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New York Criminal Law Newsletter

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NYSBA

Message from the Chair

It formerly was Associate Justice Sandra Day O'Connor, but the end of the Supreme Court's most recent term suggests that Justice Anthony Kennedy has emerged as the Supreme Court's crucial "swing vote"—not unlike Judge Albert Rosenblatt on the New York Court of Appeals. To get their vote is to occupy what the late Red Barber referred to as the "Cat Bird Seat."

That "Anthony and Albie" have emerged as key "players" on their respective courts in no way diminishes the enormous power and prestige of Chief Justice John Roberts and Chief Judge Judith S. Kaye. However, each "Chief" has recently faced dramatic internal challenges to their power and prestige, diminishing their ability to appropriately influence and to control the outcome of cases decided by their respective courts.

Thus, the Supreme Court's unwillingness to tacitly accept Bush Administration policy establishing military tribunals for detained enemy combatants housed in Guantanamo Bay, Cuba reflects a judiciary's unwillingness to accept the nature of armed hostilities as a sufficient reason to avoid applying a modicum of core due process. As we approach the new court term this October, it is clearly a court in transition with Chief Justice Roberts beginning his second full term in office and Associate Justice Alito beginning his first full term.

Closer to home, with Associate Judge George Bundy Smith's term drawing to a close, and Judge Rosenblatt's tenure ending on December 31st due to age, the Court of Appeals is likewise in transition. The recent trilogy of "depraved mind" murder cases has witnessed the Court's significant jurisprudential change in direction curtailing what many in the defense bar felt was an elastic use of the "depraved mind" murder statute to create an alternate basis for juries in murder cases to consider. For Chief Judge Kaye, this represents a court shift firmly toward the pristine clarity of Judge Rosenblatt's more focused view.

Finally, the 4-2 vote in the same-sex marriage case (*Hernandez v. Robles*, __ N.Y.3d __ [7/6/06]) found the Chief Judge on the "short end" of the decision. Her dissenting opinion was as well written as it was emotionally aspirational. However, Judge Robert Smith's ability to craft a narrow and legislatively deferential majority provides additional hints of emerging future collegial influence.

As we approach the November State elections, the winds of change are certainly blowing across the capital. Governor Pataki's departure at year's end leaves a judicial legacy likely to endure well beyond his term. His numerous appointments to the four Appellate Divisions have clearly staffed the courts with jurists likely to rule throughout our legal lifetimes. It is hoped, at least by this writer, that the next Governor will have a decidedly broader view on notions of judicial diversity, and look to appoint justices residing in the Judicial Districts located with the Appellate Division's geographic jurisdiction.

If nothing else, the costs of transporting judges from outside their home jurisdiction and providing them with lodging in New York City has added significant additional costs to the administration of appellate justice for what appears to some to be precious little more than partisan political expediency.

All things considered, the recognition that we live in an interesting time is surely true. The Section will endeavor to voice its views on matters of legislative policy and criminal justice administration. Indeed, we are presently analyzing the Report of the "Commission on the Future of Indigent Defense Services" (Kaye Commission) on which our own Justice Burton B. Roberts served as co-chair, and on which Larry Goldman, Esq. ably served as a commissioner, as well as the Report of the "Special Committee on Collateral Consequences of Criminal Proceedings" (Peter Sherwood, Chair). We will make our views known concerning these important reports later this fall.

Roger B. Adler

Message from the Editor

This issue presents several important feature articles which deal with a variety of interesting issues. First of all, the recent Supreme Court decisions further clarifying the extent of the *Crawford* decision as it relates to 911 conversations are discussed in great detail. Important new statements made by the New York Court of Appeals with respect to depraved indifference are discussed in a scholarly and detailed article by Peter Dunne.

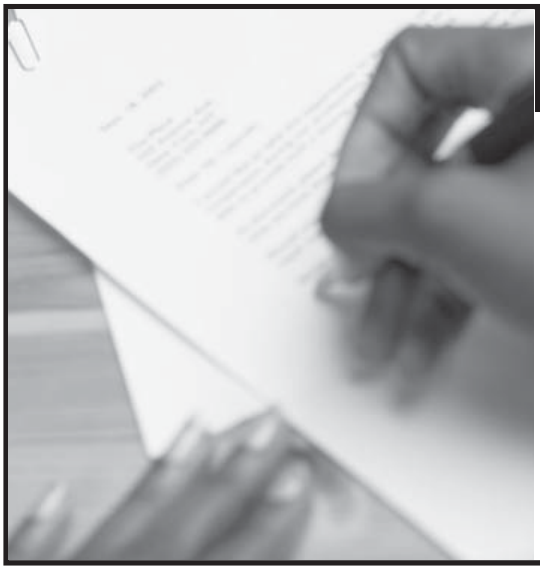
We are also pleased to present an interesting and very practical article dealing with motions to dismiss for facial insufficiency presented by Justice Seth L. Marvin and his summer intern from Cardozo School of Law. An interesting article on the new sentencing guidelines for steroid convictions is also presented by Rick Collins, a nationally recognized legal authority on the subject. Finally, a personal note is presented regarding my recent trip to the United States Supreme Court along with a photo selection indicating the highlights of my one-day adventure.

The United States Supreme Court during the last several months has presented a steady stream of very important decisions relating to the criminal law area as well as serious constitutional issues. Among these decisions have been cases involving search and seizure, the 6th Amendment right to select an attorney, the extent of Presidential authority in ordering military trials for war time detainees, and several other issues. These matters are discussed in detail in several case notes prepared by students at St. John's Law School.

In our For Your Information Section, we continue to provide interesting details on a variety of topics, including the passage of new criminal law legislation, both in New York and on the federal level, significant new crime statistics, and the fact that the nation now has a population of over 300 million people. Within our About Our Section feature, we highlight the recent elevation of our long-time executive committee member, Barry Kamins, to the Presidency of the New York City Bar Association. We also report on the findings and recommendations of the Committee on Collateral Consequences of Criminal Proceedings, which shortly will be pending before the House of Delegates.

This issue is one of our largest and I believe one of our best, covering a variety of interesting and important matters. I thank our members for their continued contribution of legal articles and their feedback regarding our *Newsletter*. We hope you enjoy this and future issues as we enter our fourth year of publication.

Spiros A. Tsimbinos



Request for Articles

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

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

The Impact of the *Crawford* Decision on the Admissibility of 911 Calls—Part II

By Spiros A. Tsimbinos

On June 19, 2006, the United States Supreme Court in a single opinion determining two cases clarified the question as to whether statements received in 911 calls or other initial statements made to police could be introduced at trial without violating a defendant's right to confrontation following its landmark decision in *Crawford v. United States*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

In *Davis v. Washington*, 126 S. Ct. 226 (2006), the Court unanimously held that a crime victim's emergency call to 911 can be introduced as evidence at trial even if the victim is not present for cross-examination. The opinion written by Justice Scalia, who wrote the majority opinion in *Crawford*, addressed the matter on the basis of whether a 911 call can be considered testimonial.

In *Davis*, the relevant statements in question had been made to a 911 emergency operator. The victim had a fight and argument with her former boyfriend and during the 911 call the victim had told the operator that the defendant had been using his fists and that he was jumping on her again. She subsequently gave her boyfriend's name in response to a question by the operator.

In *Davis,* the Supreme Court of Washington had permitted prosecutors to use the 911 call to convict the defendant boyfriend of violating a felony domestic protective order. At the time of the trial, the prosecutor was unable to locate the girlfriend and in the absence of the witness, the 911 call provided the vital evidence for the prosecution.

Judge Scalia wrote that such a call for help to 911 is not inherently "testimonial" because the caller is not acting as a witness. Justice Scalia observed that no witness goes to court to proclaim an emergency and seek help. Justice Scalia in the majority opinion specifically framed the holding of the case as follows at page 2273:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogations—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In comparing the *Davis* facts with the situation in *Crawford*, the Court emphasized that in *Davis*, the caller was speaking about events as they were actually happening rather than describing past events and was facing an ongoing emergency which the police were primarily concerned with at the time. Under these circumstances, the Court found that objectively considered, the interrogation that took place in the course of the Davis 911 call was not a testimonial statement.

Another interesting point made by the Supreme Court's majority opinion was that a 911 call such as in *Davis* could start out as being non-testimonial and therefore admissible but at some point in the conversation, the line could be crossed into the area of investigatory questioning. Thus, Justice Scalia specifically stated at page 2277:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N.E.2d at 457, once that purpose has been achieved.

Thus an important tip for practitioners is to carefully examine the full context of the statement and to ascertain whether at some point the statement can be viewed as having become testimonial and therefore at least partially excludable.

Interestingly, in rendering the majority opinion, Justice Scalia took note of the fact that some 20 amicus curie briefs on behalf of law enforcement and domestic violence organizations had been filed requesting greater flexibility in the use of testimonial statements. The Court, although rejecting the position that different types of cases could warrant different evidentiary rules, nevertheless pointed out that when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the 6th Amendment does not require the Courts to acquiesce and that improper acts by

a defendant could result in a forfeiture or a waiver of the constitutional right to confrontation. The Court further stated that any such claim could be the subject of a separate hearing within the state or federal courts.

To further illustrate the differing result when a statement is taken in the course of an emergency situation, such as in *Davis*, from the case where a statement is elicited through a process of interrogation with a view toward obtaining trial evidence, the Court then turned to the companion case of *Hammon v. Indiana,* 126 S. Ct. 2281 (2006).

In *Hammon v. Indiana*, police had responded to a report of a domestic disturbance and had found evidence of a physical struggle between the husband and his wife. The police interviewed Mrs. Hammon and subsequently had her sign a written statement in the form of an affidavit regarding the incident. They then arrested her husband and he was charged with domestic battery. Although the wife was subpoenaed for trial, she did not appear and the prosecution proceeded to have the officer who had interviewed her testify to what she had told him and also had the affidavit introduced into evidence as a present sense impression.

The Indiana Supreme Court rejected the defendant's argument that the statement should not have been admitted and upheld his conviction. The Supreme Court, however, in *Hammon* held that the prosecutors could not make use of the statements made during the police interview nor of the affidavit because they had occurred for the purpose of investigating a crime rather than responding to a developing emergency. Thus although the 911 emergency call in *Davis* did not qualify as being testimonial, the statement taken during the course of the police interrogation in *Hammon* was testimonial and was therefore inadmissible. The Court found that the situation in *Hammon* was not much different from the statements found to be testimonial in *Crawford*. It was entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct and there was no emergency in progress. The Court noted when the officer questioned the victim in *Hammon*, he was not seeking to determine what was happening, but rather what happened. "Objectively viewed, the primary if not indeed the sole purpose of the interrogation was to investigate a possible crime."

Although the Court's ruling in *Davis* was unanimous, Justice Thomas dissented in the *Hammon* decision. In doing so, Justice Thomas argued that excluding the *Hammon* statement extended the confrontation clause far beyond the abuses it was intended to prevent. Justice Thomas appeared troubled by the fact that the Court's adoption of a new objective standard of determining whether a police officer intended to render emergency assistance or whether he had wished to obtain investigatory material would continue a state of confusion and indecision in the prosecutorial community. Justice Thomas specifically stated on page 2280 of the decision:

> Today, a mere two years after the Court decided Crawford, it adopts an equally unpredictable test, under which district courts are charged with divining the "primary purpose" of police interrogations.

He further stated at page 2283:

> The Court's standard is not only disconnected from history and unnecessary to prevent abuse; it also yields no predictable results to police officers and prosecutors attempting to comply with the law.

Although he had concurred in the *Crawford* result, Justice Thomas in examining the situation in *Hammon* found that the statements taken were not testimonial because they had not involved a sufficiently formalized dialogue and there was no suggestion that the prosecution attempted to offer hearsay evidence in order to avoid confrontation. See page 2284.

In reviewing the context of the Supreme Court's analysis in *Davis v. Washington* and *Hammon v. Indiana*, it is clear that the New York courts basically anticipated the correct analysis to be followed in determining whether the contents of a 911 call or an initial statement made to police was testimonial under *Crawford* and therefore subject to exclusion. The Supreme Court's most recent analysis should clarify some of the confusion which may have previously existed, and while not answering all questions, has set forth certain parameters and avenues to be utilized and followed by both prosecutors and defense attorneys as well as trial courts when dealing with the issue of a *Crawford* question.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 38 years. He has authored many articles that have appeared in the *New York Law Journal*, the *New York State Bar Association Journal*, and is the editor of this *Newsletter*. He is a graduate of New York University School of Law.

The Current Status of Depraved Indifference

By Peter Dunne

In the Fall 2004 issue of this publication in my article entitled "Is There Life Left in Depraved Indifference Murder?" we examined the implications of *People v. Gonzalez*[1] on the homicide statutes. This article will examine subsequent events and explore remaining questions.

On January 25, 2000, Walter Gonzalez walked into a Rochester barber shop, whispered something into the ear of a patron, and quickly left. He soon returned, kicked in the door, pulled a gun from his waistband, and shot the victim in the chest. The victim fell to the floor, and Gonzalez shot him in the head. He then walked over to the victim and shot him eight more times in the back and the head. The defendant was charged with intentional murder and depraved indifference murder. The jury acquitted Gonzalez of intentional murder, but convicted him of depraved indifference murder and gun possession.

The Court of Appeals affirmed the Appellate Division's order dismissing the depraved indifference count. It held that under the facts of the case, there was no reasonable view of the evidence that the defendant was indifferent to the consequences of his actions, and therefore set aside the conviction for depraved indifference murder.

Hard on the heels of *Gonzalez*, the Court of Appeals decided *People v. Payne*.[2]

Kenneth Payne and the victim, Curtis Cook, had been friends for nearly twenty years. However, in March of 1998, Cook was accused of sexually abusing an eight year old girl who was a playmate of the defendant's daughter. On the night of April 27, 1998, the defendant was in a local bar and drank heavily. His girlfriend arrived at the bar to drive him home, and told him that Cook had telephoned her and complained about the defendant's dog. This apparently infuriated the defendant who went home and got a 12-gauge shotgun, which he referred to as an "elephant gun." He walked to Cook's home, began to argue with Cook at the door, and shot Cook in the chest at point-blank range.

Payne was charged with intentional murder and depraved indifference murder. The jury acquitted him of intentional murder and convicted him of depraved indifference murder.

The Court of Appeals set aside the conviction and dismissed the depraved indifference count. "This Court's recent holdings . . . have made it clear that depraved indifference murder may not be properly charged in the overwhelming majority of homicides that are prosecuted in New York."[3] The Court went on to state in categorical language, "The use of a weapon can never result in depraved indifference murder when, as here, there is a manifest intent to kill."[4]

The controversy in these two cases had two separate roots. First, in 1983, the Court in *People v. Register*[5] began to tinker with the *mens rea* element of depraved indifference murder. Manslaughter in the second degree is defined as conduct where a person recklessly engages in conduct which creates a *substantial and unjustifiable* risk of death to another. A person is guilty of depraved indifference murder when, *under circumstances evincing a depraved indifference to human life*, he recklessly engages in conduct which creates a *grave* risk of death to another person.

"[The Court of Appeals'] 'recent holdings . . . have made it clear that depraved indifference murder may not be properly charged in the overwhelming majority of homicides that are prosecuted in New York.'"

In *Register*, although it was settled law that voluntary intoxication was not a defense to a reckless crime, the defendant wished to present evidence of intoxication in an attempt to mitigate the additional requirement of acting under circumstances evincing a depraved indifference to human life. The Court disagreed. It decided that the *mens rea* for depraved indifference murder was the same as the *mens rea* for reckless manslaughter in manslaughter in the second degree. The difference between the two crimes was in the factual setting in which the risk-creating conduct occurred. "The focus of the offense is not upon the subjective intent of the defendant, as it is with intentional murder, but rather upon an objective assessment of the degree of risk presented by the defendant's reckless conduct."[6] The Court shifted the focus from the subjective evaluation of the defendant's state of mind to an objective view of the circumstances surrounding the defendant's conduct.

The second root of the crisis was the practice of local prosecutors to charge defendants with both intentional murder and depraved indifference murder. A jury would be instructed to first deliberate on intentional murder and to only deliberate on depraved indifference murder if they found the defendant not guilty of intentional murder. The Court of Appeals specifically stated that it feared that juries were viewing depraved indifference murder as

a lesser crime and compromising on what they viewed as a less serious crime perhaps carrying lesser punishment.[7]

In the *Gonzalez* Court's view, there was a danger that there was no longer any meaningful difference between depraved indifference murder and reckless manslaughter. To remedy this problem, the Court attempted to redefine the limits of depraved indifference murder and circumscribe the conduct which it encompasses. The Court therefore used the phrase, "The use of a weapon can never result in depraved indifference murder when, as here, there is a manifest intent to kill."[8] This phrase has proved to be a vexing problem. Whether there is a manifest intent to kill is not so readily apparent. The problem with categorical language such as this is that the infinite variety of human conduct is a maze of actions accompanied with an extensive palette of varying mental states.

"'A person acts with depraved indifference to human life when . . . his conduct . . . is so wanton, so deficient in moral sense and concern, so devoid of regard for the life or lives of others and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another.'"

The categorical language used in *Gonzalez* and *Payne* was not the only choice available to the Court. In the course of preparing this article, I retrieved and examined the official Criminal Jury Instructions for depraved indifference murder, beginning with the first edition dated 1979, through the revision in 1996, and the most recent revision dated April 9, 2006. The changes are informative.

The first instruction in 1979 begins by defining recklessness, and uses the slightly different degree of risk creation required for depraved indifference murder, i.e., "created a grave risk of death" as opposed to the "substantial risk of death." However, it then goes on to state that, "In addition, to constitute depraved murder, the circumstances surrounding the defendant's conduct must evince a depraved indifference to human life. Conduct evincing a depraved indifference to human life is much more serious and blameworthy than conduct which is merely reckless. It is this element of depravity which raises the degree of the crime to murder in the second degree and *which the law considers as blameworthy as intentional murder*. A person acts with depraved indifference to human life when, in the judgment of the jury, his conduct, beyond being reckless, is so wanton, so deficient in moral sense and concern, so devoid of regard for the life or lives of others and so blameworthy as to warrant the same criminal liability as *that which the law imposes upon a person who intentionally causes the death of another*."[9]

This charge specifically requires heightened depravity, and also contains the specific instruction that it is the equivalent of intentional murder.

The 1996 version changes this language; one would assume in response to *Register*. It begins similarly by defining recklessness, but then goes on to state, "Under our law, a crime committed recklessly is generally regarded as less serious and blameworthy than a crime committed intentionally. But when reckless conduct is engaged in under circumstances evincing a depraved indifference to human life, the law regards that conduct as so serious, so egregious, as to be the equivalent of intentional conduct," and proceeds to instruct the jury that the circumstances of the defendant's conduct should be viewed objectively, rather than looking into the heart of the defendant.[10]

This language seems much less strong in instructing the jury that depraved indifference murder is the equivalent of intentional murder.

Surely, one of the options open to the Court of Appeals in *Gonzalez* and *Payne* was to return to the very strong language of the original charge, and include a requirement that the conduct of the defendant must be viewed subjectively, and accompany it with explicit language that depraved indifference murder was the equivalent of intentional murder in terms of punishment.

There are commentators who have suggested that a reintroduction of a subjective element into depraved indifference murder should be rejected because it focuses on the overall moral character of the accused instead of the nature of the accused's conduct, and would lead to convictions by instinct, or worse, prejudice.[11] These fears could have been addressed in appropriate instructions to the jury rather than the categorical holding of *Gonzalez* and *Payne*.

So, in the view of the *Gonzalez* and *Payne* courts, what is depraved indifference murder? "[T]he reckless conduct must be so wanton, so deficient in moral sense of concern, so devoid of regard for the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another."[12] This language harkens back to the original jury instruction of 1979.

The reaction to *Gonzalez* and *Payne* on the Appellate Division level has not been consistent. One of the questions left open by *Gonzalez* and *Payne* was what if there was no manifest intent to kill? What if, instead, there was a manifest intent to cause serious physical injury? The Second Department addressed this question in *People v. Atkinson.*[13]

The deceased, Lloyd Clark, and his partner Earl Graham occasionally sold marijuana out of a grocery store in Queens. On December 21, 1992, Graham sold the defendant $4,000 worth of marijuana. Graham soon discovered that money was counterfeit, and demanded that the defendant either return the drugs or bring real money.

On January 19, 1993, the defendant called Clark in the store, and Clark told him "I don't want to hear it. Bring it back." A few minutes later, the defendant arrived at the store, accompanied by a group of men. After one of the men asked Clark why he had hung up on him, the defendant suddenly produced a gun, pointed it at the deceased, and said, "I heard you been telling people you were going to do me." The deceased replied, "that's not right, that ain't true." The defendant fired one shot at him from a distance of approximately four to five feet, striking him in the neck. Clark grabbed his neck, and attempted to run away. The defendant walked out of the store without firing another shot. Clark was brought to the hospital, and later died as a result of the gunshot wound to his neck.

The defendant was indicted for intentional murder, depraved indifference murder and other charges. At the request of the defendant, the trial court also submitted the lesser included offenses of manslaughter in the first degree, and manslaughter in the second degree. The jury acquitted the defendant of intentional murder and found him guilty of depraved indifference murder.

The Second Department began by concluding that the conduct of the defendant did not exhibit a manifest intent to kill. "A defendant may, for example, attack the victim, not with the intent to cause death, but with the intent to cause the victim serious physical injury. The defendant's conduct may nevertheless be such as to create a substantial and unjustifiable risk that the victim will not merely sustain serious physical injury, but will die." Stated otherwise, "a defendant could certainly intend one result—serious physical injury—while creating a substantial and unjustifiable risk that a different, more serious result—death—would ensue from his actions."[14]

The Appellate Division could have left it at that. It could have distinguished the case from *Gonzalez* and *Payne* by stating that there was no manifest intent to kill, and that therefore the conviction of depraved indifference murder was supported by the evidence. However, it went on to make two remarkable points. First, it entered the thorny legal question of whether a person can act both intentionally and recklessly.

Years earlier, in *People v. Gallagher*,[15] the Court of Appeals, in a surprise holding, established that intentional murder and depraved indifference murder must be submitted to the jury in the alternative. It stated, "[o]ne who acts intentionally . . . cannot at the same time act recklessly. . . . The act is either intended or not intended; it cannot simultaneously be both."[16]

However, the *Atkinson* Court felt that there are circumstances where a person can act with the intent to cause serious physical injury, such as shooting someone in the neck, and simultaneously act under circumstances evincing a depraved indifference to human life. "Plainly then a single homicidal act committed against one individual can, under certain circumstances constitute both an intentional crime and a reckless one, provided only that the intent harbored by the perpetrator is other than an intent to kill. Where however the defendant acts with the intent to kill the victim, he or she may not be convicted of any reckless crime, either reckless homicide or depraved indifference murder, in connection with the death."[17]

Secondly, the *Atkinson* court characterized a significant portion of the *Payne* decision as "*obiter dictum*." "We do not read *Payne* as standing for the broader proposition that, as a matter of law, a shooting that results in death may never support a finding that the death was caused with heightened recklessness rather than with an intent to kill."[18]

Immediately after *Atkinson*, the Court of Appeals again entered the fray with *People v. Suarez*.[19] *Suarez* consisted of two cases involving stabbing. In the first, Santos Suarez stabbed his girlfriend three times; once in the throat, once in the chest and once in the abdomen. He fled the scene without summoning assistance, and his girlfriend bled to death. Upon his arrest, Suarez stated that he and his girlfriend had an argument, during which she lunged at him with a knife, scratching him. He became outraged and lunged at her, and cut her neck. He could not remember what happened next, and at trial he testified that he never intended to kill her.

In the second case, Trisha McPherson had an argument with the father of her child. The victim raised his hand to strike her, and the defendant pulled a knife out of her purse and stabbed him once in the chest. She called 911 and requested an ambulance and left the scene before it arrived. The boyfriend died from the knife wound.

Both defendants were charged with both intentional murder and depraved indifference murder. Both were acquitted of intentional murder and convicted of depraved indifference murder. The only apparent difference between the two cases was that Suarez left without calling for help and McPherson called an ambulance.

In both cases, the People pointed to this distinction in their arguments that the conduct represented depraved indifference murder. In *Suarez*, the People argued that leaving the scene without calling for assistance evinced a depraved indifference to human life, and in McPherson the People argued that calling for the ambulance evinced a depraved indifference to human life because it showed that the defendant knew how serious the wound was.

The Court rejected the factor. It concluded that the actions of both defendants manifested an intent to cause serious physical injury, and explicitly rejected the notion that an intent to cause serious physical injury could co-exist with depraved indifference murder. "[S]omeone who intends to cause serious physical injury does not commit depraved indifference murder because the intended victim dies."[20]

The Court again attempted to illustrate the types of acts which it considers to constitute depraved indifference murder: pushing a robbery victim out of a car in the freezing cold without shoes; pushing a young boy who cannot swim into the water; "torture or brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim;" wanton cruelty, brutality or callousness, as exhibited by the boy who played "Polish roulette" with a shotgun.[21]

The Court stated that "circumstances evincing a depraved indifference to human life" constitutes "an additional requirement of the crime—beyond mere recklessness and risk—which in turn comprises both depravity and indifference."[22]

The last vestiges of *Register* were obliterated by *People v. Feingold*.[23]

An attorney named Larry Feingold attempted suicide in 2003. He sealed his apartment door with tape, blew out the pilot lights of his stove, turned on the gas, took tranquilizers, and fell asleep in front of the stove. The subsequent explosion wrecked the walls of his apartment and heavily damaged a number of neighboring apartments. Miraculously, no one else was seriously injured and the defendant survived. He was charged with reckless endangerment in the first degree, which uses the same *mens rea* requirement as depraved indifference murder.

At his non-jury trial, the trial court stated that "this defendant was a plainly depressed individual, who committed an extremely foolish act not because of his lack of regard for the lives of others but because of his focus upon his troubles and himself. . . . While being reckless, the defendant's state of mind was not one of extreme wickedness, or abject moral deficiency, or a mischievous disregard for the near certain consequences of his irresponsible act."[24] However, despite the lack of a subjective depravity, from an objective point of view, the trial court concluded that his actions constituted depraved indifference to human life. Therefore, *Register* compelled the trial court to find the defendant guilty of reckless endangerment in the first degree.

A sharply divided Court of Appeals voted 4-3 to reverse the conviction. It felt that if the defendant had just been found guilty of reckless endangerment in the first degree, it could have merely affirmed the conviction. However, the statements of the trial court compelled reversal and in doing so, explicitly overruled *Register*. "We say today explicitly . . . depraved indifference to human life is a culpable mental state."[25]

On July 5, 2006, the Court of Appeals reversed *Atkinson* by stating, "Defendant did not commit depraved indifference murder within the meaning of the statute."[26] However, it did not dismiss the indictment. It reduced the defendant's conviction to manslaughter in the second degree, and stated, "The facts are sufficiently different from *Payne* to enable a jury to reasonably conclude that defendant's actions, although not depraved, were reckless. Among other evidence, testimony at trial could have led a rational jury to infer that the victim moved into a shot that was intended only to scare him."[27]

So what is now the state of the law of depraved indifference murder?

Substantively, depraved indifference is now a separate element of the crime which must be proved. The element must be evaluated from a subjective viewpoint; i.e., from the viewpoint of the defendant. The circumstances under which it should be charged are limited.

Procedurally, indictments should rarely contain both intentional murder and depraved indifference murder. The Court of Appeals has not indicated that there are any circumstances where both theories may be submitted to a jury in the alternative. The Court has further suggested that trial courts take an aggressive approach to dismissing one theory when confronted by an indictment which contains both.

There are a number of interesting issues remaining to be resolved.

Retroactivity. What effect will these decisions have on the numerous defendants who have been convicted of depraved indifference murder, and whose appeals were decided before this line of cases? The Court stated that "We expect or at least hope, that the rule embodied in this and our other recent decisions will be applied prospectively."[28] However, in another case that addressed retroactivity, the Court stated that, "A rule that is determinative of whether a particular accused has actually committed the crime charged is fully retroactive."[29] It would appear that the extensive revision to the substantive law of depraved indifference would be a rule change which is determinative of whether a particular accused has actually committed a crime.

Preservation of appeal. Does a defense attorney waive his right to appeal a conviction of depraved indifference murder by requesting the lesser included offense of manslaughter in the second degree? The best trial strategy is often to request this lesser included offense. However, it has been held that by requesting this lesser offense, the defendant waives his right to appeal on *Gonzalez* grounds.[30] This question was left open by the Court of Appeals in *Atkinson*.

Lastly, I would like to identify some issues for prosecutors, defense counsel, and courts to be aware of in homicide prosecutions.

Prosecutors should be extremely wary of continuing to indict defendants for both intentional murder and depraved indifference murder. If there is one continuous thread throughout these cases, it is that such indictments should be rare. However, this can be a good thing. By making a choice very early on in the prosecution of the defendant, the theory of the case can be sharpened to a razor's edge. Those factors which point to intent or those factors which point to the subjective *mens rea* of the defendant can be developed.

"Prosecutors should be extremely wary of continuing to indict defendants for both intentional murder and depraved indifference murder. If there is one continuous thread throughout these cases, it is that such indictments should be rare."

Defense counsel who are faced with a dual indictment must move to dismiss one of the counts in the omnibus motion specifically citing this line of cases. If that motion is denied, the motion should again be made before the trial starts. Extreme care must be taken, if both of these motions are denied, in the decision to request lesser included offenses, for fear that the issue will be waived.

Courts should be aware that the Court of Appeals has now appointed them "gatekeepers," and has encouraged them to appropriately dismiss one or the other theories upon a motion to dismiss.[31] Lastly, if the Court submits to the jury a count of depraved indifference, it must be sure to remove the objective language in the charge as it now exists, and substitute the old language requiring the jury to evaluate the depraved indifference requirement from the viewpoint of the defendant.

The editor of this publication hoped that this article would be the end of this issue. The Court of Appeals has struggled with this issue since *Register* and has been single-minded in restoring the legal distinction between intentional murder and depraved indifference murder. However, the nasty habits of human beings to act in unforeseen ways makes categorical rules difficult to apply. "There are more things in heaven and earth than are dreamt of in your philosophy." I have the feeling we will be meeting again in this space to discuss further developments in the future.

Endnotes

1. 1 N.Y.3d 464, 775 N.Y.S.2d 224, 807 N.E.2d 273.
2. 3 N.Y.3d 266, 786 N.Y.S.2d 116, 819 N.E.2d 634.
3. *Id.* at 270.
4. *Id.* at 271.
5. 60 N.Y.2d 270, 469 N.Y.S.2d 599, 457 N.E.2d 704.
6. *Id.* at 277.
7. See Justice Rosenblatt's dissent in *People v. Sanchez*, 98 N.Y.2d 373, at 402, 748 N.Y.S.2d 312, 777 N.E.2d 204.
8. *Payne*, *supra*, at 271.
9. CJI P.L. 125.25(2) (1979) (emphasis supplied).
10. CJI 2 P.L. 125.25(2) (July 1, 1996).
11. *See, e.g.*, Abramovsky & Edelstein, Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification, 55 Syracuse L. Rev. 455, 488.
12. *Gonzalez*, *supra*, at 469.
13. 21 A.D.3d 145, 799 N.Y.S.2d 125.
14. *Id.* at 151.
15. 69 N.Y.2d 525, 516 N.Y.S.2d 174, 508 N.E.2d 909.
16. *Id*. at 529.
17. *Atkinson*, *supra*, at 152.
18. *Id.* at 156.
19. 6 N.Y.3d 202, 811 N.Y.S.2d 267, 844 N.E.2d 721.
20. *Id.* at 211.
21. *Id.* at 212-213.
22. *Id.* at 214.
23. 2006 N.Y. Slip Op. 5233.
24. *Id*. at 7.
25. *Id.* at 5.
26. *People v. Atkinson*, 2006 N.Y. Slip Op. 5234, at 1.
27. *Id.* at 2.
28. *Suarez*, *supra*, at 217.
29. *People v. Pepper*, 53 N.Y.2d 213, 221, 440 N.Y.S.2d 889, 423 N.E.2d 366.
30. *See, e.g., Sanchez, supra*, at 378; *Atkinson, supra*, at 155.
31. *Suarez, supra*, at 215.

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Pumping Up the War on Steroids

By Rick Collins

In February 2004 the nation's top lawman, Attorney General John Ashcroft, arranged a press conference and announced the steroid-related indictment of four men in San Francisco. The investigation which preceded and the media circus which followed, all targeting a company known as BALCO (Bay Area Lab Co-Operative) and the elite athletes who were its clients, led to the most notorious doping scandal in recent American history. It also fueled Congressional hearings and even prompted President Bush to dedicate part of his 2004 State of the Union Address to a denunciation of anabolic steroids in sports. That was just the beginning.

The New Steroid Law

In addition to providing sports journalists with endless opportunities for sermonizing, the BALCO scandal spurred the passage of new federal anti-steroid legislation, which was signed into law on October 22, 2004, and took effect ninety days later.[1] The Anabolic Steroid Control Act of 2004 simplifies the requisite elements of an anabolic steroid, greatly expands the steroidal substances listed under the law, and corrects some of the poor draftsmanship of the original 1990 anti-steroid law. However, the new law presents issues of interpretation, and it remains to be seen how law enforcement officers, prosecutors and judges will make determinations as to which substances, such as steroidal ingredients in dietary supplements, remain legal and which do not. Furthermore, the effectiveness of the criminal justice system in combating sports doping is open to question, and law reviewers have been generally critical of the criminalization approach to non-medical steroid use and its militaristic enforcement.[2]

The New Steroid Sentencing Guidelines

In federal criminal cases, the United States Sentencing Guidelines advise courts as to issues of punishment.[3] A Sentencing Table sets forth the potential months of imprisonment for each offense level, as determined by applying the "offense level" to the past criminal conduct of the accused. The quantities of controlled substances determine the offense level.[4] Congress designated steroids as Schedule III controlled substances, which are generally quantified in a manner such that one "unit" of a Schedule III drug is defined as one pill, capsule or, tablet, and one unit of a substance which is in liquid form means one-half (0.5) ml.[5] However, in creating the original guidelines for anabolic steroids in 1991, the U.S. Sentencing Commission acknowledged distinctions between steroids and other Schedule III drugs, providing a "steroid discount" in which one unit was defined as a 10 cc vial of injectable steroids or fifty oral tablets.[6]

As part of the Anabolic Steroid Control Act of 2004, Congress directed the U.S. Sentencing Commission to consider amending the federal guidelines to increase the penalties for steroid offenses "in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use. . . . "[7] The Department of Justice urged the Commission to do just that, advocating that steroids be calculated just like any other Schedule III drug.[8] Defense lawyers urged otherwise, citing differences between the patterns and characteristics of steroid use as compared to other Schedule III drugs.[9]

On April 5th, the U.S. Sentencing Commission voted to promulgate as permanent the "emergency" amendments to the federal anabolic steroid sentencing guidelines, which had taken effect on March 27, 2006.[10] Henceforth, injectable and oral steroids will be quantified for punishment in a 1:1 ratio to other Schedule III drugs, resulting in a *twenty-fold* measurement increase for injectable steroid units and a *fifty-fold* increase for oral steroid units. One "unit" of an oral steroid is now one pill, tablet or capsule. One unit of a liquid steroid is now 0.5ml. Steroids in other forms ("e.g., patch, topical cream, aerosol") will be reasonably estimated based on a consideration of 25 mg as one unit. Additionally, sentencing enhancements will apply in cases involving distribution to "athletes" or where coaches use their positions to influence athletes to use steroids, as well as in cases involving "masking agents." The new 1:1 ratio nonetheless ignores fundamental differences between steroid usage and volume patterns as compared to other Schedule III drugs.[11] Other problems with the amendments include the lack of any reference to potency in oral or injectable steroids, potentially leading to black market adaptations to circumvent the amendment (e.g., the creation of high potency "mega-pills"), as well as the lack of any knowledge requirement involving distribution (e.g., via the Internet) to unidentified customers who may turn out to be athletes.

The Impact for Practitioners

The reasonably anticipated effect of the new law and increased punishments will be an increase in steroid pros-

ecutions and investigations. Scott Burns, a deputy director of the White House Office of National Drug Control Policy, has already declared that senior law enforcement officials have now "made the trafficking of steroids a priority."[12]

Indeed, steroid operations have already started. DEA announced last December the arrests of individuals involved with eight "major steroid manufacturing companies" as part of what DEA claims is "the largest steroid enforcement operation in U.S. history."[13] DEA special agent Doug Coleman stated: "Because this is the biggest one we've ever done—we went after the manufacturers as well as the distributors, all the way down to the retail buyers— we're hoping it's going to have a significant impact on the market."[14]

Although DEA appears to be stepping up its efforts, it is likely that the Office of the Postal Inspector and the Department of Homeland Security will be even more aggressive. The Internet has become a primary vehicle for buying and selling steroids illegally, permitting American consumers to order online, usually from foreign sources, and have the drugs delivered by international mail or express carrier.[15] Indeed, these agencies have already been the primary enforcement agencies involving steroids.[16] Given the increase in punishments, including a new enhancement that applies to distribution of any controlled substances over the Internet,[17] U.S. Attorneys may be much more interested in pursuing these cases.

Most of the Capitol Hill rhetoric igniting anti-steroid legislation has focused on cheating athletes and the poor example they set for America's youth. However, in the fifteen years since steroids were placed under the federal Controlled Substances Act, it is difficult to name a single professional or elite level athlete who went to jail as a steroid offender, although use within sports, such as baseball, seems to have risen. Historically, most steroid arrests have been of personal users, and under the new escalation we are likely to see more, perhaps much more, of the same.

Endnotes

1. Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, 118 Stat. 1661 (2004) (codified as amended at 21 U.S.C. §§ 801, 802, 811 (2004)).
2. *See*, Jeffrey Black, *The Anabolic Steroids Control Act of 1990: A Need for Change*, 97 Dick. L. Rev. 131 (1992); John Burge, *Legalize and Regulate: A Prescription for Reforming Anabolic Steroid Legislation*, 15 Loy. L.A. Ent. L.J., 33, 45 (1994); Jeffrey Hedges, *The Anabolic Steroids Act: Bad Medicine for the Elderly*, 5 Elder L.J., 293 (1997); Rick Collins, *Anabolic Steroid Legislation: The Wrong Prescription?*, 9 NYSBA Crim. Just J. 2 (Summer 2001); Philip J. Sweitzer, *Drug Law Enforcement in Crisis: Cops on Steroids*, 2 DePaul J. Sports L. Contemp. Probs., at page 229; Rick Collins, Legal Muscle: Anabolics in America (Legal Muscle Publishing, 2002), available http://www.legalmusclebooks.com.
3. *See* http://www.ussc.gov. *See also*, *U.S. v. Booker*, 543 U.S. 220 (2005).
4. USSG § 2D1.1(c).
5. USSG § 2D1.1 (Note F, Drug Quantity Table).
6. USSG § 2D1.1 (Note G, Drug Quantity Table). All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).
7. *Supra*, note 1 at § 3.
8. *See*, Prepared Testimony of Robert G. McCampbell, U.S. Attorney, Western District of Oklahoma, Chair, Attorney General's Advisory Subcommittee on Sentencing before the United States Sentencing Commission, April 12, 2005, available at http://www.ussc.gov/hearings/04_12_05/McCampbell.pdf; Transcript of Testimony of Robert G. McCampbell, April 12, 2005, available at: http://www.ussc.gov/hearings/04_12_05/Trans_0412.pdf.
9. *See*, Prepared Testimony of Rick Collins before the United States Sentencing Commission, April 12, 2005, available at: http://www.ussc.gov/hearings/04_12_05/Collins.pdf; Transcript of Testimony of Rick Collins, April 12, 2005, available at http://www.ussc.gov/hearings/04_12_05/Trans_0412.pdf.
10. *See* News Release, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids, April 11, 2006 (announcing April 5 vote), available at http://www.ussc.gov/PRESS/rel0406.htm. *See also* United States Sentencing Commission *Supplement to the 2005 Guidelines Manual*, March 27, 2006, available at http://www.ussc.gov/2005guid/GLMSupplement-032706.pdf; U.S. Sentencing Commission Steroids Working Group, *2006 Steroids Report*, March 2006, available at http://www.ussc.gov/USSCsteroidsreport-0306.pdf.
11. *See supra*, note 9.
12. George Dohrmann and Luis Fernando Llosa, *The Mexican Connection: Special Report on Steroid Trafficking*, Sports Illustrated, April 24, 2006, at 68.
13. *See* Press Release, U.S. Drug Enforcement Admin., *DEA Leads Largest Steroid Bust in History*, December 15, 2005, available at http://www.dea.gov/pubs/pressrel/pr121505.html.
14. Kelly Whiteside and Dick Patrick, *DEA makes largest-ever steroid-related arrests*, USA Today, December 15, 2005, available at http://www.usatoday.com/sports/2005-12-15-dea-steroid-arrests_x.htm (accessed April 25, 2006).
15. GAO Report #GAO-06-243R, *Anabolic Steroids are Easily Purchased Without a Prescription and Present Significant Challenges to Law Enforcement Officials,* November 3, 2005, at 6, available at: http://www.usatoday.com/sports/2005-12-15-dea-steroid-arrests_x.htm *See also*, Collins, *supra* note 2.
16. Collins, *supra* note 2. *See also* Richard D. Collins, *Drugs and the Body Beautiful: A Guide to Defending Anabolic Steroid Cases,* 26 CHAMPION 12, March 2002, at 12.
17. USSG, § 2D1.1(b)(5), 18 U.S.C.A. (supp. to the 2005 Guidelines Manual, March 27, 2006).

Rick Collins, a founding partner of Collins, McDonald & Gann (www.cmgesq.com) in Carle Place, is a nationally recognized legal authority on performance-enhancing drugs and supplements. He has testified before the U.S. Sentencing Commission on behalf of the National Association of Criminal Defense Lawyers and has written and lectured extensively on the topic.

The Incredibly Shrinking Motion to Dismiss for Facial Insufficiency on Hearsay Grounds in the Local Criminal Court

By Honorable Seth L. Marvin and Brian S. Baum

In the six years since the Court of Appeals decided *People v. Casey*, the ability of a local Criminal Court to dismiss an information on sufficiency grounds has been reduced significantly. The *Casey* Court's " . . . fair and not overly restrictive or technical reading [of pleadings]" standard for determining an information's facial sufficiency has become the basis of a number of appellate rulings limiting the grounds upon which a local Criminal Court can dismiss a complaint for the insufficiency of non-hearsay allegations.[1]

Under CPL § 170.35, a local Criminal Court is authorized to dismiss an information for facial insufficiency when the information fails to meet the requirements of CPL § 100.40.[2] Subdivision(1)(c) of § 100.40, in turn requires that, "Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof[.]"

In *People v. Alejandro*, the Court of Appeals ruled that under CPL § 100.40, ". . . an information must, for jurisdictional purposes, contain nonhearsay factual allegations sufficient to establish a prima facie case . . . "[3] Noting that the information served a unique function because it was the, ". . . sole instrument upon which the defendant could be prosecuted"[4]—the Court held that an information based upon hearsay evidence is inadequate under the statute, rendering it jurisdictionally defective.[5]

In *Casey*, however, the Court of Appeals determined that ". . . *Alejandro*'s *suggestion* that the . . . non-hearsay requirement of CPL § 100.40(1)(c) was 'jurisdictional' and, thus, non-waivable and reviewable on appeal without preservation was not essential to the Court's holding."[6] In thus limiting the reach of *Alejandro*, the *Casey* Court held that hearsay defects in accusatory instruments are non-jurisdictional, and considered waived if not raised at the trial level.[7]

At the same time, the *Casey* decision narrowed the grounds upon which a trial court could find such defects. In finding that other provisions of the Criminal Procedure Law related to § 100.40(1)(c), " . . . show[ed] an intent to relax the pleading requirements of prior statutory and decisional law[,]"[8] the Court in *Casey* justified the loosening of its holding in *Alejandro*, concluding that:

> So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a *fair and not overly technical reading*[.][9]

In the six years since *Casey* was decided, there have been 60 reported Appellate Term decisions stemming from appeals over trial court rulings as to the sufficiency of informations. Of those 60 decisions, 19—nearly one-third— resulted in the Appellate Term reversing trial court judgments as to the insufficiency of an information.[10] Sixteen of the reversals resulted in the reinstatement of a dismissed information.[11]

Additionally, the Court of Appeals has twice reversed Appellate Term decisions dismissing informations for insufficiency, holding both times that the hearsay allegations, if true, were sufficient to meet the information requirements contained in the Criminal Procedure Law.[12] The Court of Appeals has further affirmed the "fair and not overly technical reading" standard in several subsequent decisions.[13]

Indeed, in a post-*Casey* case, *People v. Konieczny*, a unanimous Court of Appeals stated that, "Under *Casey* it is evident that an accusatory instrument must be given a reasonable, not overly technical reading and this Court will not rely on external factors to create jurisdictional defects not evident from the face of the document."[14] It, therefore, appears that *Casey* and its progeny may present a formidable obstacle in the context of a motion in a local criminal court to dismiss a misdemeanor information as legally insufficient on hearsay grounds.

Endnotes

1. 95 N.Y.2d 354, 360 (2000).
2. "An information . . . is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when: (a) It is not sufficient on its face pursuant to the requirements of section 100.40[.]" CPL § 170.35 (1).
3. 70 N.Y.2d 133, 138 (1987).
4. *Id*. at 138.
5. *Id*.; *see also In re Gerald R.M.*, 12 A.D.3d 1192 (4th Dep't 2004).
6. 95 N.Y.2d at 362 (emphasis added).
7. *Id*. at 360; *see People v. Konieczny*, 2 N.Y.3d 569, 575 (2004).
8. *Id*. at 364; *e.g.*, CPL § 120.20(1) (as to misdemeanor complaints including hearsay).

9. *Id*. at 360 (emphasis added).

10. *People v. McConnell*, 11 Misc. 3d 57 (App. Term, 2d Dep't 2006); *People v. Turpin*, 8 Misc. 3d 128A (App. Term, 2d Dep't 2005); *People v. Prevete*, 10 Misc. 3d 78 (App. Term, 2d Dep't 2005); *People v. Lynch*, 8 Misc. 3d 126A (App. Term, 1st Dep't), *lv. denied*, 5 N.Y.3d 807 (2005); *People v. Schmidt*, 7 Misc. 3d 128A (App. Term, 2d Dep't 2005); *People v. Lopatin*, 6 Misc. 3d 131A (App. Term, 1st Dep't), *lv. denied*, 4 N.Y.3d 888 (2005); *People v. Alexander*, 4 Misc. 3d 133A (App. Term, 2d Dep't), *lv. denied*, 3 N.Y.3d 703 (2004); *People v. Zhou Yu*, 4 Misc. 3d 128A (App. Term, 1st Dep't), *lv. denied*, 3 N.Y.3d 713 (2004); *People v. Gordon*, 3 Misc. 3d 128A (App. Term, 1st Dep't 2004); *People v. Caravousanos*, 2 Misc. 3d 137A (App. Term, 2d Dep't 2004); *People v. Guan*, 2003 N.Y. Slip Op. 50878U (App. Term, 1st Dep't 2003); *People v. Kessman Brothers*, 2002 N.Y. Slip Op. 50653U (App. Term, 1st Dep't 2002); *People v. King*, 2002 N.Y. Slip Op. 50654U (App. Term, 1st Dep't. 2002); *People v. 260 Brooke Ave. Realty Corp.*, 2002 N.Y. Slip Op. 50435U (App. Term, 1st Dep't 2002); *People v. Aquino*, 2002 N.Y. Slip Op. 50223U (App. Term, 1st Dep't 2002); *People v. Davis*, 2001 N.Y. Slip Op. 40558U (App. Term, 1st Dep't. 2001); *People v. Holder*, 2001 N.Y. Slip Op. 40559U (App. Term, 1st Dep't 2001); *People v. Grabinski*, 189 Misc. 2d 307 (App. Term, 2d Dep't), *lv. denied*, 96 N.Y.2d 939 (2001); *People v. Brooks*, 189 Misc. 2d 247 (App. Term, 1st Dep't 2001).

11. *Those reversed for the defendant were* 2002 N.Y. Slip Op. 50653U; 2002 N.Y. Slip Op.; and 189 Misc. 2d 307.

12. *People v. Inserra*, 4 N.Y.3d 30, 33 (2004); *People v. Pittman*, 2003 N.Y. Slip Op. 51182U (4th Dep't 2003) (remittitur from the Court of Appeals following *People v. Keizer*, 100 N.Y.2d 114 (2003)).

13. *People v. Baumann & Sons Buses, Inc*., 6 N.Y.3d 404 (2006); *People v. Thomas*, 4 N.Y.3d 143 (2005); *In re Michael M.*, 3 N.Y.3d 441 (2004); *People v. Keize*r, 100 N.Y.2d at 114.

14. 2 N.Y.3d at 576.

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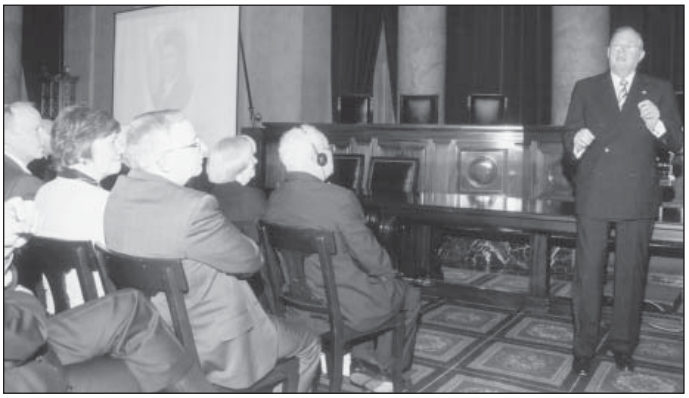
My Day at the United States Supreme Court

By Spiros A. Tsimbinos

On Monday June 5, 2006, I had the unique and wonderful opportunity to attend a series of events held at the United States Supreme Court in Washington, D.C. The day-long series of activities were sponsored by the Supreme Court Historical Society, which was founded in 1974 and which since that time has promoted a variety of events to promote the historic interest in and an appreciation of the workings of our nation's highest court.

Chief Justice Roberts presents an award to Michael Cooper of Sullivan & Cromwell LLP for his services to the Supreme Court Historical Society during afternoon awards program

Before participating in the scheduled list of activities, I decided to visit the Court early in the morning and check with the clerk's office on the status of two cases involving a criminal law issue which I was interested in. I was informed that decisions would be issued at 10 a.m. and after waiting for a few minutes, I



Justice Kennedy presenting his John Marshall Lecture in the courtroom

was told that the matter I had been interested in had not yet been decided but that a decision on another criminal law issue had been rendered. I was then handed a copy of a decision in *Zedner v. United States* involving the Federal Speedy Trial Act and I felt privileged to be one of the first attorneys to receive an important Supreme Court decision literally hot off the press. At the Clerk's Office I found the most courteous and efficient personnel who went out of their way to render assistance and whose conduct and decorum were the epitome of the high standards of the Court.

The day began with a 2 p.m. lecture by Associate Justice Anthony M. Kennedy on the "Legacy of Chief Justice John Marshall." The main point of Justice Kennedy's 45-minute lecture was that much of the thought and reasoning which permeated many of Marshall's historic decisions, including *Marbury v. Madison*, stem from his earlier views and experiences gained from various governmental positions held prior to his ascendancy to the Supreme Court bench. The lecture was held in the Supreme Court Chamber and was attended by approximately 125 judges and attorneys from throughout the country. Also in attendance at the lecture were Chief Justice Roberts and Associate Justices Ginsberg and Breyer.

Following the lecture, groups of 10 to 12 were given a royal tour of some of the historical rooms and areas within the Supreme Court building. The Justices' dining room is beautifully furnished with 17th and 18th century pieces and contains many historical items. A view from the Court's world famous "spiral staircase" is inspiring and commensurate with the majesty of the court surroundings. A review of the east and west conference rooms with their displays of portraits of the various Chief Justices was also an impressive site.

After resting for a few hours and then getting dressed up in my tuxedo, I attended the evening's highlights, a lavish cocktail reception and a wonderful dinner within the Supreme Court rotunda. The cocktail reception was held in the east and west conference rooms and in the adjoining garden area. Beautiful chamber music was provided by members of the Air Force band. During the cocktail reception, several Justices of the Supreme Court mingled with the approximately 200 attorneys and judges who attended the event. I personally had the pleasure of meeting and speaking briefly with Chief Justice Roberts and Associate Justices Scalia and Thomas. Also in attendance at the cocktail reception were Associate Justices Gingsburg, Breyer, and Kennedy.

Guests begin to arrive at cocktail reception

As attorneys we are trained to be in awe of the august figures who assume a seat on the United States Supreme Court. But that evening, I was introduced to very warm and gracious human beings who went out of their way to see that we felt very welcomed in the Supreme Court.

At 8 p.m., following the cocktail reception, we were served a lavish and elegant dinner and were presented with a personalized dinner menu bearing the seal of the Court. In commencing the dinner, Chief Justice Roberts made a traditional toast to the President of the United States in keeping with the courtesy and respect which each branch of government has for the other. During the dinner, entertainment was also provided by a navy chorus known as the Sea Chanters. They magnificently performed many of the standard favorites, including "Danny Boy" and "Anchors Aweigh." They concluded their performance to thunderous applause of a most appreciative audience.

Members of Air Force Band play during reception in east and west conference rooms

This year's dinner was the 31st Annual Dinner held by the Historical Society. During my trip to Washington, I had the occasion to visit the Society's headquarters located very close to the Supreme Court. The Society's Director, Mr. David Pride, graciously provided me with a tour of the headquarters and gave me some important information regarding the society and its activities. The Supreme Court Historical Society currently has 5,506 members scattered throughout the United States. Currently, New York has 447 members. The Society was formed at the behest of former Chief Justice Warren E. Burger who felt it important to establish an institution that could document and preserve the history of the Court. In announcing the formation of the Historical Society, Chief Justice Burger in 1974 remarked:

> "Much of the history of the Supreme Court can be found in memorabilia, art, and documents that have gathered dust for too long in storerooms and attics. Some have been lost forever, because of carelessness, or neglect, or the failure to appreciate their worth, or the absence of any plan to preserve them. I am confident that the Society will reverse that trend and will acquire significant materials and preserve them for future generations. Equally important, it will encourage research on all aspects of the Court and on the rich and varied traditions and personalities that are part of its history."

In speaking with Mr. Pride, I also learned of a unique and extremely valuable educational program which the Historical Society conducts on an annual basis. Each year, some 60 high school teachers come to Washington D.C. and participate in a five-day program at the Georgetown Law Center where they receive instructions on the workings of the Supreme Court and other law-related topics. These teachers then become the focal point of instruction to high school students throughout the country. Interestingly, Chief Justice Roberts for many years was a participant in this educational program.

Members of Navy chorus, the "Sea Chanters," perform at the dinner

Being greeted by David T. Pride, Executive Director of the Supreme Court Historical Society, at its Washington, D.C. headquarters

The fees for membership in the Historical Society run from a $50 stipend for regular membership to $5,000 or more for a life membership. Those wishing to obtain more information regarding the Historical Society can contact the Director of Membership, Orazio F. Miceli, at the Society Address 224 E. Capital Street, NE Washington DC 20003 or can call 202-543-0400.

My trip to the United States Supreme Court can be categorized as a lifetime event. As an attorney, one cannot help but have a special feeling when you step into the highest court of our nation with its rich history and its enormous power and influence which affects our daily lives. I truly had a great day.

New York Court of Appeals Review

Discussed below are significant decisions in the field of Criminal Law issued by the New York Court of Appeals from May 9, 2006 to September 6, 2006.

EXPERT TESTIMONY REGARDING IDENTIFICATION

***People v. Drake*, decided May 9, 2006 (N.Y.L.J., May 10, 2006, pp. 1, 7 and 22)**

In a 6-1 decision, the New York Court of Appeals upheld a defendant's conviction where expert testimony regarding eyewitness identification was introduced. Although the Court found that the trial court's charge regarding the use of such testimony contained errors, the Court held that the charge viewed as a whole conveyed the correct expert testimony standard to the jury. In her charge to the jury the trial court told the jury that the experts' testimony may not be used to discredit or accredit the reliability of eyewitness testimony in general or in this case. The Court of Appeals concluded that no reasonable juror could have found that the experts' testimony had been effectively stricken from the case. Rather, the entire charge viewed in its totality did not communicate to the jurors that they should disregard the experts' testimony.

In rendering its decision, the Court of Appeals reiterated that the trial courts have wide discretion to allow or disallow expert testimony on the reliability of eyewitness identification. Judge George Bundy Smith dissented and argued that the flawed charge totally negated the expert's testimony and reversal of the conviction was required.

***People v. Young*, decided May 9, 2006 (N.Y.L.J., May 10, 2006, pp. 1, 7 and 23)**

In another 6-1 decision, the Court of Appeals upheld a defendant's conviction where a trial judge refused to allow an expert to testify about the various factors which could affect the reliability of eyewitness identification. Although recognizing that the issue was close, the court deferred to the wide discretion given to trial judges to decide this issue. In rendering its decision in an opinion by Judge Robert S. Smith, the court suggested that it generally will defer to the discretion of trial judges, except perhaps when such expert evidence is denied the defense and the case turns on uncorroborated identification evidence.

Judge George Bundy Smith dissented, stating that "The majority's ruling misses the opportunity to hold that here, as a matter of law, where eyewitness identification is attenuated and possibly tainted, and corroboration evidence is weak, courts should allow expert testimony concerning eyewitness identification."

FAILURE TO DISCLOSE BRADY MATERIAL

***People v. Williams*, decided May 11, 2006 (N.Y.L.J., May 12, 2005, pp. 1, 7 and 23)**

In a 4-3 decision, the Court of Appeals upheld a drug conviction where a prosecutor failed to disclose *Brady* material and then was afforded a second chance by the trial judge to rehabilitate the case. In the case at bar the prosecutor had failed to reveal at a suppression hearing that his sole original witness, who was a police officer, was under investigation for perjury. When this information came to light the court ordered a new hearing and allowed the prosecutor to call a witness who did not have the same credibility problem.

The Court of Appeals found that the trial judge had broad discretion to select a remedy in response to the *Brady* violation and a reversal was not required. Judge George Bundy Smith issued a dissent, arguing that a reversal was required because of the *Brady* violation. Judge Smith argued that "the prosecutor's duty to ensure a fair proceeding supersedes the concern for gaining a conviction." Joining Judge Smith in dissent were Chief Judge Kaye and Judge Ciparick.

DUPLICITOUS COUNTS

***People v. Wells*, decided May 11, 2006 (N.Y.L.J., May 12, 2006, pp. 1, 7 and 22)**

In a unanimous decision, the New York Court of Appeals held that a single count of attempted murder is not rendered duplicitous when the indictment fails to state which of two potential victims the defendant allegedly tried to kill. The Court's ruling resolved an issue which had been unsettled for many years and which had caused prosecutors much uncertainty.

With respect to a secondary issue regarding the jury selection process, the Court held that the trial judge was not obligated to discharge an entire panel of prospective jurors simply because one of them openly attested to the honesty of a police detective friend on the witness list. Judge Graffeo, writing for the Court, observed that the trial court had polled the prospective jurors to ensure that none of them had been influenced by the comment. With the court's inquiry and no indication that any juror had been prejudiced there was no legal basis to dismiss the entire panel for cause.

LESSER INCLUDED CHARGE

***People v. Leon*, decided June 8, 2006 (N.Y.L.J., June 9, 2006, pp. 6 & 28)**

In a unanimous decision, the Court of Appeals held that a trial judge did not abuse his discretion in refusing to charge a lesser count of criminal possession of a weapon. In the case at bar, the defendant was charged and was subsequently convicted of criminal possession of a weapon in the second degree. During the trial, the defense had requested an additional charge of criminal possession of a weapon in the third degree. The Court concluded that under the circumstances of the case at bar, the requested lesser count was not a "lesser included offense of criminal possession of a weapon in the second degree." Rather the two were "non-inclusory concurrent counts" where it was possible to commit the greater offense without committing the lesser one.

Under these circumstances, the trial judge's ruling was a proper exercise of judicial discretion. In writing for the Court, Judge Robert S. Smith stated:

> In exercising its discretion, the court had to weigh competing possibilities: Would the submission of the third-degree count help the jury arrive at a fair verdict, or would it simply provide a distraction or an opportunity to split the difference? The trial court concluded, not unreasonably, that submission of the less serious charge would do more harm than good to the goal of a reasoned, fair adjudication.

JURY VOIR-DIRE

***People v. Serrano*, decided June 8, 2006 (N.Y.L.J., June 9, 2006, pp. 6 and 29)**

In a unanimous decision, the Court of Appeals concluded that the Criminal Procedure Law was not violated when prospective jurors were questioned in the jury box through a simultaneous voir-dire procedure which involved 44 people. In the case at bar, the trial court called 44 individuals for simultaneous questioning, placing 12 in the jury box and the others in four front rows of the courtroom. The defense attorney objected to the number of prospective jurors stating that he would have difficulty conducting an effective voir-dire since many prospective jurors sat behind him. The trial court commented that counsel could turn his chair at any point to observe any prospective juror and that although the follow-up questioning might take longer than usual, the 44 juror voir-dire would continue in the interest of efficiency.

The Court of Appeals, in reviewing CPL § 270.15(1)(a), determined that the statute only mandated that the names of not less than 12 members of the panel be called as prescribed by the judiciary law. The Legislature set no upper limit, thereby allowing judges discretion to make their voir-dire procedure more efficient.

WAIVER OF APPEAL

***People v. Ramos*, decided June 13, 2006 (N.Y.L.J., June 14, 2006, p. 29)**

In a unanimous decision, the Court of Appeals upheld the Appellate Division's determination that a defendant's waiver of his right to appeal was effective and that therefore the appeal in question should be dismissed. The Court based its determination on the fact that the defendant executed a detailed written waiver which stated that the defendant had the right to appeal, explained the appellate process and confirmed that defense counsel had fully advised him of the right to take an appeal. Under these circumstances, even if there was any ambiguity in the sentencing court's colloquy the defendant, by executing such a detailed written waiver, indicated that he knowingly, intelligently, and voluntarily waived his right to appeal. In rendering its decision, the Court of Appeals distinguished the case at bar from *People v. Billingslea*, 6 N.Y.3d 248, 257 (2006), where the sentencing court's colloquy was accompanied by nothing other than a one-word response to the question of whether the defendant understood the conditions of the plea.

POST-RELEASE SUPERVISION

***People v. Vandunsen*, decided June 29, 2006 (N.Y.L.J., June 30, 2006, pp. 5 and 24)**

In a unanimous decision, the Court of Appeals vacated a defendant's plea and remitted the matter back to the trial court for further proceedings. The defendant had entered into a plea bargain on a robbery charge for a term of 5-15 years, but at the time of plea, she was not advised that her period of incarceration would be followed by 5 years of post-release supervision.

The Appellate Division, Third Department had ruled that it was not necessary to allow the defendant to withdraw her plea because in the case at bar the prison term of 8 years and the period of post-release supervision of 5 years did not exceed the 15 year maximum which the defendant had actually agreed to.

The Court of Appeals, however, found that under its prior holding in *People v. Catu*, 4 N.Y.3d 242, the failure of a court to advise the defendant regarding post-release supervision requires reversal. A reversal was required even though the defendant did not establish that she would have declined to plead guilty if she had known about the post-release supervision. Since following *People v. Catu*, *supra*, the defendant's decision to plead guilty cannot be said to have been knowing, voluntary, and intelligent, a vacation of the defendant's plea was required and further proceedings were necessary at the trial court level.

LABOR DISPUTE EXCEPTION MAY BE RAISED BY ACCUSED BUT IS NOT JURISDICTIONALLY REQUIRED TO BE PLEADED BY PROSECUTION

***People v. Santana*, decided June 29, 2006 (N.Y.L.J., June 30, 2006, pp. 5 and 23)**

In a unanimous decision, the Court of Appeals upheld a defendant's conviction for criminal contempt in the second degree and rejected his claim that the prosecution was required to plead as a jurisdictional element that the crime did not arise out of a labor dispute. The Court of Appeals found that the inclusion of the exception reference to labor disputes in the second degree criminal contempt statute (Penal Law § 215.50(3)) could be raised by the accused as a bar to prosecution or a defense at trial but was not required to be affirmatively pleaded as an element in the accusatory instrument. The prosecutor's information was thus jurisdictionally valid and the defendant's conviction was upheld.

The Court of Appeals decision settled a dispute which had arisen between the First and Third Departments with the Court of Appeals supporting the position previously taken by the First Department in *People v. D'Angelo,* 284 A.D.2d 146.

DEPRAVED INDIFFERENCE

***People v. Feingold*, decided July 5, 2006 (N.Y.L.J., July 6, 2006, pp. 1 and 23)**

In a 4-3 decision, the Court of Appeals reduced a First-Degree Reckless Endangerment conviction to Reckless Endangerment in the Second Degree, finding that the evidence was insufficient to establish depraved indifference conduct under its recent rulings in *People v. Sanchez* and related cases. In doing so the Court, in issuing its decision, officially eliminated any further reliance on its 1983 decision in *People v. Register*, 60 N.Y.2d 270, whose holding had been repeatedly challenged in the Court's recent case law severely restricting the use of the depraved indifference concept.

Judges Ciparik and Kaye dissented with Judge Kaye specifically objecting to the Court's overruling of *People v. Register*. Judge Graffeo also issued a separate dissenting opinion, again expressing her view that *People v. Suarez* was wrongfully decided.

***People v. Atkinson*, decided July 5, 2006 (N.Y.L.J., July 6, 2006, pp. 8 and 26)**

In a unanimous decision, the Court of Appeals reduced a defendant's conviction of depraved indifference murder to manslaughter in the second degree. The Court found that under the facts of the case, the defendant did not commit depraved indifference murder within the meaning of the statute and pursuant to the Court's prior decisions in *People v. Payne*, 3 N.Y.3d 266 (2004) and *People v. Suarez*, 6 N.Y.3d 202 (2005). Judge Graffeo, although concurring in the result, did so on constraint of the Court's prior decision in *People v. Suarez*.

***People v. Mancini*, decided July 5, 2006 (N.Y.L.J., July 6, 2006, pp. 8 and 26)**

In a 6-1 ruling, the Court of Appeals again on the basis of *People v. Suarez*, reduced a defendant's conviction of depraved indifference murder to manslaughter in the second degree. The defendant in the case at bar had struck the victim on the head with a toilet tank lid. She then left the victim who eventually died from the injury. The Court ruled that during the trial the defendant had testified that she did not think that the defendant was hurt that bad and that under these circumstances a conviction regarding the element of recklessness was required rather than a claim of depraved indifference. Justice Graffeo dissented.

***People v. Swinton*, decided July 6, 2006 (N.Y.L.J., July 9, 2006, p. 27 and July 10, 2006, p. 1)**

In a unanimous decision, the Court of Appeals reduced the defendant's conviction for Assault in the First Degree to Assault in the Third Degree. The Court found that in viewing the evidence in the light most favorable to the People, the evidence was legally insufficient to prove beyond a reasonable doubt that the defendants acted with the culpable mental state of depraved indifference. In rendering its decision, the Court specifically referred to *People v. Feingold*, and Justices Kaye, Ciparik, and Graffeo concurred in the result on constraint on *People v. Feingold* even though they had dissented in that decision.

These newly decided cases regarding depraved indifference are covered in greater detail in our featured article written by Peter Dunne which appears on page 7.

HARMLESS ERROR IN JUSTIFICATION CHARGE

***People v. Petty*, decided July 5, 2006 (N.Y.L.J., July 6, 2006, p. 22)**

In a unanimous decision, the Court of Appeals affirmed a defendant's murder conviction and held that although the trial court's justification charge was in error, the error was harmless and could not have affected the jury's verdict. The trial court, during its justification charge, instructed the jury that the deceased victim's prior threats against the defendant may be considered solely in determining the defendant's state of mind and the reasonableness of his conduct.

The Court of Appeals found that the trial court erred when it failed to also inform the jury that the prior threats could be used in the jury's determination of who was the initial aggressor. The Court of Appeals, however, found that the People had disproved the defendant's justification defense and because of overwhelming evidence there was no reasonable possibility that the verdict would have been different if the charge was correctly given. The error which occurred was therefore harmless.

Recent United States Supreme Court Decisions Dealing With Criminal Law

Case Notes by Students from St. John's Law School

In the two months prior to the conclusion of its 2006 term, the United States Supreme Court issued several important decisions which should be carefully examined by criminal law practitioners. In late May the Supreme Court unanimously ruled that police officers can enter a home uninvited and without a search warrant to break up a fight they had observed through a window. Utilizing the emergency exception, Chief Justice Roberts stated that a fight in progress is the kind of emergency that justifies quick action by police. The unanimous ruling of the Court overturned the previous decisions of the Utah state courts which had held that a loud party and a drunken fight did not give police enough reason to break into the home without a warrant. In overturning the decision of the Utah state courts Justice Roberts observed that the "officers had objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone unconscious and semiconscious or worse before entering."

On June 15, 2006, the Court also issued an important decision which substantially modified the "knock and announce requirement for home searches." In *Hudson v. Michigan*, in a 5-4 decision the Supreme Court upheld the use at trial of evidence found by police officers who executed a home search warrant without first following the constitutional requirement to "knock and announce."

Justice Scalia who wrote the majority opinion argued that the application of the exclusionary rule would be too drastic a remedy and that persons subject to an improper police entry were free to go to court and bring a civil rights suit against the police. Justice Breyer writing for the four dissenters argued that the court's ruling weakened and perhaps destroyed much of the practical value of the knock and announce protection. The decision in the case followed a reargument after Justice Alito had joined the Court.

In late June, the Supreme Court also made it easier for death row inmates to contest the use of lethal injections. Also in late June, the Supreme Court issued its long-awaited decisions in *Davis v. Washington* and *Hammon v. Indiana* regarding the admissibility of 911 calls following the *Crawford* decision. The Court, to the relief of prosecutors, upheld the use of 911 calls on the basis that they were not testimonial but statements made in the course of an emergency situation.

The *Davis* case is discussed in detail in the first feature article appearing in this issue and the other Supreme Court decisions are discussed in the Case Notes prepared by students from St. John's Law School.

The Supreme Court Holds That the Eighth Amendment Does Not Provide a Defendant Federally Protected Right to Present Live Mitigating Evidence at the Sentencing Proceeding

***Oregon v. Guzek*, 126 S. Ct. 1226, 163 L. Ed. 2d 1112, 2006 U.S. LEXIS 1818, 74 U.S.L.W. 4142 (February 22, 2006).**

Respondent was found guilty of capital murder and was sentenced to death for killing Lois and Rod Houser while burglarizing their home. This verdict was delivered despite respondent's alibi, which was substantiated by his grandfather and mother.

Respondent appealed his death sentence on the grounds that he should be allowed to introduce live mitigating evidence at his sentencing hearing. The Oregon Supreme Court affirmed the conviction, but ordered a new sentencing hearing. Respondent appealed two additional times with the same result. On the fourth appeal, the Oregon Supreme Court again affirmed the verdict, but vacated the sentence on the grounds that the Eighth and Fourteenth Amendments provide respondent with a federal constitutional right to introduce live mitigating evidence at his sentencing proceeding. *Oregon v. Guzek*, 125 S. Ct. 1929 (2005). The Supreme Court granted the State's petition for writ of certiorari. The Court vacated the Oregon Supreme Court's judgment and remanded for further proceedings.

The Court held the state of Oregon has the right to regulate evidence introduced at sentencing by exclusion; therefore, the Eighth Amendment does not protect a defendant's right to present live mitigating evidence at the sentencing hearing. While the Court has previously found that the Eighth Amendment insists that the sentencing jury should be permitted "to consider and give effect to mitigating evidence," *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989), "[S]tates are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990).

The Court summarized the rationale for its holding by providing three circumstances, which convinced the Court that the State of Oregon has the power to regulate, through exclusion, evidence at sentencing hearings. The first circumstance outlined by the Court is that sentencing traditionally concerns how, not whether, a defendant committed the crime when coming to their decision. The second circumstance is that the Court typically discourages collateral attacks concerning whether the defendant actually committed the crime. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The third circumstance is that Oregon state law permits defendants to introduce transcripts and exhibits from their prior trial at re-sentencing. Therefore, the Court rationalized that although the respondent would be subjected to a minimal adverse impact, that impact is outweighed by the State right to regulate evidence introduced at sentencing. As such, the Eighth Amendment does not protect a defendant's right to present live mitigating evidence at the sentencing proceeding.

Justice Scalia's concurring opinion proposes that the third circumstance is unnecessary to convince the Court, and could be replaced with the rationale that the nation's legal history and traditions do not support the introduction of live mitigating evidence at sentencing.

By Dennis Shelton

REMEDY FOR "KNOCK AND ANNOUNCE" VIOLATION: Supreme Court Rules Exclusion of Evidence is Not an Appropriate Remedy for a "Knock and Announce" Violation

***Hudson v. Michigan*, 126 S. Ct. 2159; 165 L. Ed. 2d 56, *; 2006 U.S. LEXIS 4677, **; 74 U.S.L.W. 4311 (June 15, 2006).**

The Court agreed with the Michigan Court of Appeals that a failure by police to knock and announce their presence before entering a home was not grounds to exclude the evidence obtained subsequent to the entry.

The Supreme Court considered whether a violation of the common law knock and announce rule required exclusion at trial of any evidence obtained after the police entered a home immediately after the violation. The Petitioner, Hudson, claimed a violation of his Fourth Amendment rights against unreasonable search and seizure when the police entered his home unannounced. He therefore sought exclusion of the drugs and loaded gun seized by the police during the execution of their search warrant.

The Court noted that the knock and announce rule is easily dispensed with, since police need only "reasonable suspicion" that knocking and announcing prior to entry would be dangerous to them, or would result in the destruction of evidence, in order to be able to proceed unannounced. The Court declared that suppression of evidence has always been a "last resort" to protect a suspect's rights. Furthermore, the Court concluded that the seizure of evidence was sufficiently attenuated from the knock and announce violation to break the chain of causality, which would otherwise trigger the exclusionary rule, if the violation were a "but for" cause of the seizure. Attenuation is a recognized exception to the exclusionary rule, even if it did apply in this case.

Finally, the Court concluded that the interests protected by the knock and announce rule (personal privacy), were different than those protected by the exclusionary rule (substantial social costs incurred if exclusion is not granted and deterring police misconduct). Therefore, the exclusionary rule would not even serve the interests sought to be protected by the knock and announce rule. Acknowledging mixed messages from prior decisions about whether exclusion of evidence was the proper remedy for a failure to knock and announce, the Court nevertheless held that there were other, sufficient deterrents to police misconduct in this area, including threats to professional advancement, police professionalism, and civil lawsuits under 42 U.S.C. § 1983.

By Valerie Ferrier

The Court of Appeals Erroneously Denied House's Petition for Habeas Corpus Relief on Grounds That He Failed to Meet the Standard of Review Established in *Schlup v. Delo*

***House v. Bell*, 126 S. Ct. 2064; 165 L. Ed. 2d 1; 2006 U.S. LEXIS 4675; 74 U.S.L.W. 4291 (June 12, 2006).**

Based heavily on circumstantial evidence, a Tennessee jury convicted petitioner Paul House of Carolyn Muncey's murder and sentenced him to death. After his state post-conviction relief was denied, House filed a habeas petition in federal court seeking release from death row with compelling new evidence of his innocence. The Sixth Circuit Court of Appeals concluded that although the new evidence cast some doubt on certain evidence presented at trial, it was insufficient to warrant habeas relief. More specifically, the Sixth Circuit found that House failed to meet the standard of review for habeas petitions established in *Schlup v. Delo*, 513 U.S. 298 (1995), which required House to show that "it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. The U.S. Supreme Court granted certiorari.

The Supreme Court was faced with two issues presented: (1) Whether the Sixth Circuit erroneously applied *Schlup v. Delo* in finding that the new evidence was legally

insufficient to excuse his failure to present such evidence in state court; and (2) Whether House has shown a "truly persuasive showing of actual innocence" under *Herrera v. Collins*, 506 U.S. 390 (1993) sufficient to warrant habeas relief.

As to the first issue, the Court ruled in the affirmative. Despite the "demanding" standard set forth in *Schlup*, the 5-3 majority held that House's case was so extraordinary that his failure to present his new evidence in state court may be excused. The Court reasoned that House's new evidence did not warrant conclusive exoneration and that the issue was close. However, a petitioner's burden at the gateway stage does not require absolute certainty as to innocence. Rather, the applicable standard is the "more likely than not" threshold. Here, had the jury heard the conflicting testimonies regarding the blood, semen, and history of domestic abuse contained in the new evidence, it was more likely than not that a reasonable juror viewing the record as a whole would not find House guilty beyond a reasonable doubt. Hence, House's federal habeas action was ordered to proceed.

The Court left the second issue unresolved by declining to define what constitutes a "truly persuasive showing of actual innocence." In *Herrera*, the Court left open the question of whether federal courts may review convincing claims of actual innocence. They noted that since the first issue of House satisfying *Schlup's* gateway standard for obtaining federal review despite a state procedural default was close, he fell short of the extraordinarily high threshold for showing freestanding innocence as implied in *Herrera*.

By Matt Yi

EXCLUSION OF EVIDENCE OF THIRD PARTY GUILT—Application of South Carolina Rule That Considers Only the Weight of the Prosecution's Evidence Violates the Defendant's Constitutional Right to Mount a Complete and Meaningful Defense

***Holmes v. South Carolina*, 126 S. Ct. 1727, 164 L. Ed. 2d 503, 2006 U.S. LEXIS 3454, 74 U.S.L.W. 4221 (May 1, 2006).**

Petitioner Bobby Lee Holmes was convicted of raping, robbing, and murdering an 86-year old woman, but was granted a new trial by a state appeals court. At the retrial, the prosecution relied heavily on forensic evidence. Petitioner's experts attempted to controvert the forensic evidence, claiming fabrication of some evidence, specifically a palm print, and contamination of the samples. At a pretrial hearing, the petitioner sought to admit evidence of the guilt of a third party, Jimmy McCaw White. Several witnesses testified that White had incriminated himself in the crime and also placed him near the scene at the time of the incident. White testified on his own behalf and offered an alibi, which was contradicted by another witness. The trial court excluded the petitioner's evidence of third party guilt, and after the petitioner was convicted a second time, he appealed based on the trial court's ruling. The South Carolina Supreme Court affirmed. The United States Supreme Court granted certiorari, and in a unanimous opinion authored by Justice Alito vacated the judgment and remanded.

The South Carolina Supreme Court relied on *State v. Gregory*, 198 S. C. 98, 16 S.E.2d 532 (1941), and *State v. Gay*, 343 S. C. 543, 541 S.E.2d 541 (2001), ruling that when strong forensic evidence of a defendant's guilt is present, evidence of a third party's guilt cannot create a reasonable inference of the defendant's innocence and therefore should be excluded. Although the test created in *Gregory* allowed such evidence if it rose above a mere accusation or conjecture and raised a reasonable inference or presumption of innocence, the South Carolina high court used *Gay* to extend that rule to where it stood when this case was decided. In essence, the court said that when the presumption of guilt is so strong, all other possible explanations must be erroneous.

The United States Supreme Court, while acknowledging that states have much freedom to create evidentiary rules excluding evidence, wholly rejected the reasoning of the state court. Rules that are arbitrary or interfere with an important right of a criminal defendant violate either a) the Due Process Clause of the Fourteenth Amendment b) the Compulsory Process Clause of the Sixth Amendment, or c) the Confrontation Clause of the Sixth Amendment. Here, the South Carolina court failed to even weigh the probative value of the petitioner's evidence of third party guilt; it was dismissed out of hand. The state court considered only the strength of the forensic evidence presented by the prosecution, and based its determination to exclude petitioner's evidence based solely upon that analysis. Additionally, the Court also found no mention of the petitioner's opposition to the validity of the prosecution's forensic evidence in the state courts' declaration of the strength of that evidence, and stated that when contested, the credibility of such evidence has long been the purview of the trier of fact.

Although the Court found the rule applied in this case to be arbitrary, it did seem to indicate that the rule as originally laid out in *Gregory* would pass constitutional muster, perhaps a signal to the South Carolina courts to abandon the doctrine as modified by *Gay* and return to the prior test for the admission of evidence of third party guilt.

By John Vobis

DEFINING THE PROVINCE OF 42 U.S.C. § 1983—Inmate's Challenge of a Particular Method of Lethal Injection as Cruel and Unusual Is Properly Brought Under 42 U.S.C. § 1983, Because Such Challenge Does Not Dispute Legality of Sentence Itself

***Hill v. McDonough*, 126 S. Ct. 2096 (June 12, 2006).**

Petitioner was sentenced to death in Florida. Applicable Florida law mandated lethal injection. After his unsuccessful federal habeas corpus petition, Petitioner sought injunction under 42 U.S.C. § 1983 barring Respondents from executing him by the particular method of lethal injection in use, claiming that the three-drug sequence injection was likely to cause gratuitous great pain. The district court dismissed his claim as successive habeas corpus petition and therefore procedurally barred, reasoning that Petitioner's claim, although brought under § 1983, was functionally equivalent to a habeas corpus petition since the injunction sought would practically frustrate the sentence. The Eleventh Circuit affirmed. The Supreme Court reversed.

The Supreme Court applied *Nelson v. Campbell*, 541 U.S. 637 (2004) to decide whether Petitioner's claim challenged the legality of the sentence, a habeas corpus claim, or the circumstances the sentence, a § 1983 claim. In *Nelson*, the State planned to perform a surgical procedure to access the inmate's veins for lethal injection. The inmate sought injunction under § 1983 barring the preliminary surgical procedure. The Court held that the inmate's claim was cognizable under § 1983, because the claim did not challenge the legality of the sentence or prevent the State from implementing the sentence. The surgical procedure was neither mandated by law nor necessary to the lethal injection, and the inmate conceded the existence of an alternative procedure of execution.

The difference between Petitioner's claim and *Nelson* was that Petitioner challenged the injection method rather than a surgery preliminary to the injection. This difference did not change the analysis. The Florida statute did not specify a particular lethal injection method, Petitioner did not challenge the legality of lethal injection but only challenged the particular injection method, and he conceded the existence of constitutional alternative lethal injection method. Therefore, barring use of planned method would not prevent Respondents from executing Petitioner by lethal injection.

As to Respondents' concern about the prospect of inmates bringing dilatory § 1983 claims with requests for stay of execution, the Court clarified that a claim can be dismissed if it is filed too late—could have been brought earlier to allow consideration of merit without a stay, or too speculative—no significant possibility of success on merit.

By Rita Wang

The Structure and Procedural Framework of the Military Commission Established by the President for Non-Citizens to Stand Trial in the War Against Terrorism Violate Both the UCMJ and the Geneva Conventions and Lack the Authority to Proceed

***Salim Ahmed Hamdan v. Donald H. Rumsfeld, et al.*, 126 S. Ct. 2981 (June 29, 2006).**

Petitioner Salim Ahmed Hamdan was captured in Afghanistan in November 2001 during hostilities between the U.S. and the Taliban and transported to Guantanamo Bay, Cuba in 2002 to stand trial by military commission for then-unspecified crimes. In 2003, Hamdan was finally charged with one count of conspiracy "to commit . . . offenses triable by military commission."

Hamdan filed petitions for a writ of habeas corpus and a writ of mandamus to challenge the Executive Branch's intended venue for his trial. Hamdan argued that neither legislation nor the common law of war supports trial by Military Commission for the crime of conspiracy. Furthermore, Hamdan claimed that the procedures adopted by the President violated the principle of permitting a defendant to see and hear the evidence presented against him.

The District Court granted Hamdan's request for a writ of habeas corpus and stayed the commission's proceedings, concluding that the President's authority to establish military commissions extends only to offenders or offenses triable by such a commission under the law of war, that the Third Geneva Convention is considered a law of war, and that Hamdan is entitled to the Geneva Convention's full protections until his status as a prisoner of war is adjudged under the Geneva Convention's terms. The Court further held that irrespective of whether Hamdan was properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never hear. The Court of Appeals for the District of Columbia reversed, holding that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable. After granting certiorari, the Supreme Court reversed the Court of Appeals decision.

The Supreme Court held that the military commission convened to try Hamdan lacks the power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. The Court declared that of the three types of military commissions used historically under the UCMJ, the law-of-war commission was the only model available to try Hamdan. Under Article of War 15 (later incorporated into UCMJ Art. 21), the preconditions to such a tribunal's exercise of jurisdiction are, inter alia, that it must be limited to trying

offenses committed within the convening commander's field of command (i.e., within the theater of war) and that the offense charged must have been committed during, not before or after, the war. The Supreme Court held that Hamdan was not alleged to have committed any overt act in the theater of war or any specified date after September 11, 2001. The Court also held that conspiracy is not triable by law-of-war military commission. The Supreme Court noted that the language under Common Article 3 of the Geneva Convention, which requires "the guarantees . . . recognized as indispensable by civilized peoples," was not defined within the Articles. The Court interpreted the language to require, at a minimum, the barest of the trial protections recognized by customary international law, including an accused's right, absent disruptive conduct or consent, to be present for his trial and to be privy to the evidence presented against him. The procedures adopted to try Hamdan failed to meet these basic requirements. Thus, the Supreme Court remanded the case for further proceedings.

By Emily Prager

INTERPRETATION OF THE FOURTH AMENDMENT REASONABLENESS REQUIREMENT—The Supreme Court Overrules the Utah High Court and Restates the Reasonableness Requirement of the Fourth Amendment for Police Making a Warrantless Entry and Arrest in a Home

***Brigham City v. Stuart*, 126 S. Ct. 1943, 164 L. Ed. 2d 650, 2006 U.S. LEXIS 4155, 74 U.S.L.W. 4253 (May 22, 2006).**

The Court granted certiorari to reconcile differences among courts interpreting the Fourth Amendment standard of reasonableness exercised by law enforcement making a warrantless entry in an emergency situation. Police in Brigham City, Utah responded to a house after complaints of a loud party at 3 a.m. and found two juveniles drinking beer in the backyard. Officers then observed through a back window an altercation between four adults and one juvenile that left one participant with a bloody mouth. One officer approached the open door and announced his presence, but he was not heard over the tumult. He entered and again announced his presence, and when the participants noticed him the physical and verbal skirmish ceased. Three adults were arrested for contributing to the delinquency of a minor, disorderly conduct, and intoxication. At trial the court suppressed on Fourth Amendment grounds all evidence obtained after the warrantless entry by the police; the Utah Court of Appeals and Utah Supreme Court affirmed. In a unanimous decision authored by the Chief Justice, the United States Supreme Court reversed and remanded the case for further proceedings, finding that the officer's warrantless entry was objectively reasonable and therefore justified.

The Court differed with the respondents' contention and Utah courts' finding that the subjective motive of the officers in entering a home without a warrant is determinative, stating that it is "irrelevant." *Brigham City v. Stuart*, 126 S. Ct. 1943, 1948 (2006). Thus the respondents' argument that the officers' motive to enter was based on the desire to arrest them and gather evidence must fail, and the warrantless entry is valid under the emergency doctrine if reasonable after an *objective* analysis of the situation (emphasis added). In dismissing the Utah Supreme Court's view that a police officer's objectively reasonable belief must relate to an "unconscious, semi-conscious, or missing person feared injured or dead," *Brigham City v. Stuart*, 2005 UT 13, P24 (Utah 2005), the Court stated that the Fourth Amendment does not require law enforcement to wait until a person is in such dire circumstances before rendering assistance. That would reduce the police's role to that of a "boxing (or hockey) referee," 126 S. Ct. at 1949, acting only after sufficient injury is inflicted.

The Court also indicated that the exigency exception would allow officers to enter without a warrant to provide emergency aid to an injured person or protect someone from imminent harm, as would appear to be the case here. The Utah Supreme Court had rejected petitioner's exigency argument although it conceded that it was a "close and difficult call." 2005 UT at P35. As for the knock requirement, the Court found that the entering officer's announcement was equivalent to a knock on the screen door; expecting the officers to go to the front door and knock would be unreasonable, given the fact that the noise and commotion initially prevented the occupants from hearing or noticing the officer in the open doorway merely a few feet away. Whether all the respondents had standing to challenge the admission of the evidence apparently was not at issue, as it was not addressed.

Justice Stevens concurred in the judgment but wrote in his own inimitable style that he had voted against certiorari on this "odd flyspeck of a case"—minor infractions that had been litigated for six years—reasoning that the Court should not interfere where a state court is interpreting state law. 126 S. Ct. at 1949. States may set stricter standards in their own constitutions, and the Court has no authority to overrule the Utah courts' interpretation of the Utah constitution, which is how he viewed the procedural posture of this case. However, respondents never advanced a claim under the Utah constitution, relying solely on the Fourth Amendment, and the Utah courts decided the case on that basis. Thus, petitioners were able to seek certiorari based on the Federal Constitution and ultimately were successful.

By John Vobis

NO PROSPECTIVE WAIVER OF THE SPEEDY TRIAL ACT—A Defendant's Express Waiver of the Speedy Trial Act of 1974 "For All Time" Is Ineffective

***Zedner v. United States*, 126 S. Ct. 1976, 164 L. Ed. 2d 749, 2006 U.S. LEXIS 4509, 74 U.S.L.W. 4271 (June 5, 2006).**

The Speedy Trial Act of 1974 (the "Act"), 18 U.S.C. §§ 3161-3174, generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance. The Act contains a detailed scheme under which certain delays are not counted in computing the time within which the trial must start.

In March 1996, Petitioner attempted to open accounts at several financial institutions using counterfeit U.S. bonds. On April 4, 1996, a grand jury in the Eastern District of New York indicted Petitioner on seven counts of attempting to defraud a financial institution and one count of knowingly possessing counterfeit obligations of the United States. At a November 8, 1996 status conference, Petitioner requested a third continuance. Concerned with the application of the Act, the District Court's calendar, and the Petitioner's additional request for a longer adjournment to January 1997, the District Court offered to allow the adjournment if Petitioner waived his rights to a speedy trial under the Act "for all time." The District Court then produced a preprinted waiver form that Petitioner and his counsel both signed. At the next January 31, 1997 status conference, Petitioner sought yet another continuance. "[A]pparently satisfied with petitioner's waiver 'for all time,' " the District Court granted the continuance without mention of the Act or record of findings to support exclusion of the 91 days between January 31 and the next appearance on May 2, 1997. 126 S. Ct. at 1982.

Four years followed with a variety of proceedings, but without a trial. On March 7, 2001, while competency issues were still outstanding, Petitioner moved to dismiss the indictment for failure to comply with the Act. The District Court denied the motion because Petitioner had waived his rights "for all time." On April 7, 2003, Petitioner's trial began and the jury found him guilty on six counts of attempting to defraud a financial institution. The Second Circuit Court of Appeals affirmed the judgment of conviction. The Supreme Court granted certiorari to resolve the disagreement among the Courts of Appeals on the standard for analyzing whether a defendant has made an effective waiver of rights under the Act. The Supreme Court reversed the Second Circuit's judgment and remanded for further proceedings.

The Supreme Court held that Petitioner's waiver "for all time" was ineffective, agreeing with Petitioner that a defendant may not prospectively waive the application of the Act. The Supreme Court held that the Act comprehensively regulates the time within which a trial must begin. Section 3161(h) of the Act has no provision excluding periods of delay within which a defendant waives the application of the Act, and demands that defense continuance requests fit within one of the specific exclusions of subsection (h). The Court further held that the Act recognizes that the public interest cannot be served if defendants may opt out of the Act entirely and that this interpretation is entirely within the Act's legislative history. The Supreme Court disagreed with the District Court's reasoning that if a defendant may waive by failure to move for dismissal under § 3162(a)(2), then a defendant should be allowed to prospectively waive.

The Supreme Court saw no basis for applying the doctrine of judicial estoppel to Petitioner's express waiver. The Court found none of the factors that typically inform the decision whether to apply the doctrine. *See New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). They also held that the Act requires express findings on the record, at least by the time a district court rules on the motion to dismiss, to support ends-of-justice continuances, and does not permit those findings on remand. To apply the harmless error rule to the absence of express finding on the record, the Court reasoned, would undermine the detailed requirements of the provisions regulating ends-of-justice continuances under the Act.

The Supreme Court held that the 91-day continuance from January 31, 1997 was not excluded from Petitioner's speedy trial clock. Having exceeded the maximum 70-day limit in this instance, the Supreme Court concluded that the Act was violated.

By Brian P. Mitchell

The Denial of the Respondent's Choice of Counsel Violated His Sixth Amendment and Such Violation is Not Subject to Harmless Error Review

***United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2006 U.S. LEXIS 5165.**

Respondent was charged with conspiracy to distribute more than 100 kilograms of marijuana in the Eastern District of Missouri. Attorney John Fahle was hired to represent him, but after his arraignment the respondent called California attorney, Joseph Low, to discuss if Low could represent him in addition to Fahle or instead of Fahle. Low was hired by the respondent. At a later evidentiary hearing before a Magistrate Judge, Low was provisionally admitted to participate on the ground that he file a *pro hac vice* motion. Low's provisional admission was revoked when Low violated a court rule. Eventually, the respondent wanted Low to be his sole attorney. Low filed an application for admission *pro hac vice*. His applica-

tion was denied by the District Court without comment. A second application was filed and denied. Low's appeal in the form of a writ of mandamus was dismissed by the United States Court of Appeals for the Eighth Circuit. Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low for violating Model Rules of Professional Conduct 4-4.2 which prohibits a lawyer from communicating about the subject of representation to a party being represented by another lawyer without that lawyer's consent. Fahle's motion was granted and the respondent hired attorney Karl Dickhaus to represent him at trial. Low's motion to strike was denied for the reason that he violated Rule 4-4.2 in a separate matter.

At trial, the respondent was found guilty. On appeal, the Eighth Circuit vacated his conviction, reasoning that the District Court erred in basing its decisions to deny Low's admission on the basis that he had violated rule 4-4.2 in this case and in a separate matter. The Eighth Circuit held that the denials were erroneous and therefore violated the respondent's Sixth Amendment right to paid counsel of his choosing. The Court concluded that the violation was not subject to harmless error review. The Supreme Court granted certiorari. The Supreme Court affirmed the Eighth Circuit ruling and remanded the case for further proceedings.

The Supreme Court found that the respondent was erroneously deprived of his right to counsel of his choice, violating his Sixth Amendment. The issue thus became whether the erroneous deprivation of chosen counsel was subject to harmlessness error review. The Supreme Court held that no such review is required. In holding this, the Supreme Court divided constitutional errors into a defect dichotomy: trial error and structural defects. Trial errors are errors that occur during the presentation of the case to the jury, in which their effect may be quantitatively measured in order to determine if harmless beyond a reasonable doubt. Structural defects affect the framework within which the trial proceeds and are not a mere error in the trial process itself. Denial of counsel is a structural defect where different counsels may pursue different trial tactics and strategies, thereby making these errors unquantifiable and non-compliant with harmless error review.

By Bena Varughese

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from May 9, 2006 to August 7, 2006.

People v. Anderson (N.Y.L.J., May 15, 2006, pp. 1 and 27)

In a unanimous decision the Appellate Division, First Department, reversed a defendant's felony drug conviction on the grounds that the trial attorney had committed numerous errors which denied the defendant a fair trial and required a reversal. Among the errors committed was conceding the element of identity even though a suppression court had precluded the use of such evidence. Further the court found that the defendant's attorney throughout the trial had appeared confused on various issues and had taken contradictory positions. Thus, the defendant's right to a fair trial had been compromised and he had been denied the effective assistance of counsel.

People v. Parker (N.Y.L.J., May 19, 2006, pp. 1 and 3 and May 24, 2006, p. 22)

In a 3-2 decision, the Appellate Division, Third Department, upheld a conviction for depraved indifference murder where the defendant allegedly shot the victim while using a scope-equipped rifle that he aimed at his target's chest. In attempting to apply the recent decisions from the New York Court of Appeals in *People v. Payne*, 3 N.Y.3d 266 (2004) and *People v. Suarez*, 6 N.Y. 3d 202 (2005) limiting the ability of prosecutors to use depraved indifference indictments, the Appellate Division split sharply with respect to whether the facts in the case at bar allowed for a depraved indifference conviction. The three-judge majority in upholding the conviction stated "In our view, defendant's conduct in firing from a doorway across the street in a direction where several people were present on a dark, snowy night established his indifference to the grave risk of death posed by his actions."

The two dissenting judges argued that the evidence showed that the defendant specifically targeted one person in the crowd and also noted that the prosecution in their summation told the jury that whoever put the dot on the victim's chest and squeezed the trigger intended to kill the victim. It appears that because of the sharp split within the Appellate Division and continuing decisions from the Court of Appeals this case will itself be headed for New York Court of Appeals review.

People v. VanGuilder (N.Y.L.J., May 26, 2006, pp. 1 and 5)

In a unanimous decision the Appellate Division, Third Department, upheld the use of a confession obtained from a defendant after he had been treated with sedatives when he injured himself by banging his head against a prison wall. The defendant claimed due to the medication he lacked the capacity to understand and intelligently waived his Fifth Amendment rights. During the suppression hearing an expert testified that the medication administered would not have impaired the defendant's ability to understand his constitutional rights. In addition a detective testified that the defendant was alert, capable and normal during the questioning. Under these circumstances the Appellate Division concluded that the trial judge properly weighed conflicting expert testimony in making its suppression ruling.

People v. Bloomfield (N.Y.L.J., June 2, 2006, pp. 1 and 6 and June 5, 2006, p. 27)

In a unanimous decision, the Appellate Division, First Department, dismissed a conviction against an attorney with respect to a charge of falsifying business records and conspiracy. The matter had been remitted to the Appellate Division after the Court of Appeals had reversed an earlier ruling of the Appellate Division on a question of law. On remand after its review of the legal sufficiency of the evidence, the Appellate Division concluded that the evidence was legally insufficient to establish a key element of the crime charged, to wit that the defendant had an intent to defraud.

The attorney had assisted a client in obtaining letters which were subsequently presented to the Securities and Exchange Commission. The First Department found, however, that there was no evidence that the attorney knew that the letters would be used for fraudulent purposes and therefore there was a failure to establish that Mr. Bloomfield possessed the intent to defraud.

People v. Melendez (N.Y.L.J., June 2, 2006, pp. 1 and 5 and June 7, 2006, p. 18)

In a unanimous ruling, the Appellant Division, First Department, upheld a defendant's drug conviction even though it found that the trial court had repeatedly and improperly intervened in the questioning of witnesses. The Court found that the trial court had repeatedly interfered during the prosecution's direct examination of witnesses and had asked approximately 50 questions, cutting off the prosecutor on numerous occasions and presenting her own line of questioning. Despite the Appellate Court's criticism of the trial judge's actions, the Appellate Panel affirmed the conviction and concluded that the

"trial judge did not become an advocate for the People or usurp the role of the prosecutor or defense counsel."

The trial judge in question was acting Supreme Court Justice Arlene Silverman. The Court noted in its decision that they had prior occasions to observe the same transgressions and the Panel concluded "that the trial judge would do well to heed our criticism."

People v. Harper (N.Y.L.J., June 9, 2006, pp. 1 and 6 and June 14, 2006, p. 18)

In a unanimous decision, the Appellate Division, Second Department, upheld a defendant's conviction and declared a new standard for instructing juries in criminal trials before summations. In the case at bar, the trial court gave preliminary instructions to the jury that distinguished between the three robbery counts. In prior rulings, the Second Department had reversed convictions where the trial judge had defined the elements of robbery before opening statements and again before closing arguments.

In the case at bar, the Appellate Division concluded that its prior precedent would no longer be followed and that it would no longer be considered reversible error if a trial judge gave a criminal jury oral instructions on the elements of a crime prior to closing arguments. Although the Court of Appeals in *People v. Townsend*, 67 N.Y. 2d 815 (1986) had held that a trial judge had improperly provided jurors with written instructions prior to the trial, the Appellate Division found that the Court of Appeals ruling would not apply to preliminary oral instructions.

In reaching its conclusion, the Appellate Division cited extensive research on juries including studies conducted by the Unified Court System and the American Bar Association. These studies concluded that juries benefit from substantive preliminary instructions. In rendering its determination, the Appellate Panel cautioned, however, that any preliminary instruction provided ought to remain fair and balanced and substantive preliminary instructions were no substitute for complete final instructions.

People v. Coppolo (N.Y.L.J., June 15, 2006, pp. 1, 2 and 32)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's burglary conviction, calling the prosecutor's conduct in the case inexcusable. The prosecutor had used a question to suggest that the defendant was also a drug dealer. The prosecutor so acted even after the trial court had specifically barred the prosecution from raising this issue. Although the trial court had granted a curative instruction, the Appellate Panel had found that the prejudice to the defendant was so severe that a reversal was required.

People v. Brown (N.Y.L.J., June 27, 2006, pp. 1, 3 and 33)

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's conviction and ordered a new trial because the trial court had failed to provide the jury with a proper alibi charge. The Court found that since the evidence supported an alibi defense and the defendant requested such a charge, the trial court committed reversible error in failing to provide one to the jury. The Court also found that prosecutorial misconduct had occurred during the cross-examination of the defendant and during the prosecutor's summation. The Appellate Division concluded that the cumulative effect of these errors required a reversal.

People v. Nelson (N.Y.L.J., July 3, 2006, pp. 1 and 29)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's drug conviction and found that a judge's statement to a jury which had deliberated for three days was unduly coercive.

The trial court had informed the jury that they would be sequestered for the night if they were unable to reach a decision. The Court found that under the circumstances of the case, where the jury had not been previously sequestered and had repeatedly reported itself deadlocked, the trial court's indication that they would be sequestered overnight in the event that they did not reach a verdict by the end of the day was impermissibly coercive and prejudicial to the defendant's right to receive a fair trial.

People v. Kopp (N.Y.L.J., July 11, 2006, pp. 1 and 2 and July 14, 2006, p. 22)

In a unanimous decision, the Appellate Division, Fourth Department, upheld a conviction of an upstate defendant who admitted shooting an obstetrician in order to prevent him from performing abortions. The defendant had argued that he was entitled to present a justification defense specifically related to the protection of the unborn.

The Court dismissed the defendant's justification argument, stating that:

> The alleged harm sought to be avoided by defendant's actions—described by defendant as the imminent deadly force being used upon the unborn—does not constitute an imminent public or private injury within the meaning of the Penal Law.

People v. Vielman **(N.Y.L.J., July 21, 2006, p. 1 and July 24, 2006, p. 24)**

The Appellate Division, Second Department, reversed a defendant's burglary conviction on the grounds that the prosecutor had knowingly made false statements during her summation. The Court stated that the prosecutor's argument to the jury was a blatant attempt to mislead them and that thus her responsibilities as a prosecutor had been violated. The Appeals Bureau of the Brooklyn DA's office in fact had consented to the reversal of the burglary conviction.

People v. Jones **(N.Y.L.J., July 21, 2006, pp. 1, 5, and 39)**

In a unanimous decision, the Appellate Division, Second Department, reversed a murder conviction where a prosecution witness had falsely testified that she had identified the defendant's nephew in a lineup as one of two individuals who had shot at the victim. The prosecutor who was aware of the false testimony failed to correct the testimony. The Second Department stressed that a prosecutor is under a duty to correct false testimony given by a prosecution witness. The Court also found that the prosecution had incorrectly vouched for the credibility of a witness and that the combination of this prosecutorial misconduct required a new trial.

People v. Kozlow **(N.Y.L.J., July 31, 2006, pp. 1 and 44)**

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction for attempting to disseminate indecent materials to minors because the e-mail which he had sent had text only and did not contain visual sexual images as is required by Penal Law § 235.00(1).

For Your Information

2005 FBI Crime Statistics

According to recent statistics released by the FBI for the year 2005, homicides rose nationwide by 4.8%. For the entire State of New York, murders went up by 2.5%. At the same time, homicides in New York City fell by 5.4%. With respect to overall violent crime, there was a 2.5% increase nationwide while in New York City violent crime dropped 1.9%. Statewide, however, violent crime rose 1.2%. One of the areas in the city that saw an increase was with respect to robberies, which rose 1.4% over last year.

While the results for 2005 were quite positive for the city, preliminary figures for the first six months in 2006 indicate a possible spike in the crime rate with the number of homicides up as compared with the same time last year. Reported rapes are also up by 8%. New York City Police Commissioner Raymond Kelly recently reported that the City is currently operating with some 5,000 fewer police officers than it had in the year 2000, but he expects that through new innovative procedures and the continued dedication of the members of the New York City Police Department, the statistics can remain at a low level.

New Legislation Regarding Criminal Law

On June 15, Governor Pataki signed new legislation that significantly increases penalties for those who place swastikas or burning crosses on property without permission. Utilizing such devices to "harass, threaten, and intimidate individuals, particularly members of ethnic, racial, and religious minorities" will now be classified as a Class E Felony punishable by up to four years in prison. The new legislation is effective immediately, but it appears that its constitutionality may be challenged on free speech grounds.

In late July, Governor Pataki also signed a new law which increases penalties for those driving with extremely high blood-alcohol levels or who kill someone during a drunk driving crash. The bill creates the crime of Aggravated Driving While Intoxicated for drivers with a blood-alcohol content of 0.18 or higher. The measure would allow prosecutors to seek longer prison terms for those charged with vehicular manslaughter and who have a high blood-alcohol content. The new penalties could range as high as 15 years in prison as opposed to the current seven-year maximum. A person convicted of Aggravated DWI would also be required to have an ignition interlock system installed on his vehicle while on probation.

In the last hours of the legislative session, the Legislature also passed a bill placing additional photos and home addresses of sex offenders on the Internet as part of an extension of Megan's Law. Under the new legislation, some 8,000 moderate risk or Level 2 offenders will have their photos placed on the state website. The Governor signed this new legislation on July 7, 2006.

DNA Databank Expanded

After years of controversy and bitter debate, the two Houses of the Legislature and Governor Pataki reached a compromised solution on the expansion of the DNA databank. The Governor and the State Senate had been aggressively pushing for an extension of the DNA databank to cover all crimes, both felonies and misdemeanors. The State Assembly on the other hand had resisted, including misdemeanor crimes on the grounds that adequate funding for such an expansion had not been provided and that the huge increase in new cases would overwhelm the testing system.

In late June in the last hours of the legislative session, a compromise legislative bill was approved. Under the compromise, all convicted felons would be required to give a DNA sample to the state. In addition, anyone convicted of seventeen specified misdemeanors, including petty larceny, would be required to provide a sample. Under the compromise proposal, it is estimated that nearly 50% of defendants convicted of a crime would now have to provide DNA samples.

As part of the DNA compromise, the Legislature also eliminated the statute of limitations for rape and other serious sex crimes. The statute of limitations to bring a civil suit regarding these crimes was also extended from one year to five years.

In recent months the support for the expansion of the DNA databank had been steadily growing and political leaders throughout the state, including Mayor Bloomberg, Attorney General Spitzer, and district attorneys around the state had thrown their support behind an expansion bill. Several months ago, a detailed report from the State Investigations Commission also called for the expansion of the DNA databank. In the last hours of the legislative

session, Assembly Leaders agreed to the passage of the bill after obtaining the modifications discussed.

Governor Pataki had called DNA the fingerprint of the 21st century and lauded the expansion of the databank when he signed the new legislation into law.

Court System Proposes New Rules to Govern Lawyer Advertising

The state's four presiding justices of the Appellate Division have promulgated new rules to govern lawyer advertising. The new rules were adopted in response to a number of complaints in recent years and are aimed at stopping misleading ads and overly aggressive solicitation. Chief Administrative Judge Jonathan Lipman stated that the proposed rules were meant to encourage lawyers to cultivate a more dignified image of the profession and to give clients greater opportunities to make rational decisions about which lawyers to hire. The new rules include:

1. A 30-day moratorium on advertising for wrongful-death or personal injury clients after tragedies such as plane crashes or other disasters with large numbers of casualties.
2. Guidelines on Internet-based ads and solicitations, including bans on popup ads and chatroom solicitation.
3. A ban on using fictional portrayals of clients, lawyers and judges or celebrity voiceovers in commercials.

The presiding justices have provided for a comment period from attorneys and bar associations which expires on September 15, 2006 and the new rules are expected to take effect on November 1, 2006.

A full listing of the proposed rules was published in the *New York Law Journal* on June 21, 2006, in the court notes section beginning on page 17.

Significant Number of Illegal Immigrants Incarcerated in State and Local Prisons

In a recent report issued by the United States Justice Department, it was revealed that during the year 2004, a large number of illegal immigrants spent time in state and local prisons. Throughout the country, the total number so incarcerated was 270,000. Ten states, however, accounted for most of the incarcerations. At the top of the list was California with New York State in the third position. The ten states along with the number of illegal immigrants incarcerated within the State were listed as follows:

California	108,247
Texas	36,407
New York	23,183
Florida	12,449
Arizona	12,205
Washington	6,977
New Jersey	6,959
Colorado	6,601
Illinois	5,718
Nevada	5,714

Concerns Raised Over Release of A-1 Felony Offenders as a Result of Rockefeller Drug Law Modifications

In a report issued by Bridget Brennan, the city's special narcotics prosecutor, concerns were raised that dozens of hard-core drug dealers have now been released as a result of the retroactive sentencing modifications allowed under the Drug Reform Act of 2004. According to the city prosecutor's report, of the 84 A-1 felony offenders who have applied for re-sentencing, 39 had their sentences modified to such an extent that they are presently out on the street. The report identified several of the defendants who had recently been freed as being high-level drug dealers with a high propensity to return to their former illegal trade. The report concluded that although the motivation for the Rockefeller Drug Law modifications was pure, in practice, its implementation may have unexpected and detrimental consequences.

Use of Death Penalty Increases for Repeat Sex Offenders Against Children

In late June, Oklahoma became the fifth state to allow the death penalty for sex crimes against children. The law makes people found guilty of rape and other sex crimes more than once against children younger than 14 eligible for the death penalty. A similar statute was also recently passed in South Carolina. Other states that also have such similar laws are Florida, Louisiana, and Montana. Although the use of the death penalty for sex crimes against children appears to be growing, serious issues regarding the constitutionality of such statutes exist. In 1977, the Supreme Court ruled that the death penalty could not be imposed for the rape of an adult woman. Thus, whether the death penalty for repeat sex offenders against children is somewhat in doubt and the issue may eventually have to be determined by a further decision from the United States Supreme Court.

Governor Pataki Makes His Last Selection to Fill Court of Appeals Vacancy

On July 20, 2006, the Commission on Judicial Nominations provided Governor Pataki with seven recommendations to fill the Court of Appeals seat which became vacant by the expiration of Judge George Bundy Smith's term on September 24, 2006. Judge George Bundy Smith, who still has one year before he reaches the mandatory retirement age of 70, requested reappointment to the court for an additional year and the Commission, in fact, included him as one of the seven proposed nominees. Judge Smith, who is a Democrat, was appointed by Governor Mario Cuomo in 1992 and has served on the court for 14 years.

The other six proposed candidates were:

Justice Eugene F. Pigott, Jr., Presiding Justice of the Appellate Division, Fourth Department.

Justice A. Gail Prudenti, Presiding Justice of the Appellate Division, Second Department.

Justice Thomas E. Mercure, presently sitting in the Appellate Division, Third Department.

Justice James M. Catterson, currently sitting in the Appellate Division, First Department.

Justice Richard T. Andrias, currently sitting in the Appellate Division, First Department.

Justice Steven W. Fisher, currently sitting in the Appellate Division, Second Department.

Of the 7 nominees, 4 are Republicans and 3 are Democrats. All are sitting Justices in the Appellate Divisions and several have appeared on the list of nominees with respect to openings for prior seats. Pursuant to the selection procedure, Governor Pataki was required to make a final selection from the list of nominees within 30 days after the recommendations were made. After careful consideration, the Governor announced on August 18 that his choice to fill the vacancy in question is Justice Eugene F. Pigott, Jr. Judge Pigott was confirmed by the Senate in mid-September and we will provide a biographical sketch of the new appointee to the Court in the next issue.

The Governor's selection represents his last pick since he will be leaving office at the end of the year. The next Court of Appeals seat will become available following Justice Rosenblatt's retirement at the end of 2006. The next Governor will receive a list of nominees for Judge Rosenblatt's seat no later than January 15, 2007 and it is expected that several of the nominees who made the list for Judge Smith's replacement will also be included as nominees for Judge Rosenblatt's replacement.

New York City Funding Increases for Defense Outpace District Attorney Increases

A recent report in the *New York Law Journal* of July 26, 2006 reported that during the four years of Mayor Bloomberg's term, there has been a significant increase in budget outlays for defense organizations and only slight increases in the budgets of the various District Attorney's Offices.

Since 2002, the budgets for the Legal Aid Society, Assigned Counsel, and other legal defense groups increased by nearly 30% from $120 million in 2002 to $158 million for the fiscal year 2007. At the same time, the budgets for the five district attorneys' offices and the special narcotics prosecutor increased from $227 million in 2002 to $233 million for the fiscal year 2007, an increase of 2.4%.

John Feinblatt, the City's Criminal Justice Coordinator, explained that the large increases for the defense groups were largely mandated by the State's increase in 18B rates and increased funding, which was required for the Legal Aid Society. In addition, he pointed out that the various prosecutors' offices, in addition to their allocated budgets, also had access to additional funds through a sharing of forfeiture proceedings and various state and federal grant programs.

The various district attorneys in the city have expressed disappointment with the lack of significant budget increases for their offices and have stated that they will continue to press for additional funds in the future.

Federal Database Created for Convicted Child Molesters

In late July, President Bush signed a new law that was passed by the Congress requiring convicted child molesters to be listed on a national Internet database and to face felony charges for not updating their whereabouts. The law also increased federal penalties for sexually assaulting a child, including the possibility of the death penalty when murder is involved.

United States Reaches Population of 300 Million

The U.S. Census Bureau estimates that the United States will pass the 300 million population mark in early October of 2006. This will make the United States the third largest country in the world, behind China and India. The United States is the fastest-growing industrialized nation in the world, adding about 2.8 million people a year. The country reached the 200 million mark in 1967. It has taken just under 30 years to add an additional 100 million to the population. The Census Bureau also report-

ed that Hispanics surpassed Blacks as the largest minority in the country and today Hispanics make up more than 14% of the U.S. population. The Census Bureau also reported that the U.S. population is aging, with 12% of the population being 65 or older.

Commission Report Calls for Changes in Indigent Defense System

In late June, a Commission established by Chief Judge Judith S. Kaye reported its findings and recommendations with respect to the indigent defense system throughout New York State. The Commission on the Future of Indigent Defense Services proposed the drastic solution of scrapping the current system and replacing it with a new statewide, state-funded system governed by uniform regulations and standards. The report summarized the current major problems as follows:

1. System fails to meet state's constitutional and statutory commitment;
2. No standards to define indigent defense;
3. Funding "grossly inadequate";
4. Attorneys overworked and undertrained, and;
5. Availability and adequacy of services vary from region to region.

To solve the current problems, the Commission makes specific recommendations as follows:

1. Establish a statewide, state-funded, independent defender system;
2. Create an Indigent Defense Commission to organize and manage delivery of defense services statewide;
3. Shift financial burden from counties to the state, and;
4. Eliminate disparity between funding for prosecution and defense services.

The Commission report has the strong support of the Office of Court Administration and Judge Kaye stated they will do everything in their power to address the issue immediately. The indigent defense system has been the topic of much discussion during the last few years and the issue was recently discussed by the Doyle Committee of our Bar Association, which made similar recommendations to Judge Kaye's Commission. We will keep our readers advised of any final decisions made with respect to significant changes in the system.

About Our Section and Members

Barry Kamins Named City Bar President

We are pleased to announce that Barry Kamins, a longtime and active member of our Executive Committee, has assumed the position of President of the New York City Bar Association for a two-year term. Barry will be the 62nd President of the City Bar, but has the distinction of being the first President to have a small firm practice based outside of Manhattan. Barry is well known to the legal profession and to criminal law practitioners, being the author of a well-respected treatise on search and seizure and being a regular lecturer and writer of legal articles for many years. He is a regular contributor to our newsletter and provides periodic updates on new legislation for the benefit of our readers.

Barry is a graduate of Rutgers Law School and is a former prosecutor in the Brooklyn District Attorney's Office. He is presently in practice in the law firm of Flamhaft, Levy, Kamins, Hersch & Rendlero, which he joined in 1973. He has also served as President of the Brooklyn Bar Association, the head of its Judiciary Committee, and various Committees which were of assistance to the Courts and to the legal profession.

Barry Kamins has also served as a member of the Board of Editors of the *New York Law Journal* and a Vice President of the New York State Bar Association. Barry is well liked and highly respected by members of the bench and bar and we congratulate him on his assumption of the Presidency of the New York City Bar.

Special Committee on Collateral Consequences of Criminal Proceedings

A special committee of the New York State Bar Association has recently released its informational report to the House of Delegates. The mission of the special committee was to highlight the problems faced by persons leaving correctional facilities and identifying the collateral consequences of criminal proceedings on various institutions and the community at large. The committee first of all summarized the 8 topics addressed by the report as follows:

Employment: Up to 60% of formerly incarcerated persons are unemployed one year after released, because major obstacles prevent them from getting a job.

Education: While imprisoned, many prisoners do not have the opportunity to develop the educational and vocational skills needed to get a job upon release.

Benefits: Public assistance is denied to many formerly incarcerated persons who desperately need such assistance to get back on their feet.

Financial Penalties: Convicted persons face burdensome government fines and fees that can interfere with the ability to develop a good credit rating and get a job.

Housing: Individuals charged with crimes and their families often cannot secure and maintain housing, and this problem is directly linked to reincarceration.

Family: The majority of incarcerated people are parents of minor children, and entire families are adversely affected by the incarceration of one member.

Civil Participants: New Yorkers convicted of felonies cannot vote while in prison or on parole and are barred for life from serving on juries.

Immigration: Non-citizen residents convicted of even misdemeanors are at grave risk of removal from the country, and they often leave family members behind.

The committee has proposed several recommendations, including requiring judges to inform criminal defendants of all civil consequences prior to accepting a guilty plea and incorporate the collateral consequences of criminal conviction into the sentence or judgment imposed by the court, facilitating the process for obtaining certificates of relief from disability, expanding the scope of the current Sealing Statute, and expanding the use of alternatives to incarceration. The special committee also advocates increased educational programs and greater employment training.

The committee's recommendations are scheduled to be considered at the November meeting at the House of Delegates. We will report on any final action with respect to the committee's recommendations.

Reminder—Fall Program in Buffalo

Members are reminded that the Fall program of our Section will be held on October 6 and 7 in Buffalo, New York. The program will feature CLE Sessions on Parole and Sentence Computations as well as updates on recent New York Court of Appeals and Second Circuit Federal cases. The program is being held at the Hyatt Regency in Buffalo. We are pleased that Justice Eugene F. Pigott, former presiding Justice of the Appellate Division, Fourth Department, and now a member of the New York Court of Appeals will serve as our luncheon speaker. Full details regarding this program has previously been forwarded to our Section members. We look forward to a good attendance and an excellent program. See page 37 for more details.

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.

Yvette Aguiar
Tracy Ann Amato
Michael Troy Baldwin
Andres J. Bermudez Hallstrom
Justin Bernstein
Douglas Burton Brasher
Amanda Burke
Tisha A. Burrows
Charles B. Ciago
Nicholas James Dennany
Danielle Frattura
Jon P. Getz
Erik Anthony Goergen
John Grasso
Mark J. Hackett
Ernest Hemschot
Michael Horn
Isaac D. Hurwitz
Anthony Laurence Katchen
Thomas Arthur Kenniff
Jason Israel Kirschner
Julie Anne Kleeman
Jaime Lathrop
Kathleen Conaty Leicht
Timothy Weldon Lynch
Kori Alisa Medow
Carla J. Miller Montroy
John M. Mooney
Kevin C. Murphy
Christopher P. Nalley
Julius P. Panell
Rita Pasarell
David M. Pascale
Clarissa H. Porter
Kenneth T. Powers
Steven M. Raiser
Naomi Kathryn Schneidmill
Diane Lynn Serbalik
Ryan Roger Sharpe
Sylvia Shaz Shweder
Jie Tang
Regina Maria Vilani
Howard Barry Weber
Brad Scott Weinstein
Noel L. Williams
Brian John Wilson
Kevin R. Wolf
Navid Zareh
Stephen R. Zastrow

NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

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

Name:_____

Daytime phone: _____

Fax: _____

E-mail: _____

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

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

Please return this application to:
Membership Department, New York State Bar Association,
One Elk Street, Albany, New York 12207
Telephone: (518) 487-5577 • Fax: (518) 487-5579 • www.nysba.org

Criminal Justice Section Fall Meeting

Hyatt Regency Buffalo / Buffalo Niagara Convention Center
Buffalo, New York • October 6-7, 2006

Section Chair: Roger B. Adler, Esq., New York City

Program Chairs: Norman Effman, Esq., Attica, and Paul J. Cambria, Jr., Esq., Buffalo

SCHEDULE OF EVENTS

Friday, October 6

12:00 p.m. — **Registration** - Lobby at Buffalo Niagara Convention Center

2:00 p.m. - 5:00 p.m. — **General Session -** Buffalo Niagara Convention Center Room 106B

2:00 p.m. - 2:10 p.m.

Welcoming Remarks
Section Chair
Roger B. Adler, Esq.
New York City

Program Introduction
Program Co-Chair
Norman Effman, Esq.
Legal Aid Bureau, Attica

2:10 p.m. - 4:00 p.m. — **A Practical Knowledge of the State Prison and Parole System for the Court Practitioner**

Speakers:

Anthony J. Annucci, Esq.
Deputy Commissioner and Counsel
NYS Department of Correctional Services
Albany

Edward R. Hammock, Esq.
Flushing

Moderator: **Norman Effman, Esq.**
Executive Director, Attica Legal Aid, Wyoming County Public Defender, Attica

6:00 p.m. - 7:00 p.m. — **Reception** - Harriet's at the Hyatt Regency

7:30 p.m. — **Dinner** - Tempo Restaurant - Belvedere Room - 581 Delaware Avenue

Saturday, October 7

7:30 a.m. - 9:00 a.m. — **Executive Committee Meeting -** Board Room at the Buffalo Niagara Convention Center

8:30 a.m. — **Registration** - Lobby at Buffalo Niagara Convention Center

9:00 a.m. - 12:00 p.m. — **General Session -** Buffalo Niagara Convention Center Room 106B

9:00 a.m. - 9:10 p.m.

Welcoming Remarks
Section Chair
Roger B. Adler, Esq.
New York City

Program Introduction
Program Co-Chair
Paul J. Cambria, Jr., Esq.
Lipsitz Green Fahringer Roll Salisbury & Cambria, Buffalo

9:10 a.m. - 10:25 a.m. — **Second Circuit Update**
Richard Ware Levitt, Esq., New York City

10:25 a.m. - 12:00 p.m. — **Court of Appeals Update**
Paul J. Cambria, Jr., Esq.
Lipsitz Green Fahringer Roll Salisbury & Cambria, Buffalo

12:00 p.m. - 1:00 p.m. — **Luncheon -** Ellicott Room, located in the Hyatt Regency, Second Floor
Guest Speaker: **Hon. Eugene F. Pigott, Jr.**
former Presiding Justice, Fourth Judicial Department and newest appointee to the New York Court of Appeals

Important Information

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York's MCLE rule, this program has been approved for a total of **5.5 MCLE credit hours in Practice Management and/or Professional Practice**.

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Albany, NY 12203

Rachel M. Kranitz
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Kenmore, NY 14217

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Publication and Editorial Policy

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.

Publication Policy: All articles should be submitted to:

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

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

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