depraved indifference to human life. The Court of Appeals concluded, however, that there was no question that the defendant's actions rose to the level of depravity and were manifested by heinous and despicable acts which resulted in the death of the child.

People v. Hunter (N.Y.L.J., June 12, 2007, pp. 1 and 2 and June 14, 2007, p. 18)

In a unanimous decision, the Appellate Division, Third Department, affirmed a defendant's conviction for sodomy in the first degree. The defendant claimed that the People had failed during the trial to disclose to the defense that, in the month prior to the defendant's trial, the complainant had accused another man of the crime. In seeking a post conviction motion to set aside the verdict, the defendant argued that this information constituted newly discovered evidence and *Brady* material.

The Appellate Division found that the material in question did not constitute *Brady* material and there was an insufficient showing that the information would have been admissible to impeach the complainant and that it would have had an impact on the jury which would have caused the jury to render a different verdict.

People v. Domine (N.Y.L.J., July 9, 2007, pp. 1 and 14 and July 11, 2007, p. 20)

In a 4-1 decision the Appellate Division, Third Department, reduced the level of a sex offender classification finding that the prosecutor had been unable to prove the charge of rape in the first degree.

The majority of the court found that there was thus no proof of forcible compulsion and the sex offender level had to be reduced from level 2 to level 1. Justice Cardona dissented, finding that the victim had testified in the Grand Jury regarding forcible compulsion and that this was enough to establish the higher classification level.

People v. Casper (N.Y.L.J., July 10, 2007, p. 1 and July 13, 2007, p. 22)

In a unanimous decision the Appellate Division, Fourth Department, found that the evidence was legally insufficient to establish the crime of depraved indifference murder. The defendant had killed his wife after their van had plummeted into a gorge. The couple's two sons had claimed that it was done intentionally. The jury, however, had acquitted the defendant of the intentional charge but had found him guilty of depraved indifference murder. The Appellate Division, utilizing the standard set forth in *People v. Payne*, determined that the depraved indifference conviction was improper and in accordance with recent Court of Appeals decisions reduced the charge to manslaughter in the second degree.

People v. Knowles (N.Y.L.J., July 16, 2007, pp. 1 and 6 and July 18, 2007, p. 20)

In a unanimous decision the Appellate Division, Third Department, reversed a conviction for felony murder and robbery because the trial court had rendered an erroneous jury instruction and the prosecutor had elicited improper information from his police witnesses. With respect to the robbery claim, the defendant took the position that the drugs which were allegedly stolen were actually his and he was the rightful owner of the property. The court had charged the jury that the victim as a matter of law was the owner of the drugs. The Appellate Division stated that this was reversible error because it relieved the prosecution of the burden of proving this allegation as a matter of fact. The court also found that error had been committed when the court allowed the prosecutor to bring out inferences that the defendant had invoked his right to counsel and had refused to answer police questions.

People v. Willette (N.Y.L.J., July 16, 2007, pp. 1 and 6)

In a unanimous decision the Appellate Division, Third Department, reversed a trial court ruling and upheld a police search of a vehicle. The police had stopped a vehicle which had an unlit license plate. When questioning the driver, the police also determined that the person driving had a restricted license. The police then impounded the vehicle and were in the process of towing it when the defendant acknowledged that there were 9 pounds of marijuana in the back. The Appellate Division stated that since the police had a right to initially stop the vehicle on the basis of the unlit license plate, the impounding of the vehicle and the intention to search was valid.

People v. Sutton (N.Y.L.J., July 19, 2007, p. 22)

In a unanimous decision the Appellate Division, First Department, affirmed a defendant's conviction for possession of a controlled substance. The Court held that the defendant had failed to establish that his non-appearance before the Grand Jury was a product of ineffective assistance of counsel. The Court noted that despite his

claim that he desired to appear before the Grand Jury, the defendant in his motion papers presented no showing of what he would have testified to in the Grand Jury and how it would have altered the result. The Appellate Division also considered in determining the defendant's claim that he did not testify at trial.

***People v. Hernandez* (N.Y.L.J., July 23, 2007, p. 18)**

In a unanimous decision the Appellate Division, Third Department, reversed a defendant's conviction for promoting prison contraband in the first degree. The Court found that the lesser included offense of promoting prison contraband in the second degree should have been submitted to the jury pursuant to a defense request. The Court noted that the only difference between the first degree and the second degree count was whether the contraband was dangerous. In the case at bar the contraband in question was marijuana and the Court held that the jury had the right to consider the lesser degree count as requested by the defendant.

***People v. Johnson* (N.Y.L.J., July 26, 2007, p. 1 and July 27, 2007, p. 26)**

In a unanimous decision the Appellate Division, Third Department, dismissed a defendant's indictment charging him with vehicular manslaughter because a violation had occurred of the speedy trial rules pursuant to CPL Section 30.30. In the case at bar the prosecutor had filed away the Grand Jury minutes instead of forwarding them to the Judge. The indictment had been filed on February 6, 2006 and the Grand Jury minutes were not sent to the Judge until April 19, 2006, 137 days later. The Court held that this created an impermissible delay in the commencement of the defendant's trial and that there was no excuse for the prosecutor's delay in expeditiously forwarding the Grand Jury minutes. The 137-day delay was thus properly included in computing the speedy trial time.

For Your Information

New Presiding Justice Selected for Appellate Division, First Department

In early May, the Governor's Judicial Screening Panel for the First Department forwarded to him the names of five candidates for the position of Presiding Justice of the Appellate Division, First Department. The five candidates were Louis A. Gonzalez, Angela M. Mazzarelli, Peter Tom, all Associate Justices of the Appellate Division, First Department; Appellate Division Justice Stephen G. Crane from the Second Department; and Jonathan Lippman, who had served as Chief Administrative Judge and a Justice of the Supreme Court in Westchester County. All of the five candidates were Democrats. Justice Peter Tom, one of the named candidates, had been acting as Presiding Justice since January 1, 2007, after Justice Buckley reached the mandatory retirement age. Two senior judges of the Appellate Division, First Department who were expected to be named to the list of potential candidates, to wit: Justices Richard T. Andrias and David B. Saxe, were not named to the final group, causing some criticism of the screening process which led to the selection of the five finalists.

On May 23, 2007, Governor Spitzer made his selection from the five candidates and selected Jonathan Lippman. Justice Lippman is 61 years old and has had a long career in the court system. He has served as Chief Administrative Judge since 1978 and recently was elected as a Supreme Court Justice from Westchester County. He is a graduate of New York University School of Law and is a longtime resident of New York City. In announcing the appointment, Governor Spitzer stated that Justice Lippman "has displayed the strength of character and the profound respect for the law that makes him an outstanding choice for this position." Chief Judge Kaye further added that Justice Lippman will be a great Presiding Justice just as he has been an outstanding Chief Administrative Judge. Justice Lippman's appointment has already fueled speculation that he may be a prime candidate for Chief Judge of the Court of Appeals when Judge Kaye retires at the end of 2008. We congratulate Judge Lippman on his appointment and wish him all the best in his new position.

Judge Pfau Appointed as New Chief Administrative Judge

Following Judge Lippman's selection as Presiding Justice of the Appellate Division, First Department, Chief Judge Judith Kaye announced in late May that she had appointed Judge Ann T. Pfau as the new Chief Administrative Judge of the State's Court System. Judge Pfau, who is currently 59 years old, is the first woman to hold that post. She will be in charge of the Court system that includes 3,600 state and local judges and 15,000 other employees. She will also oversee the state's $2.4 billion annual budget. Judge Pfau has served in the court system for 23 years and most recently was the Deputy Chief Administrative Judge serving alongside Justice Lippman. Judge Pfau over the years has been involved in implementing a number of important court initiatives, including jury reform and a continuing legal education program for Judges. Judge Pfau is a graduate of Brooklyn Law School, having graduated in 1984. As Chief Administrative Judge, Judge Pfau will be earning $147,000 per year.

Fee Increases Announced for Federal CJA Lawyers

In late May, the Administrative Office of the United States Courts announced that an increase will go into effect with respect to the rates paid to lawyers receiving compensation under the Federal Criminal Justice Act. The hourly rate for panel attorneys handling non-capital cases will be increased from $92 per hour to $94 per hour. The maximum hourly rate for those attorneys handling capital cases will rise from $163 to $166 per hour. Further details on the increase can be found in the Court notes section on page 11 of the May 22nd issue of the *New York Law Journal*.

Governor Introduces New DNA Bill

In late May, Governor Eliot Spitzer introduced into the legislative process a new bill seeking to expand mandatory DNA testing with respect to all crimes. The state began requiring DNA samples in some cases in 1999 and the data bank has been repeatedly expanded since then. Pursuant to current legislation enacted last year, DNA samples are now required from about 1/2 of the people convicted of crimes in New York. This includes all felonies and about 30% of the misdemeanors. The Governor's current proposal would make mandatory testing for persons convicted of all crimes.

The State Assembly has previously resisted the continued expansion of mandatory DNA testing, arguing that it would require increased expense and would overly burden the current facilities required to conduct the tests. The Assembly has also previously argued that it would be fruitless to collect and maintain DNA samples

from non-violent, low level offenders. The Governor's proposal also includes some provisions which would benefit defendants and which may be viewed favorably by the State Assembly. These include the right of defendants to apply for DNA sampling before conviction as well as after the verdict, thereby enabling defendants to clear themselves from DNA testing. The Legislature considered the Governor's new DNA proposal during the month of June but adjourned without taking any definitive action. Since DNA testing began, 191 defendants have been exonerated because of DNA testing with 11% of these exonerations occurring in New York State.

New Human Trafficking Legislation

In early June, Governor Spitzer and the State Legislature reached agreement on the passage of new anti-trafficking legislation which would enhance criminal penalties against defendants who participate in such actions. The measure, which was signed into law by Governor Spitzer on June 11, 2007, increases felony provisions for trafficking in prostitution. For example, under the new law traffickers in prostitution could be convicted of a class B felony. Other traffickers could be convicted of class D felonies.

The new law also creates an inter-agency task force to collect data on trafficking and to make recommendations for the training of prosecutors. The task force would also be empowered to investigate travel-related prostitution or "sex tourism." With the passage of the new law, New York has now joined the federal government and 24 other states in passing severe anti-trafficking measures which punish perpetrators and protect victims. In signing the new legislation, Governor Spitzer stated "Human trafficking is modern-day slavery and among the most repugnant crimes. . . . Today we have given law enforcement the ability to adequately prosecute perpetrators and have provided meaningful assistance for unfortunate victims of these egregious crimes."

State Commission Seeks to Improve New York State Court System

A State Commission, which was established last year by Chief Judge Judith S. Kaye, is currently holding public hearings to obtain comments on the operation of the court system in New York with the aim of making recommendations for the improvement of the court system. The public hearings will gather testimony from prosecutors, public defenders, law enforcement officials, judges and other interested parties. The hearings have already been held in Albany on June 13th and in Ithaca on June 26th, and will continue on September 11th in White Plains and in Rochester on September 25th. The Commission has already issued a preliminary report that was released in February and it recommended streamlining the system through the unification of various courts as well as creating a fifth department of the Appellate Division. The report also recommended the removal of the constitutional limit on the member of Supreme Court judgeships. We will continue to report any additional recommendations made by the Commission following the holding of its public hearings.

Older but Richer

A report recently issued by the national newspaper, *USA Today*, based upon a detailed analysis of federal government data, reveals that there is a growing salary gap in the United States between those persons in the age category of 55-64 and those persons in their late 30s. The current group of persons in the United States who are 55 and older constitutes about 60-70 million. The median net worth of people within this group who are 55-64 has climbed to nearly $250,000 while it has dropped to about $50,000 for those in their late 30s.

The report concluded that nearly all the additional wealth created in the United States since 1989 has gone to people 55 and older. Younger Americans in their 20s, 30s and 40s have barely kept up with the inflation rate or have actually fallen behind since 1989. The report thus concluded that older Americans are "thriving in wealth and income. Younger people are not." The report credited the increase in wealth for older individuals to the improvement in government programs such as Medicare and Social Security. The report expressed concern regarding the growing imbalance in wealth between the different sectors of American society and also forecast that, as the number of older people increases, younger people may be faced with increased burdens. The full report was issued in the May 21, 2007 edition of *USA Today*, pp. 1 and 2.

U.S. Minority Population Exceeds 100 Million

A recent report from the United States Census Bureau indicates that the nation's minority population has now reached 100 million and makes up approximately one-third of the United States' population. The largest minority group consists of Hispanics with approximately 44.3 million. The report indicated that Hispanics are now living in many states across the country and accounted for almost one-half of the nation's growth in population from July 1, 2005 to July 1, 2006. The Hispanic population is also predominantly younger than the rest of the country. This was reflected in the fact that the number of non-Hispanic white school age population dropped 4% since 2000, while the number of Hispanic school age children rose by 21%.

The second largest minority group is comprised of blacks with 36.7 million in this group. The report also indicated that there has been a substantial increase in the number of Asians in the United States. This increase amounted to 2.5 million, roughly 25%, since 2000. The

Asian population in the United States is now estimated to be 12.9 million.

The Census Bureau also reported that while the number of minorities has been increasing in the Country, the white population has been declining. Some 16 states have experienced a decline in the white population, including New York, California, New Jersey and Pennsylvania. The report also revealed that the population of people 65 and older is concentrated in certain states while other states have a much heavier concentration of persons under 30. The five states with the greatest number of elderly are Maine, Vermont, West Virginia, Florida and Pennsylvania. The states with a high concentration of younger residents are Utah, Texas, Alaska, Idaho and California.

Violent Crime Increases

The final FBI figures for 2006 revealed that the number of violent crimes in the United States rose for a second straight year. Increases occurred in the number of homicides, robberies and other serious offenses. Overall, violent offenses rose by 1.3% over 2005. Robberies rose by 6%. The increase in violent crime, which occurred in 2005 and 2006, was the first rise since the early 1990s, and has led to concern among law enforcement officials that, after years of declining numbers, the future may contain a new spiral of criminal conduct. Officials in many of the large cities in the United States are particularly concerned since the 2006 FBI figures reveal that big city murders rose sharply and contributed to the 6.7% murder rate increase in cities with more than one million people. Smaller cities, towns and rural areas seem to be faring much better than large cities with respect to violent crimes and have even experienced a slight decrease in some specific offenses.

Death Penalty Survey

A recent poll conducted by the Death Penalty Information Center, a group that opposes capital punishment, revealed that the death penalty continues to receive strong support among the nation's population. The poll found that 62% of those surveyed support the execution of convicted murderers. Although support for the death penalty has been diminishing during the last few years, the most recent poll shows that there is still a high level of support for its use with respect to certain heinous homicides. The recent use of DNA testing which has exonerated certain convicted defendants appears to have somewhat eroded the public support for the death penalty. The poll indicated that 87% of those surveyed believe that an innocent person had been executed within the last 15 years and 58% expressed the view that they would favor a moratorium on executions while alleged wrongful convictions and death sentences are being reviewed and investigated.

Cameras in Courtroom Bill

As the Legislature moved toward adjournment in late June, the push to restore the use of cameras in New York courtrooms again failed to receive legislative approval. Although the State Senate had passed a bill in early June to provide for the presence of cameras in the courtroom in certain instances, the State Assembly failed to go along with the proposed legislation and the issue has again been tabled for another year. After a 10-year experiment of letting cameras in the New York courts, the Legislature has refused during the last few years to reinstate the legislation and many members of the Legislature, as well as many attorneys and judges, continue to express grave reservations about the use of cameras and their impact on the criminal justice system.

Finally a Sentencing Commission

In 1995, the passage of the Sentencing Reform Act of 1995 made sweeping changes in New York's sentencing laws. The thrust of the new enactments was to increase minimum sentences for violent felony offenders and repeat felony offenders and to substantially reduce the possibility of early release through the parole mechanism. In 1998, with the passage of additional legislation popularly referred to as Jenna's Law, increased sentences and restrictions on parole were extended to first-time felony offenders. Both legislative enactments largely accomplished their goal through the implementation of determinate sentences rather than indeterminate ones where the defendant was given a specific designated time period of incarceration and was required to serve 6/7 of the sentence imposed.

The passage of both the 1995 and the 1998 legislation specifically contemplated that after a period of application the effects of the legislation would be reviewed and the Legislature would revisit the issue to ascertain whether any changes or modifications were necessary. In fact, within the 1995 enabling legislation is a specific sunset proviso through which many of the provisions are deemed to be automatically repealed as of September 30, 2005, unless specifically renewed.

To help determine the effects of the legislation and whether the 1995 and 1998 enactments should be renewed, modified or abandoned, the Sentencing Reform Act of 1995 also had a specific provision calling for the establishment of a Sentencing Commission. The Sentencing Commission, which was established by the 1995 legislation, was to have assumed its duties as of April 1, 1996 and was to have dissolved as of November 1, 2003. An interim report was to have been issued on or about December 1, 1999 and a final report was due on December 1, 2003.

Although former Governor Pataki made some initial appointments to establish the Sentencing Commission, it appears that the work of the Commission languished and no interim report or final report was ever issued as mandated by the Sentencing Reform Act legislation. In April 2005, the Legislature extended the provisions of the Sentencing Reform Act to September 1, 2009. Also in 2005, significant modifications were made to Rockefeller Drug Laws and new sentencing provisions were established for a variety of drug offenders.

As a result of 12 years of modifications of New York sentencing laws, the State's sentencing structure is today a complicated hodge-podge of various sentencing provisions which desperately require a new look and in-depth analysis.

In various articles in our *New York Criminal Law Newsletter*, I have during the past few years raised the issue of the failure of Governor Pataki's Sentencing Commission to make the analysis which was legislatively mandated and to issue the required reports. I was therefore pleased to learn that at the beginning of the new administration of Governor Eliot Spitzer, the formation of a new Sentencing Commission was established by Executive Order in early April. The Commission is to be headed by Denise O'Donnell, who is currently serving as the Commissioner of the Division of Criminal Justice Services. The members of the new Commission have been appointed by the Governor and legislative leaders and have begun holding public hearings throughout the state. Chairperson O'Donnell set a deadline of September 1, 2007 to produce supplementary findings and recommendations to the Governor. The aim is to have any legislative proposals ready by 2008. In creating a Commission, the Governor directed that it have a broad mandate to review criminal statutes, sentencing practices, alternatives to incarceration, programs to reduce time served for inmates, parole and programs in aiding convicts' re-entry into society and in general making recommendations for improving the criminal justice system. The other members currently appointed to the Commission are Brian Fischer, who is serving as the Commissioner of the Department of Correctional Services; George Alexander, Chairman of the State Board of Parole; Michael McDermott, an attorney from Albany; Anthony Bergamo, Chief Executive Officer of the Niagara Falls Redevelopment Corporation; and Tina Maria Stanford, Chair of the State Crime Victims Board.

Our *Newsletter* and Criminal Justice Section have actively reviewed and discussed our State's changing sentencing procedures over the last several years and it is important that we continue to provide input to the new Sentencing Commission as it continues its work with the hope that we can pass along useful suggestions and recommendations to improve the quality of our criminal justice system. We will continue to keep our readers informed of the progress of the Commission and any new sentencing proposals which come forth. We also present in this issue a proposal by Paul Shechtman for a simplified sentencing code.

No Legislative Action Taken on Judicial Pay Increases

Despite a long and often-heated effort to obtain salary increases for members of the state's judiciary, the State Legislature in late June adjourned for the summer without taking any action on pending legislation to increase judicial salaries. Despite intense efforts during the last few years and a general recognition that judicial increases are clearly warranted, a simmering dispute between the Legislature and the Governor prevented the enactment of legislation to effectuate salary increases. For several months, it appeared certain that judicial pay raises would be forthcoming, following the Governor's announced support on the issue. A deadlock quickly materialized, however, when the Governor sought to link a campaign finance reform bill and other issues to the question of judicial pay raises. The Legislature also attempted to link raises for State Legislators as part of the judicial pay package. As a result, the pay raises have remained in limbo and now it appears that no action will occur, at least for an additional several months. Judicial reaction has been vehement and claims have been made that litigation will be instituted in an effort to secure the required raises. Governor Spitzer recently denounced any effort to institute legal action as constituting a frivolous lawsuit and he continued to express his support for a judicial raise and urged the Legislative leaders to reach some acceptable compromise position on the issue. No judicial salary increase has occurred since 1999 and although it appears clear that some increase will be granted in the near future, the perplexing question continues to remain—when will this occur?

Senate Committee Issues Subpoenas Regarding Wiretapping Program

In June, the Senate Committee investigating the operation of the domestic wiretapping program currently conducted by the Justice Department and the White House issued subpoenas upon several officials of the Bush administration, including the Vice President's office and the Justice Department. The subpoenas seek information regarding the legal justification of the warrantless secret surveillance program. To date, both the White House and the Justice Department have resisted some of the Committee's requests and it appears that the controversy has now reached a higher level with the prospects of a compromise solution becoming increasingly dim. We will keep our readers advised of any further developments in this matter.

New York City Grows as Other Big Cities Decline

In a recent report, the Census Bureau indicated that the population in the United States continues to shift from the Northeast and Midwest to the South and West. As a result, many of the large cities have experienced a decline in population. The Census Bureau reported that as of 2006, 7 of the 10 most populous U.S. cities are within 500 miles of Mexico, while in 1910, all 10 of the biggest cities were within 500 miles of the Canadian border.

The one big exception to the loss of population within the Northeast is the City of New York, which since 2000 actually attracted an additional 206,000 people. New York City, with a population of 8.2 million, still ranks as the largest city in the U.S. The city of Philadelphia, which is now ranked sixth, actually lost 70,000 residents in the six-year period between 2000 and 2006. In fact, it has now been replaced by Phoenix, Arizona as the fifth-largest city in the United States with a population of 1.5 million. The huge increase in New York City is attributed to the continuing arrival of new immigrants to the city and the economic boom which has been experienced by the city in the last several years. The report also indicated that the population is continuing to shift to the suburbs and to smaller cities. The Nation's population has nearly doubled since 1950, adding about 150 million people, but of the 20 largest cities in 1950, all but four have lost population. Many smaller cities and towns in the West and South, on the other hand, have seen dramatic increases in population. The good news for New Yorkers is that the Big Apple continues to be a vibrant and growing city.

Legislature Passes Tougher DWI Laws

In late June, the Legislature created a crime of aggravated vehicular homicide, a Class B felony, which could involve a 25-year sentence. The crime could be charged against someone convicted after a fatal crash who also had a blood alcohol level of more than 0.18 or higher and the driver had been convicted of DWI in the previous 10 years. The bill also created the crime of aggravated vehicular assault, a Class C felony, punishable by up to 15 years in prison and which would apply to a driver involved in a crash that resulted in serious physical injury. Governor Spitzer signed the legislation in late July.

New York City Increases Funding for Legal Aid and Prosecutors' Offices

As expected the New York City Council in early June voted to increase the 2008 budgets for both the Legal Aid Society and the various prosecution offices throughout the city.

The Council increased the budget allocation for the Legal Aid Society by $10 million over the Mayor's request, granting the society its budgetary request and increasing their 2008 budget to $85.4 million, thus representing a 5.6% increase over the 2007 budget.

The City Council also granted increases to the various prosecutors in the city but in significantly smaller amounts than that granted to the Legal Aid Society. The six prosecution offices were granted a total budget of $253.3 million or a 4.2% increase over 2007. The breakdown for the various offices is as follows:

	2007 Budget (Millions)	2008 Budget (Millions)	% Increase
Manhattan	71.2	74.0	3.9
Brooklyn	71.0	73.1	3.0
Bronx	41.2	43.2	4.9
Queens	37.9	39.8	5.0
Staten Island	6.8	7.4	8.8
Special Narcotics Prosecutor	15.1	15.8	4.6

The largest percentage increase was given to the District Attorney's Office in Staten Island since that County has seen a large population growth during the last few years with a concomitant increase in caseload. Overall during the last six years the Legal Aid Society has seen a 25% increase in their budget while the total budget for prosecutors has increased by 11%.

New Civil Commitment Statute Results in Release of Several Defendants

As a result of the new civil commitment statute, which went into effect in April of 2007, hearings have been held for many of the defendants who were held pursuant to Governor Pataki's Executive Order. The Division of Criminal Justice Services recently announced that of the 125 sex offenders who were civilly confined under Governor Pataki's program, 44 or roughly one-third have been released after being granted court-ordered hearings. Additional hearings are continuing and we will keep our readers informed of developments regarding the new civil commitment program. The new legislation that was passed is formally known as the Sex Offender Management and Treatment Act, and litigation is currently pending regarding the constitutionality of the program.

U.S. Attorney Mauskopf Appointed as Federal District Judge

In late July, Roslynn R. Mauskopf, who had served for several years as U.S. Attorney for the Eastern District, was formally approved by the U.S. Senate for a position on the Federal District Court for the Eastern District. We congratulate Judge Mauskopf on her appointment and wish her all the best in her new position. A new U.S. Attorney for the Eastern District has yet to be announced but we will advise our readers of any new appointment as soon as it occurs.

About Our Section and Members

Malvina Nathanson Appointed as New Section Treasurer

Malvina Nathanson was recently selected to serve as Treasurer of our Criminal Justice Section. Malvina has been a long-active member of our Executive Committee and has served on a variety of committees and projects. She is in the private practice of law with offices in Manhattan. The office of Treasurer was recently added to our Section in order to better plan our budgets and improve our fiscal condition.

We congratulate Malvina on her appointment and wish her well in her new position.

Section Officers Plan Fall and Winter Programs

Our Section officers are in the process of scheduling Section events during the coming months. Details on our Fall and Winter programs will be forthcoming in separate mailings.

The Criminal Justice Section Welcomes New Members

We are happy to report that in the last few months, our Section has obtained many new members. We welcome these new members and in keeping with our recent established practice, we are listing the names of the new members who have joined within the last three months.

David Arias
Marion Bachrach
Eric Alwin Boden
Marva Claudette Brown
Russell Bart Cohen
Patrick Caston Crowley
Martina Ines Cucullu
Christine Delince
Paul DerOhannesian
Robert John Devlin
Tara Ann DiGregorio
Deborah Swindells Donovan
David Marc Eisen
Temitope Famodimu
Cynthia F. Feathers
Seth David Fier
Andrew C. Fine
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Andres D. Gil
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Alex Martin Johnson
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Edward E. Key
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Kristin M. Lasher
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Michael Dennis Lockard
Aaron Hirsch Mendelsohn
Ashley McCarthy Moore
Minna Oh
Matthew Scott Peeler
Ralia E. Polechronis
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Greg Ribreau
Roland Gustaf Riopelle
Timothy B. Rountree
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David M. Sobotkin
Graham Geoffrey Van Epps
Sherry Levin Wallach
Bellanne Weitz

Section Committees and Chairs

Committee on Appellate Practice
Mark M. Baker
Brafman & Associates, P.C.
767 Third Avenue, 26th Floor
New York, NY 10017
mmbcrimlaw@aol.com

Mark R. Dwyer
New York County District
Attorney's Office
One Hogan Place
New York, NY 10013-4311
dwyerm@dany.nyc.gov

Committee on Awards
Norman P. Effman
Attica Legal Aid Society
14 Main Street
Attica, NY 14011
attlegal@iinc.com

Committee on Capital Crimes
Barry I. Slotnick
Buchanan Ingersoll & Rooney PC
1 Chase Manhattan Plaza, 35th Floor
New York, NY 10005
slotnickbi@bipc.com

Committee on Comparative Law
Renee Feldman Singer
211-53 18th Avenue
Bayside, NY 11360-1529
rfsinger@aol.com

Committee on Continuing Legal Education
Paul J. Cambria, Jr.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202-3901
pcambria@lglaw.com

Hon. Mark H. Dadd
County Judge-Wyoming County
147 N. Main Street
Warsaw, NY 14569

Committee on Correctional System
Norman P. Effman
Attica Legal Aid Society
14 Main Street
Attica, NY 14011
attlegal@iinc.com

Committee on Defense
Jack S. Hoffinger
Hoffinger Stern & Ross, LLP
150 East 58th Street, 19th Floor
New York, NY 10155
sburris@hsrlaw.com

Committee on Drug Law and Policy
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007-3625
mnathanson@pipeline.com

Barry A. Weinstein
Goldstein & Weinstein
888 Grand Concourse
Bronx, NY 10451
bweinstein22@optonline.net

Committee on Ethics and Professional Responsibility
Lawrence S. Goldman
Law Offices of Lawrence S. Goldman
500 5th Avenue, 29th Floor
New York, NY 10110
lsg@lsgoldmanlaw.com

Hon. Leon B. Polsky
667 Madison Avenue
New York, NY 10021-8029
anopac1@aol.com

James H. Mellion
McCormack Damiani Lowe Mellion
499 Route 304
PO Box 1135
New City, NY 10956

Committee on Evidence
Hon. Edward M. Davidowitz
Supreme Court, Bronx County
851 Grand Concourse
Bronx, NY 10451
edavidow@courts.state.ny.us

John M. Castellano
Queens County DA's Office
125-01 Queens Blvd.
Kew Gardens, NY 11415-1505
jmcastellano@queensda.org

Committee on Federal Criminal Practice
H. Elliot Wales
52 Riverside Drive
New York, NY 10024-6501
elliotwales@aol.com

Robert P. Storch
US Attorneys Office
James T. Foley U.S. Courthouse
445 Broadway, Room 218
Albany, NY 12207-2924
robert.storch@usdoj.gov

Committee on Judiciary
Hon. Cheryl E. Chambers
New York State Supreme Court
of Kings County
Second Judicial District
320 Jay Street 25.49
Brooklyn, NY 11201
cchamber@courts.state.ny.us

Committee on Juvenile and Family Justice
Hon. John C. Rowley
Tompkins County Court
PO Box 70
Ithaca, NY 14851-0070
jrowley@courts.state.ny.us

Eric Warner
425 Riverside Drive
New York, NY 10025
warners5@aol.com

Committee on Legal Representation of Indigents in the Criminal Process
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007-3625
mnathanson@pipeline.com

David Werber
The Legal Aid Society
199 Water Street, 5th Floor
New York, NY 10038

Committee on Legislation
Hillel Joseph Hoffman
788 Columbus Avenue
New York, NY 10025
hillelhoffman@verizon.net

Committee on Membership
Marvin E. Schechter
152 West 57th Street, 24th Floor
New York, NY 10019
marvin@schelaw.com

Erin P. Gall
26 Briarwood Lane
New Hartford, NY 13413-2451

Committee on Nominating
Michael T. Kelly
Law Office of Michael T. Kelly
207 Admirals Walk
Buffalo, NY 14202
mkelly1005@aol.com

Roger B. Adler
225 Broadway, Suite 1804
New York, NY 10007
rbalaw1@verizon.net

Committee on Prosecution
John M. Ryan
Queens District Attorney
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmryan@queensda.org

Committee on Sentencing and Sentencing Alternatives
Susan M. Betzjitomir
507 Fish Hill Road
Beaver Dams, NY 14812
lawyer@betzjitomir.com

Ira D. London
Law Offices of Ira D. London
245 Fifth Avenue, Suite 1900
New York, NY 10016
iradlondon@aol.com

Committee on Traffic Safety
Peter Gerstenzang
Gerstenzang O'Hern Hickey & Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203
pgerstenz@aol.com

Rachel M. Kranitz
LoTempio & Brown, P.C.
181 Franklin Street
Buffalo, NY 14202
rkranitz@lotempioandbrown.com

Committee on Transition from Prison to Community
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007-3625
mnathanson@pipeline.com

Committee on Victims' Rights
James P. Subjack
2 West Main Street
Fredonia, NY 14063
jsubjack@netsync.net

NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

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

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Please return this application to:
Membership Department, New York State Bar Association,
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Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

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Spiros A. Tsimbinos
857 Cambridge Court
Dunedin, FL 34698
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Submitted articles must include a cover letter giving permission for publication in this *Newsletter.* We will assume your submission is for the exclusive use of this *Newsletter* unless you advise to the contrary in your letter. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief biography with their submissions.

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

Editorial Policy: The articles in this *Newsletter* represent the authors' viewpoints and research and not that of the *Newsletter* Editor or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

NEW YORK CRIMINAL LAW NEWSLETTER

Editor
Spiros A. Tsimbinos
857 Cambridge Court
Dunedin, FL 34698
(718) 849-3599

Section Officers

Chair
Jean T. Walsh
New York Stock Exchange, Inc.
Market Surveillance Division
20 Broad Street
New York, NY 10005
JWalsh@nyse.com

Vice-Chair
James P. Subjack
2 West Main Street
Fredonia, NY 14063
jsubjack@netsync.net

Secretary
Marvin E. Schechter
152 West 57th Street, 24th Floor
New York, NY 10019
marvin@schelaw.com

Treasurer
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007-3625
mnathanson@pipeline.com

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NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
One Elk Street, Albany, New York 12207-1002

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