NYSBA WINTER 2007 | VOL. 5 | NO. 1

New York Criminal Law Newsletter

A publication of the Criminal Justice Section
of the New York State Bar Association

Inside

NYSBA

Message from the Chair

This message, while written in late October, anticipates that, absent an unanticipated political meltdown, Eliot Spitzer will take office as our State's next Governor. I am sure that regardless of political persuasion, you join in the hope that with a new governing team, the Spitzer Administration will bring fresh thoughts and new energy to both the court system and the criminal justice community.

The last dozen years have marked a decided prosecutorial tilt toward executive policy, prerogatives and spending. Punishment was, in the view of some, the sole focused penal sanction. It is hoped that a long overdue assessment will support the view that focused attention is likewise due for the Parole Division, and inmate rehabilitation.

Most state prisoners do come home. The need to reassess Department of Correctional Services programs to better and more realistically prepare inmates—socially, psychologically, and economically—to survive in the "outside" world is paramount if one is seriously considering preventing recidivism.

The plague of drunk and impaired drivers (i.e., drugs, alcohol) continues to provide deep concern for the safety of our streets and highways. I have enthusiastically supported Brooklyn D.A. Hynes' efforts to secure funding for a dedicated D.W.I. court—believing that a centralized court, staffed with trained professionals, can devote the time and attention necessary to salvage drivers who suffer from drug and alcohol addiction and better protect the public.

I believe that "one for the road" must become as socially unacceptable as lighting up a cigarette is indoors. We can do more to attack the root cause of this societal problem. The cost may initially be significant, but the cost of ignoring the problem, other than by ratcheting up the sentencing component is, I would submit, somewhat shortsighted.

So, too, is the need to confront the problems caused by older drivers. It is shameful that political apprehension prevents retesting drivers at reasonably stated intervals following age 75. There is no known constitutional right to drive! Appropriate intervention—retesting—is appropriate, life-saving, and might well reduce the staggering high cost of liability insurance.

Finally, the *New York Times* has focused attention on the State's Justice Courts. This timely "hard-hitting" series mandates that, in this new millennium, we revisit whether they should be retained and, at minimum, improved. All such courts should be courts of record with a type of video recorder providing a unilateral "real time" record of each minute of each court session.

O.C.A. needs to become more involved in professionalizing these relics of another era, pending a thorough study of their usefulness and fairness.

Additionally, on a personal note, we extend best wishes to Judge Albert Rosenblatt on his retirement, and Judge Pigott on the commencement of his service as a member of New York's highest court.

Finally, I hope to see many of you at the Annual Meeting on Thursday, January 25, 2007, and at our festive Annual Awards Luncheon. In this connection, I note that the acclaimed author Tom Wolfe, thanks to Burt Roberts' assistance, will be the featured luncheon speaker. We anticipate thoughtful and entertaining remarks at our luncheon.

Roger B. Adler

Message from the Editor

In this issue, we present a detailed update regarding new legislation which was passed in 2006 and which deals with the criminal law area. As in the past, this update is written by Barry Kamins, a member of our Executive Committee and a regular contributor to our *Newsletter*. We thank Barry for this year's important update, which should be greatly beneficial to all who practice in the criminal law area.

We also present some very practical information regarding the New York State Correctional System presented by an expert in the field, to wit Anthony Annucci, the Deputy Commissioner and Counsel for the New York State Department of Correctional Services. Mr. Annucci made a detailed presentation on the subject at the recent Fall Meeting and this issue contains excerpts from his material. In the future we will be publishing additional aspects from his lecture, including updates on issues involving the Corrections Department.

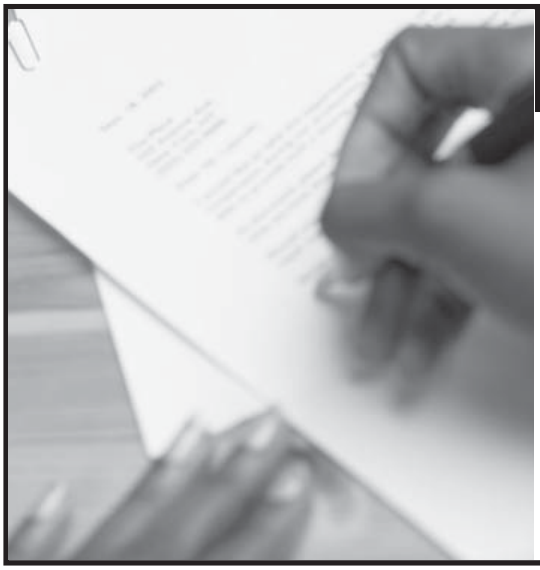
We are also pleased to present a book review on a new publication written by Judge Edward M. Davidowitz and Robert Dreher, Esq., which deals with laying the proper foundations when seeking to admit various types of evidence.

The New York Court of Appeals has also come down with some interesting decisions from its September and October terms, including the issue regarding the retroactivity of the more lenient sentencing provisions of the Drug Law Reform Act. These decisions are covered in our Court of Appeals section. With respect to recent developments in the New York Court of Appeals, we present a biography of Judge George Bundy Smith, who recently retired from the Court of Appeals, as well as a profile of Judge Eugene F. Pigott, Jr., who joined the Court in October.

We continue to provide items of general information which should be of interest to criminal law practitioners in our For Your Information section. Finally, in our section dealing with our own membership we report on an increase in membership and highlights of the recent Fall Meeting, which was held in Buffalo, New York.

I received many complimentary comments regarding our Fall issue and I continue to thank our members for their interest in and support of our 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

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

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

2006 Legislation Affecting the Practice of New York Criminal Law

By Barry Kamins

Introduction

This article will review changes in the Penal Law, Criminal Procedure Law, and several related statutes that were enacted in the last session of the Legislature and signed by the Governor. Some changes which are viewed as minor or technical will not be discussed.[1] The reader should review the new laws carefully since this article will distinguish between legislation that has already been signed by the Governor and a few proposed bills not yet signed as of the time this article was written. Obviously, the reader should determine whether those few bills have been signed before citing them as "law."

Sexual Assault

In the past session the Legislature devoted a great deal of energy to enacting laws that create new crimes and increased penalties for weapons offenses and offenses relating to unlawful sexual acts. For example, the Legislature enacted a new Class A-II felony, Predatory Sexual Assault.[2] Under this new law, a person is guilty of Predatory Sexual Assault when he commits any one of four Class B sexual crimes[3] and one of four aggravating factors are present.[4] For a first offense, the maximum sentence must be life imprisonment with a minimum of ten to twenty years. One who commits the crime and is a second felony offender faces a minimum sentence of fifteen years. A persistent felony offender faces a minimum of twenty-five years. In addition, when a person who is eighteen years or older commits one of the four predicate Class B sexual crimes and the victim is less than thirteen years of age, the underlying Class B felony is elevated to a new A-II felony, Predatory Sexual Assault Against a Child.[5]

Incest

The Legislature has also redrafted the incest statute to close a loophole in the law that permitted certain child sexual offenders to obtain relatively lenient treatment. Previously, the crime of incest was a Class E non-violent felony offense for which a defendant could receive probation. Effective November 1, 2006, incest is a crime that has three levels of severity.[6] Incest in the First Degree is a Class B felony and is committed when a person commits Rape in the First Degree or Criminal Sexual Act in the First Degree against a person related to him whether through marriage or not. Incest in the Second Degree, a Class D felony, and Incest in the Third Degree, a Class E felony, are predicated on less serious sexual crimes.[7]

Gun Possession

In the last session, the Legislature also focused its attention on the increased number of handguns in our communities. According to F.B.I. statistics, approximately 60% of the homicides that occur in New York City are committed with guns and it is estimated that there are two million unregistered handguns in the city. Under a significant new bill, which Governor Pataki has not yet signed, the Legislature dramatically increased the penalty for possession of one loaded firearm that is not possessed in one's home or business. Such possession, which was previously a Class D felony, would now constitute a Class C felony.[8] Thus, a person who is found in possession of one loaded handgun would face a mandatory determinate sentence of 3½ to 15 years in prison. Only if a prosecutor consents could a defendant plead to Attempted Criminal Possession of a Weapon in the Second Degree (a Class D felony) and would still face a mandatory determinate sentence of 2 to 7 years. A court could only impose a non-jail sentence on the D felony if it found one of three factors present[9] and made a statement on the record of the facts and circumstances upon which it imposed a non-jail sentence. Finally, the new law would eliminate the crime of possessing a loaded firearm with the intent to use it unlawfully (§ 265.03(2) of the Penal Law).

The proposed law is significant for two reasons. First, the possession of one handgun, formally a Class D felony, would now constitute a Class C felony that would *not* be subject to any mitigating sentence factors. Thus, if a prosecutor refused to offer a plea to a Class D felony, a jail sentence of at least 3½ years would be *mandatory* under the C felony. Second, by eliminating the "possession with intent" crime, the Legislature has created a situation that could be harmful to victims of domestic violence. For example, an individual who possessed a gun within his home with the intention of using it against a spouse would, under the proposed law, only be guilty of a Class A misdemeanor. As of the time this article was written the proposed law had not yet been sent to the Governor for his signature. One could argue that the bill was being held for further revision by the Legislature to address the elimination of the "intent to use" crime. It is possible that an amended bill could be passed by the Legislature late in the year or the bill, in its original form, could still be sent to the Governor for his signature.

On July 27, 2006, New York City Mayor Michael Bloomberg signed into law the country's first Gun Offender Registration Act (GORA).[10] Under this new

law (applicable only in New York City), effective March 24, 2007, every defendant who is convicted of Criminal Possession of a Weapon in the Third and Second Degree shall register with the Police Department of the City of New York at the time of sentence. The defendant must register in person at the Police Department within forty-eight hours of release from prison in the event a sentence of imprisonment is imposed, or within forty-eight hours from the date of sentence if a non-jail sentence is imposed. The defendant will be required to provide substantial personal information and a photograph may be taken. The period of registration will last four years from the date of conviction if the conviction does not include imprisonment or four years from the date of release from prison. During the four-year period, the defendant will be required to appear every six months to verify the previously submitted information. Failure to register or to verify any information shall constitute a misdemeanor punishable by imprisonment of up to one year and/or a $1,000 fine.

Reckless Assault

Other new crimes have been created by the Legislature. Reckless Assault of a Child, a Class D felony, is now committed when one engages in conduct that constitutes the "Shaken Baby Syndrome."[11] It is a crime for one to shake, slam or throw a child on a hard surface causing serious physical injury or various types of hemorrhaging that are the classic signs of shaken baby syndrome. New York is the third state to enact such legislation and it was enacted because of a gap in criminal penalties for reckless assault of children. Previously, reckless assault could only be punished by Assault in the First Degree (a Class B felony) or Third Degree (a Class A misdemeanor).

The above law, "Cynthia's Law," was named for Cynthia Gibbs, an eight-month-old child who died from a depressed skull fracture and bleeding on both sides of her brain. Each year an estimated 2,000 cases of Shaken Baby Syndrome occur in the United States and one shaken baby in four dies as a result of their injuries. In an unrelated measure, a bill was introduced to outlaw the naming of legislation after crime victims, as in "Cynthia's Law." In recent years, numerous laws have been named after their victims, such as Jenna's Law (eliminated parole for violent felonies); Kendra's Law (court-ordered treatment for mental patients); Megan's Law (sex offender registration); and Vasean's Law (drunk driving). Over the last twenty years, over 30,000 laws have been named across the country after crime victims. The proponent of the bill opposing this practice argued that by using the victim's name, family members are subject to unnecessary exploitation and pandering. However, the Legislature failed to enact the measure.

Sale of Controlled Substances

Another new crime prohibits adults over the age of eighteen from using a child under the age of sixteen to effectuate a sale or attempted sale of a controlled substance.[12] Law enforcement officials are increasingly encountering situations where adults are using children to escape detection and arrest for drug cases by having the children provide distraction and cover.

Aggravated Harassment

The Governor has also signed into law two new methods of committing Aggravated Harassment in the First Degree: placing swastikas on properties and burning crosses in public.[13] These two acts have been used to instill fear of bodily harm or death and now constitute Class E felonies.

Motor Vehicle Crimes

The Legislature also enacted a new crime, not yet signed into law, that addresses the common but dangerous situation in which a motorist fails to obey a police officer's order to stop his or her car. Under the new crime, Unlawful Fleeing a Police Officer in a Motor Vehicle, a person commits an A misdemeanor if he disobeys an order given by a uniformed police officer on foot or in a marked police vehicle with activated lights or siren and the motorist flees by driving recklessly or at a speed of 25 miles per hour or greater.[14] If the motorist causes serious physical injury or death to the police officer or a third party, the crime is elevated to an E felony (if serious physical injury is caused) or D felony (if death results).

Criminal Activity Relating to Schools

Two new laws address concerns about criminal activity committed on school buses. One prohibits the possession of a firearm on a school bus without the written authorization of school officials.[15] A second law expands the current penalties for drug sales near school grounds to apply to drug sales on a school bus.[16]

Alcohol Vaporizing Devices

Finally, a new law outlaws alcohol vaporizing devices which mix vaporized liquor with oxygen to deliver a fine alcoholic mist.[17] An individual can use this device to breathe in the vapors through a tube for a "quick shot" of alcohol. This immediately affects a person because the alcohol is inhaled directly into the bloodstream through the lungs. These machines have been sold on websites to restaurants, private parties and bar mitzvahs and the risks are great that children will be attracted to them, especially at underage drinking parties. In addition, there are potential health risks associated with the inhalation of alcohol and individuals who drive may not understand

how their bodies are affected by alcohol vapors as opposed to liquid alcohol and the rapid onset of an intoxicating effect caused by those vapors. The device known as Alcohol without Liquid, or AWOL, has been banned in sixteen other states.

Criminal Procedure Law Changes

Some new laws will affect certain procedural changes. The most significant change eliminates the statute of limitations for certain sex crimes: Rape in the First Degree, Criminal Sexual Act in the First Degree, Aggravated Sexual Abuse in the First Degree and Course of Sexual Conduct Against a Child in the First Degree.[18] While the Legislature had previously only exempted statutes of limitations for Class A felonies, the new law recognizes the comparative seriousness of certain violent felonies and determined that individuals who commit certain sex crimes should not be shielded from prosecution by the mere passage of time. At least a dozen states, including Rhode Island, New Jersey and Delaware, have no statute of limitations restricting the prosecution of serious felonies. The Legislature felt that in certain serious sex crimes, the victims should be afforded additional protection especially when the physical and emotional scars last for many years. The law applies prospectively to crimes committed on or after the effective date of the law (June 23, 2006), as well as retroactively where the former statute of limitations (five years) had not expired by June 23, 2006. Finally, the new law also extends the statute of limitations for a *civil* action arising out of these crimes to five years, or five years from the termination of a criminal action concerning the same conduct.

In another procedural change, the Legislature has amended the statute relating to *Batson* challenges in misdemeanor trials to conform to the statute for *Batson* challenges in felony trials. In 1989, the felony *Batson* statute was amended, on the subject of prior jury service, to provide that a prospective juror may only be challenged for cause when he or she served on a trial jury in a prior civil or criminal action involving the same *incident* charged.[19] Thus, jurors could no longer be challenged for cause merely because of prior jury service involving the same *type of crime* as the one alleged. The new law makes the same change for *Batson* challenges in misdemeanor trials.[20] Finally, a new law adds two counties (Essex and Orange) to the 22 counties that already use electronic technology, i.e., audio visual machines, in lieu of a personal appearance by the defendant.[21]

Enhanced Penalties

In the past session, the Legislature enacted numerous bills that will expand the definition and enhance the penalties of existing crimes. One new law adds a new definition for "computer network" and "access" to a computer system.[22] These expanded definitions keep pace with the ever-changing world of computer technology. In addition, the crime of Criminal Tampering has been expanded to include individuals who enter nuclear powered electric generating facilities.[23] Another bill expands the definition of Assault in the Second Degree with respect to injuries caused to transportation employees; the category of MTA signal person has now been added.[24] Two new laws subject repeat offenders to increased penalties. Individuals who commit certain vehicular crimes who have previously been convicted of an alcohol- or drug-related driving charge face increased penalties. Vehicular Assault in the Second Degree (a Class E felony) is elevated to a Class D felony when the defendant has previously been convicted of any violation of Vehicle and Traffic Law § 1192 within the preceding ten years.[25]

Similarly, Vehicular Manslaughter in the Second Degree (a Class D felony) is elevated to a Class C felony under the same circumstances. The Legislature has enhanced the penalties for the manufacture or sale of unauthorized music recordings by reducing the felony threshold from one thousand recordings to one hundred.[26] Finally, the definition of Riot in the First Degree, currently applicable to state correctional facilities, has been expanded to apply to local correctional facilities.[27]

Crime Victims

Each year the Legislature enacts measures addressing concerns of crime victims and this year was no exception. One of these new laws extends the maximum permissible duration of a final or permanent order of protection issued by a court at the time of sentence.[28] In felony convictions, the duration had been raised from five years to eight years. For Class A misdemeanors, the maximum period has been raised from three years to five years and in all other cases (Class B misdemeanors, violations, unclassified misdemeanors), the maximum period has been raised from one year to two years. Other new laws increase the penalties for *violating* orders of protection. For example, a defendant who violates an order of protection can be charged with Criminal Contempt in the Second Degree, a Class A misdemeanor and if the defendant has been previously convicted of Criminal Contempt in the First or Second Degree, the penalty is elevated to a Class E felony. A new law adds Aggravated Criminal Contempt to the list of predicate offenses that can elevate the punishment to a Class E felony.[29] Currently, a defendant can be charged with Aggravated Criminal Contempt when he violates an order of protection and causes physical injury or serious physical injury. Another new law permits a defendant to be charged with this crime when he commits Criminal Contempt in the First Degree and has either been previously convicted of Aggravated Criminal Contempt or Criminal Contempt in the First Degree within the preceding five years.[30]

In addition, a court is now authorized, as a condition of an order of protection, to order a defendant to refrain from injuring or killing an animal owned by a victim.[31] A judge in Queens County recently issued such an order to protect a dog from injury. Finally, a new law requires the police to provide crime victims with information regarding their basic rights and the services available from the Crime Victims Board.[32]

Registration of Sex Offenders

Each legislative session brings changes to the Sexual Offender Registration Act that was enacted ten years ago pursuant to Megan's Law. The law was originally effective on January 21, 1996, and it provided that sex offenders register for a period of ten years. Earlier this year, with the ten-year registration period about to expire, the Governor signed an amendment to the Act that extended and increased periods of registration.[33] Effective January 18, 2006, Level One offenders must register for twenty years. Level Two and Three offenders must register for life but Level Two offenders can petition for relief from registration after 30 years. Regardless of risk levels, those offenders who are designated sexual predators, sexually violent offenders or predicate sex offenders must register for life with no right to petition for relief. A class action in federal court challenged the validity of this legislation as to Level Two offenders who were originally governed by the ten-year registration requirement.[34] The court issued an order that invalidated the legislation but the order was stayed and is currently being appealed. A separate new law requires information about Level Two offenders to be posted on the website run by the Division of Criminal Justices Services.[35] Previously, only information regarding Level Three offenders was posted. The site had previously listed 23,000 offenders. The amendment will add an additional 8,000 offenders. The crime of Compelling Prostitution was added to the list of designated offenses for which registration and DNA samples are now required.[36] Finally, the Board of Parole was given the responsibility of notifying local social services programs upon the release of Level Two or Three sex offenders when it appears that the inmate is likely to seek access to local social services for homeless persons.[37]

Collateral Consequences of Criminal Activity

The Legislature addressed an area it had not focused on previously: collateral consequences of criminal convictions. Initially, an amendment added an additional purpose to the Penal Law that promotes public safety through the successful reentry of individuals into society.[38] A second bill would permit an applicant for a Certificate of Relief from Civil Disabilities to obtain the probation report considered by the court in making its determination.[39]

Vehicle and Traffic Law Violations

The Legislature turned its attention to the Vehicle and Traffic Law and enacted a comprehensive reform of alcohol- and drug-related driving charges. First, it created a new crime, Aggravated Driving While Intoxicated, which requires a blood-alcohol level of .18% or higher.[40] This crime is a misdemeanor with enhanced fines of $1,000 to $2,500. It is elevated to a Class E felony for taxicab or livery drivers and a Class D felony if the driver operates either a school bus carrying a passenger or a truck with hazardous material. The law restricts plea bargaining and a conviction requires the completion of a drunk driver program as well as a mandatory license revocation for one year. A second new crime, Driving While Ability Impaired by the Combined Influence of Drugs and Alcohol,[41] is classified as a misdemeanor.

The comprehensive new law adds four new factors that can raise the crime of Vehicular Manslaughter in the Second Degree (Class D felony) to Vehicular Manslaughter in the First Degree (Class C felony): the defendant causes the death of two or more persons; the defendant has been twice or more convicted within the previous five years of one of the provisions of § 1192 or three times within the past ten years; the defendant has previously been convicted of a homicide offense resulting from the operation of a motor vehicle; or the defendant has a blood-alcohol level of .18% or more.[42] Finally, the law increases the mandatory revocation period for refusal to submit to a chemical test. For the first refusal the period is increased from six months to one year. The revocation period for repeat offenders is increased from one year to 18 months. In addition, the civil penalty for refusal to submit to a chemical test for first offenders is increased from $350 to $550. There is also a provision for a permanent revocation of a driver's license for persistent offenders who are convicted of § 1192 of the Vehicle and Traffic Law. Operation of a vehicle while under a permanent license revocation will constitute a felony: Aggravated Unlicensed Operation. In a related measure, a new law has increased the penalties for Boating While Intoxicated and Boating While Impaired so that they are uniform with the penalties for Driving While Intoxicated and Driving While Impaired.[43]

Other measures will impact on drunken driving charges. A new law increases penalties for repeat offenders who have out-of-state convictions. Previously, all out-of-state convictions for drunken driving charges were deemed to be a conviction for impaired driving. Under the new law, the out-of-state conviction shall be considered a conviction for a misdemeanor or felony as if it had occurred in this state.[44] Another law permits a registered physician's assistant and certified nurse practitioner to withdraw blood to determine alcohol or drug content.[45] Finally, motorists who cause physical injury or death as a result of a right-of-way violation will face a mandatory

license suspension and be required to participate in a motor vehicle accident prevention course as a condition of probation.[46]

DNA Samples

A new law signed by the Governor significantly expands the list of convictions for which a defendant must supply a DNA sample which is then placed in the state's DNA database.[47] Under this new law, a defendant convicted of *any* felony and one of eighteen specified misdemeanors must supply a sample. Some of the misdemeanors include Menacing, Stalking, Sexual Abuse, and Endangering the Welfare of a Child; for these crimes there seems to be a rational basis for a DNA sample. However, the list also includes Petit Larceny and Assault in the Third Degree.

Miscellaneous

There are a number of miscellaneous laws that were enacted by the Legislature. One law amends the Public Health Law to conform state schedules of controlled substances to federal schedules.[48] This would eliminate much confusion that exists in the medical, pharmaceutical and law enforcement professions concerning the status of drugs as controlled substances. A second law would require prosecutors to notify child protective agencies upon the conviction of a defendant for child abuse.[49] Currently, a prosecutor is only required to report suspected cases of child abuse to the state central registry upon the arrest of a defendant.

As usual, the Legislature expanded the authority of certain classes of law enforcement personnel. Under these laws, the Legislature has granted peace officer status to the following individuals: commissioners and court officers in the town of Rye;[50] court attendants in the town of Yorktown;[51] uniformed court officers in Lewis County;[52] members of the Erie County Medical Center security force;[53] court officers in the town of Riverhead;[54] Department of Army special agents, detectives and police officers;[55] court officers in the town of Southhold;[56] and certain employees in the village of Lake George.[57] In addition, certain forest rangers of the Department of Environmental Conservation would become police officers.[58]

Each year the Legislature extends the expiration (or "sunset") of various laws by enacting "sunset extenders." This year it extended the law that authorizes defendants to appear at certain court proceedings through the use of audio visual equipment rather than in person. The law was extended three years, until September 1, 2009.[59] In addition, it extended the law that permits payment of motor vehicle-related fees and fines by credit card. The law was extended for four years, until July 7, 2010.[60]

Endnotes

1. Although the term "sodomy" was replaced by "criminal sexual act" in 2004, a technical change makes the change in a statute that had not been conformed. Criminal Procedure Law § 720.10(2)(a); Chapter 316, effective July 26, 2006. Several conforming changes were made in the Criminal Procedure Law to reflect the enactment of the new crime of aggravated murder of a police officer; Chapter 93, effective June 3, 2006. The Police Department can now destroy weapons (rifles or shotguns) other than firearms that are not claimed within one year; Chapter 578, effective November 1, 2006. Individuals who are fourteen years or older can now legally possess a pistol or revolver at certain pistol ranges to practice for or compete in competitions; Chapter 281, effective July 26, 2006. Finally, prosecutors will not be prohibited from disposing of cases when they are unable to confer with the victim because the victim refuses to cooperate or the victim's whereabouts are unknown; Chapter 193, effective September 1, 2005.
2. Penal Law § 130.95, Chapter 107, effective June 23, 2006.
3. Rape in the First Degree; Criminal Sexual Act in the First Degree; Aggravated Sexual Abuse in the First Degree; Course of Sexual Conduct Against a Child in the First Degree.
4. The defendant causes serious physical injury to the victim; uses or threatens the immediate use of a dangerous instrument; commits one of the four Class B felonies against more than one person; or has previously been convicted of any felony defined in Article 130 of the Penal Law, Incest, or the Use of a Child in a Sexual Performance.
5. Penal Law § 130.96; Chapter 107, effective June 23, 2006.
6. Penal Law §§ 255.25, 255.26, 255.27; Chapter 320, effective November 1, 2006.
7. Rape in the Second Degree and Criminal Sexual Act in the Second Degree (Incest in the Second Degree); Sexual Intercourse, Oral Sexual Conduct and Anal Sexual Conduct (Incest in the Third Degree).
8. Penal Law § 265.03; S-8467, effective November 1, 2006 upon the Governor's signature.
9. Mitigating circumstances that bear directly upon the manner in which the crime was committed; the defendant was not the sole participant in the crime and his participation was relatively minor; possible deficiencies in proof of the crime. See Penal Law § 70.02(4)(b).
10. Introductory Local Law No 362-A; effective May 24, 2007.
11. Penal Law § 120.02; Chapter 110, effective November 1, 2006.
12. Penal Law § 220.28; Chapter 564, effective November 1, 2006.
13. Penal Law § 240.31(3)(4); Chapter 49, effective June 15, 2006.
14. Penal Law § 270.25; S.8445, effective November 1, 2006, upon the Governor's signature.
15. Penal Law § 265.01(3); Chapter 199, effective November 1, 2006.
16. Penal Law §§ 70.70(2)(a)(i) and 220.00(17); Chapter 436, effective September 1, 2006.
17. General Business Law §§ 399-dd and 117-b; Chapter 172, effective November 1, 2006.
18. Criminal Procedure Law § 30.10(2)(a); Chapter 3, effective June 23, 2006.
19. *See People v. Beirati*, 136 Misc. 2d 959, 519 N.Y.S.2d 500.
20. Criminal Procedure Law § 360.25(1)(e); Chapter 695, effective November 1, 2006.
21. Criminal Procedure Law § 182.20; Chapters 470 and 532, effective August 16, 2006.
22. Penal Law § 156.00(6)(8); Chapter 558, effective November 1, 2006. *See People v. Versaggi*, 83 N.Y.2d 123 (1994).

23. Penal Law § 145.15; Chapter 585, effective August 16, 2006.
24. Penal Law § 120.05(11); A8351, effective November 1, 2006, upon the Governor's signature.
25. Penal Law § 120.04; Chapter 245, effective November 1, 2006.
26. Penal Law § 275.40; Chapter 682, effective November 1, 2006.
27. Penal Law § 240.06; Chapter 13, effective March 21, 2006.
28. Penal Law § 530.12 and 530.13; Chapter 215, effective August 25, 2006.
29. Penal Law § 215.51; Chapter 349, effective November 1, 2006.
30. Penal Law § 215.52; Chapter 350, effective November 1, 2006.
31. Criminal Procedure Law § 530.12(1)(f); Chapter 253, effective July 26, 2006.
32. Executive Law § 625(a); Chapter 173, effective January 1, 2006.
33. Correction Law § 168-1(6)(a)(b); Chapter 1, effective January 18, 2006.
34. *Doe v. Pataki*, 427 F. Supp. 2d 398 (So. Dist. N.Y 2006).
35. Correction Law § 168-1(6)(a)(b); Chapter 106, effective June 23, 2006.
36. Correction Law § 168-a(2)(a)(i); Chapter 9, effective June 7, 2006.
37. Executive Law § 259-c(16); Chapter 96, effective October 1, 2005.
38. Penal Law § 1.05(6); Chapter 98, effective June 7, 2006.
39. Correction Law § 702(6); Chapter 720, effective June 7, 2006.
40. Vehicle and Traffic Law § 1192(2-a); Chapter 732, effective November 1, 2006.
41. Vehicle and Traffic Law § 1192(4-a); Chapter 732, effective November 1, 2006.
42. Penal Law § 125.13; Chapter 732, effective November 1, 2006.
43. Navigation Law § 49-a(2); Chapter 151, effective August 6, 2006.
44. Vehicle and Traffic Law § 1192(8); Chapter 231, effective November 1, 2006.
45. Public Health Law § 3703(2); Chapter 618, effective August 6, 2006.
46. Vehicle and Traffic Law §§ 510(2)(a)(vii) and (viii) and Penal Law § 65.10(2)(e-1); Chapter 571, effective November 1, 2006.
47. Executive Law § 955(7); Chapter 441, effective July 26, 2006, and applies to offenses committed on or after July 26, 2006, and to crimes committed prior thereto where the sentence was not completed by July 26, 2006.
48. Public Health Law § 3306; Chapter 431, effective August 16, 2006.
49. Criminal Procedure Law § 440.65; Chapter 647, effective October 13, 2006.
50. Criminal Procedure Law § 2.10(81); Chapter 581, effective August 16, 2006.
51. Criminal Procedure Law § 2.10(81); Chapter 584, effective August 16, 2006.
52. Criminal Procedure Law § 2.10(81); Chapter 653, effective September 13, 2006.
53. Criminal Procedure Law § 2.10(81); Chapter 467, effective February 20, 2007.
54. Criminal Procedure Law § 2.10(81); Chapter 482, effective August 16, 2006.
55. Criminal Procedure Law § 2.15(26); Chapter 486, effective August 16, 2006.
56. Criminal Procedure Law § 2.10(81); Chapter 510, effective August 16, 2006.
57. Criminal Procedure Law § 2.10(81); Chapter 438, effective July 26, 2006.
58. Criminal Procedure Law § 1.20(34)(v); Chapter 693, effective September 13, 2006.
59. Criminal Procedure Law § 182; Chapter 34, effective May 16, 2006.
60. Chapter 145, effective July 7, 2006.

Barry Kamins is currently the president of the Association of The Bar of the City of New York and is a regular contributor to our *Newsletter*. He is the author of a now-famous treatise on Search and Seizure and has authored many article in the criminal law field. He is also a member of the Executive Committee of our Section.

A Practical Knowledge of the New York State Prison System

By Anthony J. Annucci

An Overview of the Department of Correctional Services

The Department is responsible for confining every individual in this state who is convicted of a felony or adjudicated as a youthful offender and who receives either a determinate or indeterminate sentence of imprisonment. Individuals who receive definite sentences of imprisonment are housed in local jails.

The Department presently operates 70 different correctional facilities scattered throughout the four corners of the state, as well as the Willard Drug Treatment Campus for individuals who either receive parole supervision sentences or who are technical parole violators diverted to Willard in lieu of state prison. The annual budget for the Department, including capital as well as operational expenditures, is in excess of $2.2 billion.

The Department employs in excess of 31,000 individuals, which includes approximately 22,000 uniformed or security staff and approximately 10,000 non-uniformed staff, such as teachers, counselors, vocational instructors, health care workers, maintenance, clerical and support personnel. As of January 2, 2006, the Department had an under custody population of 63,032 inmates. Every month, between 1,500 and 2,000 inmates are received into the Department's custody. Over the course of a one-year period, the Department will house nearly 100,000 inmates.

Since 1981 the Department has added in excess of 43,000 prison beds. Nevertheless, the Department is currently operating at 124 percent of capacity and is subject to a number of contempt proceedings. Criminal Procedure Law section 430.20 requires the Department to accept into its custody "forthwith" those individuals who are sentenced to state imprisonment. Nearly every county in the state falls within a court order that defines "forthwith" as a prescribed period of time, which typically is ten days from the date an inmate becomes state-ready. A state-ready inmate is one who has been sentenced to state imprisonment; who has had all of the requisite transfer documentation assembled for him, as set forth in paragraph (a) of Correction Law section 601, such as the commitment order, presentence report and medical summaries; and is otherwise transferable to state prison. Existing overcrowding within the Department is not a legal excuse for a failure by the Department to accept into its custody all state-ready inmates within the prescribed periods of time.

Past failures by the Department have led to the imposition of millions of dollars of fines from civil contempt proceedings. A couple of counties have even sought criminal contempt against the Commissioner of Correction. Until recently, the ability of the Department to provide all of the requisite prison space sufficient to meet the overall demands for prison capacity has been an overriding problem of concern. The prison population has been shrinking of late and is expected to continue to shrink. At one time, the Department housed nearly 72,000 inmates.

The Department must also provide for the safety and well-being of every individual committed to its custody regardless of background. This means, for example, we must also provide for inmates with complex health problems, such as AIDS or tuberculosis. We must provide treatment for inmates who may require chemotherapy or dialysis. We must provide for inmates who are paraplegics and we must take care of inmates who are mentally retarded or even psychotic. If an inmate is notorious or likely to be victimized in the general population, such as a transvestite or transsexual, we must still provide for the safe and humane confinement of such inmate. In essence, the Department has no discretion at the front end in terms of accepting inmates who are committed to its custody and it has almost no discretion at the back end in terms of deciding who gets released from prison.

Classification and Reception

Every inmate is delivered to a Department reception center for initial processing, screening, testing and classification. Inmates from New York City are delivered to the Downstate Correctional Facility if they are classified as maximum security, and Ulster Correctional Facility if they are classified as medium security or below. The Department operates a screening unit on Rikers Island, which reviews the necessary documentation in advance of transfer to make the preliminary security determination. In essence, the reception process is designed to evaluate an inmate's program needs and determine their security classification.

A sentence of imprisonment legally commences when the prisoner is received in an institution under the jurisdiction of the Department. See Penal Law section 70.30 (10). Recently sentenced inmates are delivered to reception centers when they become state-ready. The reception process lasts approximately seven days. Each inmate has his sentence calculated, i.e., all of the potential release

dates are determined. In addition, the inmate is classified as either maximum, medium or minimum security. Primarily, this is a function of the length of time before an inmate's earliest release date. In general, an inmate with six years or more until his or her earliest release date will start out in a maximum security facility.

Medical and educational tests are also conducted on each inmate during the reception process. DNA samples are obtained from those inmates covered by the law. All inmates are also given an initial shave and haircut so that photographs can be taken for security purposes. Exceptions to the initial haircut requirement will be made for legitimate religious purposes. There are no religious exceptions for the initial shave.

Critical Documents

The three critical documents the Department receives when an inmate is delivered to a reception center are the commitment document, the presentence report and the criminal history record (NYSID report). See Correction Law section 601. Pursuant to recently amended Criminal Procedure Law section 380.70, the commitment document is supposed to list "the subdivision, paragraph and subparagraph of the penal law or other statute under which the defendant was convicted."

Prior to this change a commitment document would for example generically list Robbery in the First Degree as the crime of commitment. Now, with the particular subdivision specified, the Department will know whether the robbery conviction involved serious physical injury, a deadly weapon, a dangerous instrument or the display of what appeared to be a handgun. This type of information is very relevant for purposes of determining whether Executive Order #5.1 is applicable.

The Department does not receive plea minutes. Similarly, sentencing minutes are not delivered together with the inmate but are instead mailed separately to the Department, usually a number of weeks after the inmate has been screened and classified. See Criminal Procedure Law section 380.70. In addition, in order for the Department to match the sentencing minutes with the appropriate inmates when they finally do arrive, court stenographers have been instructed to list the inmate's NYSID number on the cover of the sentencing minutes. This does not always happen. Hence, it is sporadic as to whether or not sentencing minutes will be in a particular inmate's file.

Any information that either the court or the district attorney may wish to make the Department aware of should be noted on the commitment document itself. Each commitment document usually has a section that is listed as "remarks." Critical decisions, such as whether an inmate will be accepted into the Shock Incarceration program, are made during the reception process without the benefit of sentencing minutes. This is why any remarks set forth on the commitment document are so important. Of course, by the time an inmate is eligible to be considered for parole release, if the sentencing minutes do become available, they may have some bearing upon the ultimate determination by the Parole Board.

The single most important document is the presentence report. It is of enormous importance not only in making security and classification decisions, but also in terms of making program assignments. This report follows the inmate throughout his incarceration. A computer-generated summary of the presentence is also entered into the Department's computer for each inmate. Hence, if a presentence report contains inaccurate information, it behooves the affected party to make the appropriate motion to correct the report before the defendant enters the state prison system.

Finally, as part of the reception process, the Department may receive summaries of available medical information and behavior while the inmate was incarcerated in the local correctional facility. If specific medical arrangements must be made during the Department's reception process, local officials will usually communicate such needs prior to the actual delivery of the inmate.

At the completion of the reception process, an inmate will be transferred to a general confinement facility where his or her program needs will be addressed. In certain cases, an inmate's medical or mental health needs will also determine possible facility placement. To the greatest extent practicable, correctional facilities operate with the objective of assisting sentenced persons to live as law abiding citizens. See Correction Law section 70(2).

Anthony J. Annucci is the Deputy Commissioner and counsel of the New York State Department of Correctional Services. The above article represents excerpts taken from his recent lecture and presentation at the fall program of the Criminal Justice Section in Buffalo, New York. In January 2001, Mr. Annucci received an award from the New York State Bar Association Criminal Justice Section for "Outstanding Contribution in the Field of Corrections."

A Book Review on *Foundation Evidence, Questions and Courtroom Protocols*

By Hon. Edward M. Davidowitz and Robert Dreher, Esq.

Reviewed by Spiros A. Tsimbinos

This recent publication written by Bronx Supreme Court Justice Edward M. Davidowitz and Robert Dreher, Esq., a long-time member of the Bronx District Attorney's office, and published by the New York State Bar Association is an extremely valuable tool for criminal law practitioners. It provides valuable details regarding how to properly lay a foundation for various types of evidence. The book clearly points out and stresses that unless the parties have stipulated to the introduction of a specific piece of evidence or testimony, an attorney wishing to present such evidence or testimony to the court or jury must be able to ask proper questions to ensure that the court will permit its introduction. Attorneys who do not ask the appropriate foundation questions may find themselves frustrated by a string of sustained objections. The 165-page manual in question specifically addresses the problems involved in laying a proper foundation and is an important aid to all attorneys in dealing with this situation.

The manual has six main chapters and covers the following areas:

Chapter 1 Documentary Evidence

Chapter 2 Alternative Procedures for Admission and Preclusion of Evidence

Chapter 3 Physical and Demonstrative Evidence

Chapter 4 Lay Witness Testimony

Chapter 5 Expert Witness Testimony

Chapter 6 Trial and Courtroom Protocols

In addition to the detailed text, the book also contains a collection of forms and protocols which set forth foundation questions introducing some of the more traditional and common business records and for the qualification of witnesses who will testify about them, including experts in a variety of areas, such as ballistics, narcotics and pathology. Sample questions are also provided with respect to the proper method for establishing a chain of custody for introducing physical evidence. The forms and protocols provided, for the most part, concern issues and subjects that litigators encounter on a regular basis and are therefore extremely valuable to the everyday criminal law practitioner.

In this regard, a review of the index to the standard questions and protocol reveals sample forms dealing with narcotics chemists, fingerprint experts, handwriting experts, and breathalyzer test results.

The manual also provides an important list of case law which concerns the various areas regarding the establishment of proper foundations and the admissibility of various types of evidence.

Of particular interest to criminal law practitioners are various sample questions relating to such areas as confessions or admissions, reputation or character evidence, voice identification, prior convictions and bad acts and the voir dire of child witnesses.

The authors of this manual have done an excellent job of covering the important topic of foundation evidence in a concise and clear manner. Their sample questions and forms should also greatly assist the everyday practitioner in dealing with this everyday problem. Justice Davidowitz and Robert Dreher have drawn upon their long experience in the criminal law area to produce a practical and valuable tool for anyone dealing with criminal law, be it on the prosecution or the defense side. Those interested in obtaining further information regarding this publication should contact the CLE Publications Department of the New York State Bar Association, One Elk Street, Albany, New York 12207.

The Hon. Edward M. Davidowitz is a Justice of the Supreme Court currently sitting in the criminal branch in Bronx County. He is a graduate of Cornell Law School. Prior to his judicial service, he was an Assistant District Attorney for six years and also worked in private practice for eleven years. He is an active member of several bar associations, is serving on several committees and is also the author of various prior publications.

Robert Dreher, Esq. has been a member of the Bronx District Attorney's Office for more than 31 years and presently serves as the Division Chief of the General Crimes Division. He is a graduate of Cornell Law School and has also authored various legal articles as well as serving as a lecturer for various continuing legal education programs.

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 September 6, 2006 to November 2, 2006. In order to provide Court of Appeals decisions to our readers as quickly as possible, we previously cited the *New York Law Journal* for all of the decisions for the 2005-2006 term, which were published in our last three issues. We are also now providing, as listed below, the official New York Report Citations to cover the Court of Appeals decisions from September 13, 2005 to September 6, 2006. The cases are listed in chronological order as they appeared in our last three issues, to wit, Spring, Summer and Fall of 2006.

DEPORTED ALIEN DENIED RIGHT TO APPEAL CONVICTION

***People v. Diaz*, decided September 19, 2006 (N.Y.L.J., September 20, 2006, pp. 1, 4 and 22)**

In a 6-1 decision, the New York Court of Appeals held that a defendant was not entitled to have his appeal heard before the Court because he had been deported and therefore was not before the Court so that the Court may exercise its jurisdiction.

In dismissing the appeal, the majority opinion written by Judge Ciparick stated that the Court had consistently dismissed appeals where the defendant had absconded and where the defendant had voluntarily absented itself from the court's jurisdiction. Expanding on that concept, the majority felt that while dismissal was not mandatory, the Court would exercise its discretion to dismiss the appeal with the understanding that the defendant could revisit the issue if he returned to the Court's jurisdiction. In reaching its determination, the majority stated, "analyzing the relevant factors, we have determined that it would be inappropriate under the circumstances of this case to retain this appeal."

Judge Robert Smith issued a vigorous dissent arguing that the Court had already granted the defendant leave to appeal and that his absence was not by a voluntary act, but by forcible deportation. Judge Smith concluded in his dissent that the "defendant is entitled to have us assume absent contrary evidence that he in fact wants a retrial and will cooperate in any way necessary if his conviction is reversed and the People seek to retry him."

MORE LENIENT SENTENCING PROVISIONS OF DRUG LAW REFORM ACT ARE NOT RETROACTIVE

***People v. Utsey, People v. Nelson*, and *People v. Corey Smith*, decided September 21, 2006 (N.Y.L.J., September 20, 2006, pp. 1, 2, and 22)**

Settling an issue which has been of some concern during the last two years, the Court of Appeals unanimously held that the Rockefeller Drug Law Reforms enacted in 2004 were not to be applied retroactively. Several trial courts had relied upon the "Amelioration Doctrine" to grant lower sentences to defendants who had been convicted but not yet sentenced prior to the enactment of the 2004 drug law modifications.

In the decision written by Chief Judge Kaye, the Court pointed out that the Legislature specifically provided for an effective date and that the Legislature evidenced their clear intent to apply the law only prospectively. The Court, in deciding the three cases in question, stated, "under the plain language of the statute, the relevant provisions of the Drug Law Reform Act are intended to apply only to crimes committed after its effective date."

COURT OF APPEALS NOT AUTHORIZED TO HEAR DRUG RE-SENTENCING APPEALS

***People v. Bautista*, decided September 21, 2006 (N.Y.L.J., September 22, 2006, pp. 1 and 25)**

In a unanimous decision, also dealing with an interpretation of the Drug Law Reform Act of 2004, the Court of Appeals held that with respect to the provision dealing with the re-sentencing of A-I Felony offenders, the Court of Appeals was not authorized to hear such appeals by permission. The re-sentencing provision permits offenders who are more than 12 months from being an eligible inmate as defined in the Correction Law to seek re-sentencing relief. The defendant in question had sought such relief but was turned down by both the trial court and the Appellate Division. He then sought to appeal to the Court of Appeals. The Court of Appeals dismissed the appeal in question, finding that it had no authority to act. In so doing, the Court stated:

> Chapter 643 of the Laws of 2005, the unconsolidated law at issue, provides that "an appeal may be taken as of right in accordance with applicable provisions of the criminal procedure law: (a) from an order denying resentencing". We reject defendant's argument that chapter 643 authorizes not only an appeal as of right to the intermediate appellate court, but also an appeal to this Court by permission pursuant to CPL 450.90. The Legislature failed to mention CPL 450.90 in chapter 643 of the Laws of 2005. Moreover, the Legislature did not amend the language of CPL 450.10

or CPL 450.15 to provide in those sections for appeals to the intermediate appellate court from orders denying applications for resentencing, so as to bring such orders within the scope of CPL 450.90(1).

FACTUAL FINDINGS SUPPORTED BY RECORD JUSTIFY AFFIRMANCE

***People v. Pizarro*, decided September 21, 2006 (N.Y.L.J., September 26, 2006, p. 25)**

In a unanimous decision, the Court of Appeals affirmed a defendant's conviction for murder in the second degree. The defendant claimed that the trial judge should have declared a mistrial because a juror concealed his personal knowledge about the case during jury selection and sought to share outside the record information with his fellow jurors during deliberations. After the jury foreperson had notified the trial judge regarding the allegations, the trial court conducted a day-long hearing to investigate the juror. The judge interviewed the juror on three separate cases. The juror denied under oath possessing any non-evidentiary knowledge about the matter. The trial judge also questioned every other juror regarding whether the juror in question had attempted to provide outside information. Based upon the inquiries, the trial judge concluded that the juror did not have personal information and did not try to convey outside information to other jurors. All 12 jurors also assured the trial judge that they would decide the case impartially based on the evidence alone.

Under these circumstances, the Court of Appeals concluded that they must accept the affirmed factual determinations made by the Appellate Division in the matter since they were supported by the record. The Court of Appeals stated that the trial court's observation regarding the credibility of the jurors who were questioned was entitled to great weight and that the order of the Appellate Division should be affirmed.

HARMLESS ERROR APPLIES TO SANDOVAL ISSUES

***People v. Grant*, decided October 17, 2006 (N.Y.L.J., October 18, 2006, pp. 1, 7 and 26)**

In a 5-1 decision, the New York Court of Appeals ruled that a trial court's Sandoval error, which effectively keeps a defendant from testifying in his own defense, is subject to a harmless error analysis. In the case at bar, the Court concluded that even though the trial judge's error may have precluded the defendant's testimony, the evidence at trial was overwhelming and the result would not have been different if the defendant had testified.

In the instant matter, the trial court had ruled that if the defendant chose to testify, the prosecution would be able to inquire regarding his six prior criminal contempt convictions. The defendant argued, on appeal, that he was thus essentially robbed of any defense since he was the only person who could rebut the allegations of his ex-wife that he had been harassing her. Relying upon prior decisions in *People v. Williams*, 56 N.Y.2d, 236 (1982) and *People v. Shields*, 46 N.Y.2d, 764 (1978), the court specifically declared that a harmless error analysis would apply to the instant situation.

Judge Robert S. Smith dissented, arguing that it was not the court's place to speculate on the outcome of the trial in a situation where the defendant's right to testify had in fact been curtailed. Judge Pigott, who had joined the court after the instant matter had been argued, did not participate in the decision.

NEW TRIAL IS SOLE REMEDY FOR PROSECUTORIAL MISCONDUCT

***In the Matter of Robert Gorgham v. DeAngelis*, decided October 19, 2006 (N.Y.L.J., October 20, 2006, pp. 1, 2 and 22)**

In a unanimous decision, the New York Court of Appeals held that even the most deplorable prosecutorial misconduct geared toward winning a conviction does not implicate the double jeopardy principle. It only entitles the defendant to a new trial, not dismissal of the underlying charge. In the case at bar, the local Rensselaer district attorney engaged in pervasive prosecutorial misconduct with respect to the defendant's conviction of rape and sodomy. After the Appellate Division Third Department ordered a retrial based upon the misconduct in question, the defendant moved on double jeopardy grounds to dismiss the indictment and brought the instant Article 78 proceeding to prohibit any further prosecution. The Court of Appeals, however, ruled that there was no double jeopardy bar and that the sole remedy for the prosecutorial misconduct was a new trial. In reaching its conclusion, the court stated, "*Here, although the prosecutor's conduct was deplorable, it was—as found by the Appellate Division—motivated by an intent to secure a conviction, not to provoke a mistrial motion. Thus, petitioner is entitled only to the ordinary remedy for harmful trial misconduct—a new, fair trial—and not dismissal of the indictment.*" The court's decision was rendered by six judges of the Court of Appeals since Judge Pigott joined the court after the oral argument of the matter and he took no part in the decision.

AUTHORITY OF ATTORNEY GENERAL TO HANDLE CRIMINAL MATTERS

***People v. Cuttita*, decided October 24, 2006 (N.Y.L.J., October 25, 2006, pp. 1 and 27)**

In a unanimous decision, the New York Court of Appeals held that the Attorney General's Office did not have authority under its limited criminal jurisdiction to proceed on a matter based only on a referral from an in-

house adjunct of a state agency when the adjunct does not clearly have subject matter referral authority. The Court reversed the conviction for operating an illegal adult home and said that while the Attorney General could have acted on a referral from a Governor or agency head, it cannot use a referral from the Welfare Inspector General to justify an intrusion into what is normally the jurisdiction of the local District Attorney. The Court's determination was based on an interpretation of Executive Law section 63(3), which deals with the authority of the Attorney General with respect to criminal prosecutions. The Court of Appeals also made reference to its opinion in *People v. Gilmour*, 98 N.Y.2d 133 (2002), where the Court held that the Attorney General has no power to prosecute crimes unless specifically permitted by law. Judge Pigott took no part in the decision since he was not on the Court when oral arguments were heard.

A Profile of the Honorable George Bundy Smith

Judge George Bundy Smith center had served on the New York Court of Appeals for 14 years just before he retired on September 23, 2006, and was the Senior Associate Judge of that Court. He was born in New Orleans, Louisiana, April 7, 1937. Graduated from Phillips Academy, 1955; B.A., Yale University, 1959; LL.B., Yale Law School, 1962; M.A., in Political Science and Ph.D. in Government from New York University, awarded in 1967 and 1974 respectively; Masters Degree in the Judicial Process, University of Virginia Law School, 2001.

Admitted to the New York State Bar, 1963. He was an Associate Justice of the State Supreme Court, Appellate Division, First Department from January 1987 to September 1992, when Governor Mario M. Cuomo appointed him to the Court of Appeals. He was confirmed by the State Senate, September 24, 1992. His Judicial service began in May 1975 when he was named to an interim term on the Civil Court of New York City. He was elected to a 10-year term on that bench the following November. He was elected to a 14-year term on the State Supreme Court in 1979, and served in New York County until his promotion to the Appellate Division, First Department.

Judge George Bundy Smith and his wife, Alene, have two children. Judge Smith has been an outstanding jurist who has served with great distinction. At a ceremony held in the Court of Appeals on September 15, 2006, Chief Judge Judith Kaye paid tribute to Judge Smith as a fierce advocate of justice and paid him special recognition for his many years of outstanding service. We also thank him for his services and wish him well in his future endeavors.

Judge Smith has recently been honored by several bar associations for his many years of judicial service and depicted in the photograph above is a presentation made to the Judge by the Queens County Bar Association. Included in the photo are Court of Appeals Judge Carmen Beauchamp Ciparick, presently on the Court, and former Court of Appeals Judge Joseph Bellacosa as well as Bar Association and Judicial Officials from Queens County.

Judge Pigott giving his luncheon address

Scenes f

Criminal Jus

2006 Fal

October

Hyatt
Buffal

Editor Spiros Tsimbinos and Norm Effman enjoy luncheon conversation with Judge Pigott

Section Chair Roger Adler a
Norman Effman with Judge

Luncheon Attendees

Luncheon

FROM THE

STICE SECTION

L MEETING

6-7, 2006

REGENCY
LO, NY

Editor Spiros Tsimbinos with Hon. Eugene Pigott Jr. following the Luncheon address

and Program Co-Chair
e Pigott

Section Chair Roger Adler thanks Judge Pigott for his remarks

Attendees

Luncheon Attendees

Official Citations to Criminal Law Decisions from the Court of Appeals for the 2005-2006 Term

Covering Decisions from September 13, 2005 to September 6, 2006

(Listed in Chronological Order)

Case	Citation	Issue Involved
People v. Fernandez	5 N.Y.3d 813 (2005)	Ineffective Assistance of Counsel
People v. Dunbar	5 N.Y.3d 834 (2005)	Search and Seizure
People v. Shulman	6 N.Y.3d 1 (2005)	First Degree Murder
People v. Gomez	5 N.Y.3d 416 (2005)	Search and Seizure
People v. Turner	5 N.Y.3d 476 (2005)	Statute of Limitations
People v. Green	5 N.Y.3d 538 (2005)	Claim of Right Defense
People v. Lewis	5 N.Y.3d 546 (2005)	Violation of Order of Protection
People v. Carvajal	6 N.Y.3d 305 (2005)	Jurisdiction
People v. Robbins	5 N.Y.3d 556 (2005)	Drug-Free School Zones
People v. Jacobs	6 N.Y.3d 188 (2005)	Legal Representation by Non-Lawyer
People v. DeVonish	6 N.Y.3d 727 (2005)	Failure to Charge Lesser Included Offense
People v. Buonincontri	6 N.Y.3d 726 (2005)	Right to Be Present
People v. Suarez	6 N.Y.3d 202 (2005)	Depraved Indifference Murder
People v. McPherson		
People v. Corby	6 N.Y.3d 231 (2005)	Right to Confrontation
People v. Echevarria	6 N.Y.3d 89 (2005)	Failure to Object to Jury Charge
People v. Goldstein	6 N.Y.3d 119 (2005)	Right to Confrontation
People v. Hicks	6 N.Y.3d 737 (2005)	Juror Disqualification
Jamie R. v. Consilvio	6 N.Y.3d 138 (2006)	Secure Facility Challenge
People v. Bonbongarzone-Suarrcy	6 N.Y.3d 787 (2006)	Right to Counsel
People v. Lopez	6 N.Y.3d 248 (2006)	Waiver of Appeal
People v. Billingslea	‘’	‘’
People v. Nicholson	‘’	‘’
People v. Miller	6 N.Y.3d 295 (2006)	Felony Murder
People v. Rodriquez	‘’	‘’
People v. DaCosta	6 N.Y.3d 181 (2006)	Reckless Manslaughter
People v. Waldron	6 N.Y.3d 463 (2006)	Speedy Trial
People v. Bloomfield	6 N.Y.3d 165 (2006)	Falsify Business Records

People v. Burns	6 N.Y.3d 793 (2006)	Admissibility of Statement
People v. Moore	6 N.Y.3d 496 (2006)	Search and Seizure
People v. Pacer	6 N.Y.3d 504 (2006)	Right of Confrontation-Crawford Violation
People v. Boyer	6 N.Y.3d 427 (2006)	Confirmatory Identification
People v. Garson	6 N.Y.3d 604 (2006)	Criminal Prosecution for Violation of Rules of Judicial Conduct
People v. Smith	6 N.Y.3d 827 (2006)	Jury Trial Waiver
People v. Wardlaw	6 N.Y.3d 556 (2206)	Right to Counsel
People v. Bosier	6 N.Y.3d 523 (2006)	Admissibility of Grand Jury Testimony
People v. Burton	6 N.Y.3d 584 (2006)	Standing to Obtain a Suppression Hearing
People v. Conway	6 N.Y.3d 869 (2006)	Legal Sufficiency
People v. Drake	7 N.Y.3d 28 (2006)	Expert Testimony Regarding Identification
People v. Young	7 N.Y.3d 40 (2006)	Identification
People v. Williams	7 N.Y.3d 15 (2006)	Disclosure of Brady Material
People v. Wells	7 N.Y.3d 51 (2006)	Duplicitous Counts
People v. Leon	7 N.Y.3d 109 (2006)	Lesser Included Charge
People v. Serrano	7 N.Y.3d 730 (2006)	Jury Voir Dire
People v. Ramos	7 N.Y.3d 738 (2006)	Waiver of Appeal
People v. VanDunsen	7 N.Y.3d 744 (2006)	Post-Release Supervision
People v. Santana	7 N.Y.3d 234 (2006)	Criminal Contempt
People v. Feingold	7 N.Y.3d 288 (2006)	Depraved Indifference Murder
People v. Atkinson	7 N.Y.3d 765 (2006)	Depraved Indifference
People v. Mancini	7 N.Y.3d 767 (2006)	Depraved Indifference
People v. Swinton	7 N.Y.3d 776 (2006)	Depraved Indifference
People v. Petty	7 N.Y.3d 377 (2006)	Harmless Error

Governor Names Eugene F. Pigott, Jr. as Newest Appointee to the New York Court of Appeals

On August 20, 2006, Governor Pataki named Eugene F. Pigott, Jr. as his choice to replace Judge George Bundy Smith on the Court of Appeals. Judge Pigott was subsequently confirmed by the State Senate in late September and commenced sitting on the New York Court of Appeals with the opening of the October session. Judge Pigott had been serving as the Presiding Justice of the Appellate Division, Fourth Department. His appointment gives the Western New York area representation on the New York Court of Appeals for the first time since 1985.

Judge Pigott received his Juris Doctor from SUNY at Buffalo School of Law in 1973. Prior to attending law school, Justice Pigott served in the United States Army and was an Interpreter for U.S. Forces in Vietnam in 1969 and 1970. Following his admission to the Bar in 1974, Justice Pigott practiced law in Buffalo with the firm of Offermann, Fallon, Mahoney & Adner from 1974 to 1982, becoming a partner in 1978. In 1982 he was appointed Erie County Attorney and served in that position until 1986. In 1986 he became Chief Trial Counsel for the firm of Offermann, Cassano, Pigott & Greco and in 1994 he was certified as a Civil Trial Advocate by the National Board of Trial Advocacy. On February 4, 1997, he was appointed to the New York State Supreme Court by Governor Pataki and was thereafter elected to a full 14-year term. In 1998 he was designated to the Appellate Division, Fourth Department and was appointed Presiding Justice on February 16, 2000, by Governor Pataki. Judge Pigott has been a member of the American Bar Association, the Association of Trial Lawyers of America, the New York State Bar Association, the New York State Trial Lawyers Association, the Bar Association of Erie County, the Western New York Trial Lawyers Association, the Buffalo Inns of Court, Judicial Institute on Professionalism in the Law, SUNY Buffalo School of Law Dean's Advisory Council, New York State Bar Association Special Committee on Law Practice Continuity and the Chief Judges Council. Judge Pigott has served as a member of the Vietnam Veterans Leadership Program; a member of the Board of Directors of the Legal Aid Society of Buffalo between 1980 and 1988 and as its President from 1986-1988. He served as a member of the Governor's Temporary Judicial Screening Committee between 1995 and 1996.

Judge Pigott has been described by members of the legal community as being an independent voice, a leading legal scholar and a caring and congenial individual. In announcing his appointment, Governor Pataki stated that Judge Pigott "had the demeanor, character and intelligence to be a tremendous addition to the Court of Appeals." The Governor also emphasized that Judge Pigott, who is 59, will have his term run until December 31, 2016, allowing him to have a "long-range impact" on the Court.

In welcoming him to the Court, Chief Judge Judith Kaye stated that Judge Pigott will be a great addition to the Court given Judge Pigott's outstanding legal skills, his work ethic and his collegiality.

An Interview With the Hon. Eugene F. Pigott, Jr., Newest Member of the New York Court of Appeals

By Spiros A. Tsimbinos

On Saturday, October 7, 2006, just three days before Judge Pigott's formal elevation to the Court of Appeals, I was fortunate to be able to personally interview him in Buffalo, New York. The occasion was the Fall Meeting of the Criminal Justice Section of the New York State Bar Association, which was held at the Hyatt Regency Hotel in Buffalo, New York. Judge Pigott had been scheduled to appear as the Section's luncheon speaker in early August. When I learned of his appointment to the New York Court of Appeals, I felt it would be of interest to the readers of our *Newsletter* if I could obtain some personal remarks from the Judge who was about to ascend to the highest court in our state. Judge Pigott graciously consented to grant me an interview and we arranged to meet at a conference area in the Hyatt Hotel about a half-hour prior to the luncheon.

In preparing for the interview, I had learned from several attorneys in the Buffalo area, as well as from reading initial press articles on the Judge, that among his most listed qualities were being gracious, friendly, and very down to earth. These qualities immediately manifested themselves when he first introduced himself to me not as Judge Pigott but, "Hi, I'm Eugene Pigott." I began the interview by asking Judge Pigott about the selection process that he had just undergone. He remarked that it was long and detailed and concluded with a personal interview with the Governor. He stated that the group of seven that were recommended to the Governor were extremely well qualified and talented individuals and he was honored and humbled to have been selected. When he received the call from the Governor's Counsel advising of his appointment, "It was quite a thrill."

When I asked Judge Pigott how he feels about going from a position as a Presiding Justice of the Fourth Appellate Department, where he exercised administrative authority, to being "the junior member of the Court of Appeals," he stated that he was happy about it because he looked forward to spending less time on administrative matters and more time on researching and considering legal issues and writing legal decisions. He also jokingly remarked that since there would be three additional vacancies on the Court of Appeals in the next year, he would quickly move up to senior status and the role of "the junior judge" would be assumed by someone else.

The Judge also stated that he felt he brought an additional strength to the Court of Appeals by virtue of his long experience as a trial attorney and trial judge. The Judge practiced law in Buffalo from 1974 to 1982 with the firm of Offermann, Fallon, Mahoney & Adner, eventually becoming a partner in that firm in 1978. He also served on the New York State Supreme Court in a trial part from 1997 to 1998. He was elevated to the Appellate Division, Fourth Division in 1998 and was appointed as Presiding Justice in 2000 by Governor Pataki.

Throughout his career, Judge Pigott has also been extremely active in bar associations and community activities. I asked the Judge whether his elevation to the Court of Appeals could lead to a curtailment of these activities and he stated that he hoped not because he strongly believed in continuing close contact with members of the bar and felt an obligation to be active in community and civic matters. The Judge also emphasized that he had a great respect for attorneys having been a practicing lawyer for many years and that he appreciated attorneys who appeared before the Appellate Courts in a well prepared manner. As a final question, I pointed out to the Judge that it appears extremely difficult for cases to reach the New York Court of Appeals, especially on the criminal side, with less than two percent of the criminal leave applications being granted. Judge Pigott stated that this is an area that can be explored and that the Court's current docket could easily absorb a small increase in its caseload.

Judge Pigott's gracious and friendly manner continued during his presence at the luncheon when he made a point to personally visit all of the tables. He also expressed his willingness to continue to address bar association and law school audiences, schedule permitting, indicating that he enjoyed these activities and that it was important to keep lines of communication open between the bench and the bar. Judge Pigott is 59 years old and in making his selection Governor Pataki mentioned that the Judge could have a "long-range impact" on the Court.

Although the legal community was sad to see Judge George Bundy Smith leave the Court of Appeals, it appears that Judge Pigott is a highly regarded legal scholar and a well regarded individual among the bench and bar. All indicators are that he will be a distinguished Judge of the Court of Appeals in his own right and that the State will be well served by his tenure. In welcoming him to the Court, Chief Judge Judith Kaye stated that Judge Pigott will be a great addition given his outstanding legal skills, his work ethic, and his collegiality. We thank Judge Pigott for his gracious interview and wish him all the best as he begins a new aspect of his career.

Editor's Note: Spiros A. Tsimbinos is a past president of the Queens County Bar Association and Editor of the New York State Bar Association New York Criminal Law Newsletter.

Recent United States Supreme Court Decisions

The United States Supreme Court commenced its new term in early October. There are several cases of interest in the criminal law area that are pending decision and we will be reporting on these matters in our future issues. Toward the end of last term in late June, the Court did decide two cases, which are summarized below.

Brady Violation

***Young Blood v. West Virginia*, 126 S. Ct. 2188 (June 19, 2006)**

In a 6-3 decision, the United States Supreme Court remanded a matter back to the State Court to determine whether a *Brady* violation occurred. In so doing, the court found that the defendant clearly presented a Federal Constitutional *Brady* claim on appeal by alleging that a state trooper suppressed information indicating the defendant's sexual encounters with the victim were consensual. The three dissenting justices were Justice Scalia and Justice Thomas, who joined together in one dissenting opinion, and Justice Kennedy, who filed a separate dissenting opinion.

Search and Seizures

***Samson v. California*, 126 S. Ct. 2193 (June 19, 2006)**

In a 6-3, decision the United State Supreme Court upheld suspicionless searches of California parolees and stated that such searches did not violate the Fourth Amendment. The court found that such searches were necessary to the promotion of legitimate governmental interests and were not unreasonable or capricious. The Court's majority opinion was delivered by Justice Thomas. Justices Stevens, Breyer and Souter dissented.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions of the various Appellate Divisions which were decided from August 25 to November 3, 2006.

People v. Wilhelm (N.Y.L.J., August 25, 2006, pp. 1 and 2 and August 30, at p. 22)

In a unanimous decision, the Appellate Division, Third Department, reversed the conviction of a female defendant who was accused of drowning one son and attempting to kill another. Two social workers who were conducting a child abuse investigation took statements from the defendant which implicated her and testified at trial regarding these statements. The defendant was never notified regarding the use of these statements pursuant to CPL § 710.30. The prosecution contended that since the statements were made to social workers they were not required to provide notice.

The Appellant Division, however, found that the social workers had a cooperative working arrangement with law enforcement and were acting as agents of the police in interviewing the defendant and relaying her incriminating statements. Under these circumstances, they should have advised the defendant of her right to counsel. The failure to do so required a reversal of the conviction and the ordering of a new trial.

People v. Williams (N.Y.L.J., August 28, 2006, pp. 1 & 28)

In a unanimous decision, the Appellate Division, First Department, overturned a murder conviction and ordered a new trial. During the trial, the prosecution had elicited a statement from a police officer that a non-testifying witness had stated that he had bought the defendant a gun and that the defendant was going to use it in an incident in Manhattan. The Court held that the testimony in question violated the *Crawford* rule and that under the circumstances the error was not harmless.

People v. Durrin (N.Y.L.J., August 29, 2006, pp. 1 and 4)

In a unanimous decision, the Appellate Division, Third Department, reversed a conviction utilizing its interest of justice discretion because the trial court had improperly admitted a letter of apology which the defendant wrote to the family of the 7-year-old victim. The Court found that the written apology was part of a continuous chain of improper questioning, which had occurred in violation of the defendant's *Miranda* rights and therefore any testimony regarding the apology should have been suppressed.

People v. Richards (N.Y.L.J., August 31, 2006, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's weapons conviction finding that evidence of a gun and machete seized from the defendant's car should have been suppressed. The police had found the weapons in question in the defendant's car and the prosecution had relied on the automobile exception to justify the search. The Appellate Division, however, ruled that the police were not relieved of the responsibility of having probable cause before searching a vehicle and that in the case at bar, the prosecution failed to establish the basis of the informant's knowledge regarding the defendant's involvement in a crime. The Court found that the prosecutors offered no evidence as to how the defendant's girlfriend came to know that there were weapons in the car.

People v. Wiasiuk (N.Y.L.J., September 1, pp. 1 and 2 and September 3, p. 22)

In a unanimous decision, the Appellate Division, Third Department, reversed a murder conviction on the grounds that the prosecution had improperly used prior bad acts to bolster a domestic violence case. The prosecution's theory at the trial was that the alleged murder was the culmination of escalating hostility and abuse by the defendant husband. As part of the Molineaux proffer, the prosecution was permitted to introduce testimony of prior threats by the defendant against his wife.

The Appellate Court found that the overwhelming testimony regarding these prior acts was not properly balanced with proper instructions regarding their probative value. Under these circumstances, the defendant was denied a fair trial. In making its ruling, the Appellate Division noted:

We take this opportunity to reiterate that, where inordinate attention is focused on an accused's prior abusive conduct against the victim, there exists a potential that a jury will afford such evidence undue weight, regardless of the quality of the proof implicating the accused in the charged crime.

People v. Antwine (N.Y.L.J., September 3, p. 1 and September 11, p. XX)

In a unanimous decision the Appellate Division, First Department, held that a defendant who had been arrested and had then run less than 50 feet away before being re-

captured by police can be convicted of escape. The defendant was recaptured almost immediately within the same general location where he had been in custody and had argued that a conviction for attempted escape was applicable rather than Escape in the Second Degree.

The First Department, however, found that there was legally sufficient evidence to support the jury's conclusion that the defendant had escaped from custody even if for a short while and that the escape conviction was valid. Citing *People v. Hutchinson*, 56 N.Y.2d 870.

People v. Litto (N.Y.L.J., October 10, p. 36 and October 11, p. 1)

In a 4-1 decision, the Appellate Division, Second Department, held that a driver who allegedly inhaled from a can of Dust-Off® before veering into oncoming traffic and killing one person could not face driving while intoxicated and vehicular manslaughter charges under the state's drunken driving laws.

The majority opinion held that Vehicle & Traffic Law section 1192(3) and Penal Law section 125.12 only apply to impairment caused by alcohol. The Appellate Division found that the legislative intent with respect to the statute in question was that it would apply only to driving under the influence of alcohol and not drugs. To cover the drug situation, the Legislature specifically passed a separate provision under Vehicle & Traffic Law section 1192(4). The majority concluded that to hold that section 1192(3) would apply would render section 1192(4) superfluous.

Justice David Ritter dissented and argued that the courts rather than the Legislature could define what is meant by an intoxicated condition and that this could cover the topic in question.

People v. Pina (N.Y.L.J., October 11, p. 1 and October 16, 2006, p. 18)

In a unanimous decision, the Appellate Division, First Department, held that a hearing should be conducted to determine whether an improper conflict of interest existed with respect to an issue of attorney conflict of interest.

In the case at bar, a bodega worker was denied a public defender even though the attorney who was allegedly representing the defendant had repeatedly failed to appear in court and the defendant had raised questions regarding the quality of the attorney's representation. The Appellate Division concluded that the defendant presented sufficient corroborating evidence to merit a hearing regarding the issue of conflict of interest and directed that such a hearing be held while the conviction is held in abeyance. The Court stated: "Given the serious and partially corroborated allegations defendant made relating to his attorney—and other aspects of the plea colloquy itself—a hearing to determine the truth or falsity of those allegations was necessary."

People v. Campbell (N.Y.L.J., October 16, 2006, pp. 1, 4 and 37)

In a unanimous decision, the Appellate Division, Second Department, affirmed a conviction for depraved indifference murder finding that it was reasonable for the jury to conclude that the defendant act was not reckless but evinced a depraved indifference to human life. The defendant in the case at bar had approached three men, including the victim, in broad daylight in Brooklyn. He asked them about another man and then reached into his waistband for a gun. The three men ran and the defendant fired five shots, killing one of them. Despite recent decisions from the Court of Appeals severely restricting the depraved indifference concept, the Appellate Division found that under the instant circumstances a depraved indifference conviction could be sustained.

People v. Rodriguez (N.Y.L.J., October 16, 2006, pp. 1, 4 and 37)

In a unanimous decision the Appellate Division, Second Department, reduced a depraved indifference conviction to Second Degree Manslaughter. The Appellate Panel found that the evidence was legally insufficient to establish guilt of depraved indifference murder. The Court did conclude however, that it was reasonable for a jury to find that the murder was reckless rather than intentional since not all voluntary acts are done with an intent or conscious objective to kill. In ordering the reduction, the Appellate Division appears to be following the procedure adopted by the New York Court of Appeals in *People v. Atkinson*, 7 N.Y.3d 765 (2006), wherein where possible depraved indifference convictions were reduced to charges involving recklessness.

People v. Harrison (N.Y.L.J., October 18, 2006, p. 2 and October 23, 2006, p. 22)

In a unanimous decision, the Appellate Division, First Department, reversed a robbery conviction and ordered a new trial because the trial court had improperly advised the jury regarding the "claim of right defense." In the case at bar, the defendant argued that he confronted the alleged victim with a knife because he was trying to recover what he believed to be his own backpack, not to steal one from the victim. During the deliberations, the jury sent the note to the judge requesting, "if a person attempts to forcibly regain property, that he or she truly believes is his or hers, does that make that person subject to the law of attempted robbery?" The court answered "yes."

A unanimous panel of the Appellate Division found that under the Court of Appeals decision in *People v. Green*, 5 N.Y.3d 538 (2005), the trial court's response constituted reversible error. The Appellate Panel specifically held: "Under *People v. Green* . . . defendant, while not entitled to a specific 'claim of right' jury instruction, was nevertheless free to argue to the jury that he had a good faith but mistaken claim of right to the property, and that the prosecution therefore failed to prove his intent to take property from someone with a superior right to possession." Under these circumstances, the Court found that a reversal was required because the trial court's answer to the jury left the erroneous impression that the defendant's belief as to the true ownership rights of the backpack was irrelevant. The trial court's response was thus both erroneous and not harmless and a new trial was required.

People v. Ortiz (N.Y.L.J., October 19, 2006, pp. 1, 20 and 28)

In a unanimous decision, the Appellate Division, First Department, reversed a murder conviction holding that the repeated prosecutorial misconduct prevented a fair determination of the credibility of two key witnesses, one of whom was a sitting Family Court judge. In the case at bar, two witnesses testified that the defendant had confessed to his role in the killing. The two witnesses were a detective and a judge, who had previously served as the lead prosecutor on the case before she was appointed to the bench. During the trial, the prosecutor repeatedly characterized the defendant as a liar and then consistently vouched for the credibility of the detective and the judge whom he referred to as "the judge" at least fifteen times during trial. The Appellate Court found that the prosecutor had improperly vouched for the credibility of the witnesses and had attempted to place the testimony of the judge on a higher plane simply by virtue of her judicial position. The Appellate Panel also pointed out that the trial judge failed to provide any curative instructions following the prosecutor's misconduct. Under all the circumstances, the Appellate Division concluded that the defendant was deprived of a fair trial by the cumulative effect of the prosecution's conduct and the failure of the trial judge to provide proper instructions. A new trial was therefore required.

People v. Young (N.Y.L.J., October 30, 2006, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Third Department, reversed a First Degree Murder conviction on the grounds that the trial court had improperly charged the jury on the issue of a justification defense. In the case at bar, the defendant had a contract to kill the victim but the victim initiated the aggression that led to his death. The defense argued that the fatal shooting was precipitated by a violent confrontation instigated by the victim and his friends. The trial court told the jury, however, that it could consider only the conduct of the victim in determining if the homicide was justifiable, not the conduct of the victim's associates. The Appellate Panel stated that a jury, in weighing a justification defense, must determine whether a reasonable person would have believed he was in mortal danger and that under the circumstances, a consideration of the totality of the circumstances was relevant. Thus, the jury should not have been limited to consideration of the victim's actions at the time of the incident and could have considered evidence of prior acts committed by the victim or third party aggressors acting in concert with the victim. The Panel thus concluded that the trial judge "precluded the jury, in assessing the reasonableness of defendant's belief that he was in deadly peril, from considering all of the circumstances surrounding him from his point of view at the time that he used deadly force."

For Your Information

Second Circuit Overturns Judicial Conventions

The Second Circuit Court of Appeals, in a decision issued at the end of August 2006, found that the New York State system of judicial conventions for selecting Supreme Court candidates was unconstitutional and can no longer be utilized. The Court issued its ruling in *Lopez-Torres v. New York State Board of Elections*.

The Circuit Court ruling basically upheld an earlier determination by District Court Judge Gleason to the effect that the present system violated First Amendment rights of voters and candidates. In issuing its ruling, the Circuit Court ordered the Legislature to adopt new procedures which would conform to constitutional principles.

The Court's ruling did not affect this year's selection of Supreme Court candidates. But elections held in 2007 will have to be conducted under newly established procedures. The Second Circuit decision was a victory for the Brennan Center for Justice at New York University School of Law, which commenced the landmark litigation more than one year ago.

It is unclear at the present time whether the losing parties would seek en banc review by the entire Second Circuit or would attempt to have the matter heard by the United States Supreme Court. Following the Court's decision, the continuing controversy during the next several months will be over whether a primary system or an appointed system should be adopted to replace the current Judicial Conventions. It is expected that the Legislature will soon deal with this issue. We will keep our readers advised regarding this important matter.

Additional New York Court of Appeals Vacancies to Be Filled Within the Coming Months

Following on the heels of the selection of Justice Eugene Pigott to replace George Bundy Smith on the New York Court of Appeals, the Commission on Judicial Nomination began working in late September to fill a new vacancy which occurred on January 1, 2007.

Judge Albert M. Rosenblatt retired from the Court because he had reached the mandatory retirement age of 70. Additional vacancies on the Court will occur in March 2007 and in January 2008, when the terms of Chief Judge Kaye and Judge Ciparick expire. It appears clear that in addition to any new applications for the positions, several of the Appellate Judges who were on the list of seven with respect to Judge Smith's replacement will also be on the list for the future vacancies. The five earlier contenders were: Appellate Division Justices Fisher and Prudenti from the Second Department; Andreas and Catterson from the First Department; and Mercure from the Third Department.

Governor's Civil Commitment of Convicted Sexual Predators

Recent reports indicated that the Governor's efforts to keep in civil commitment defendants who had been convicted as sexual predators but whose prison terms have expired has resulted in the confinement of at least 118 convicts. Of the 118 now confined to mental institutions, about 70% have more than one sex offense conviction and 74% have victimized children. The Governor has repeatedly stated that without the action which has been taken, some of the most dangerous criminals and pedophiles would still be roaming the streets.

Groups concerned about a possible violation of civil liberties have expressed alarm at the concept of civil commitment and have called for an impartial investigation into the Governor's actions. The Governor's civil commitment order has in fact reached the New York Court of Appeals. The State's highest court is expected to issue a decision on its constitutionality and propriety within the next few weeks. We will keep our readers advised of any further developments.

Complaints Against Judges on the Increase

The NYS Commission on Judicial Conduct recently issued its report regarding complaints filed against judges in 2005. The Commission reported that for 2005, 260 formal investigations were opened as a result of the 1,565 complaints received. The year 2005 was the sixth straight year for which increases were reported. As a result of the formal investigations conducted, 30 disciplinary determinations were made in 2005, the highest total since 1981.

With respect to the over 1,500 complaints made, the Commission reported that the overwhelming majority involved non-lawyer judges in town and village courts. However, 247 complaints were made against Supreme Court judges, of which 32 were investigated resulting in 13 reprimands and cautioned. The report also revealed

that 20 complaints were received in 2005 with respect to Court of Appeals and Appellate Division Justices, of which 2 were disciplined or cautioned.

Lawyers Warned Regarding Registration Requirements

Despite repeated warnings that attorneys are required to register with the Office of Court Administration every two years and to pay the required registration fees, it appears that thousands of attorneys have not complied and could be facing embarrassing and stringent sanctions. The Appellate Division, First Department, recently conditionally suspended more than 800 attorneys, including some from the City's largest and best-known law firms as well as attorneys in prominent government positions, for failure to comply with the registration requirement. The suspensions will take effect within 30 days after the issuance of the order unless the delinquent lawyers register immediately. We urge all attorneys who may have failed to promptly comply with the registration act to do so immediately.

New Foreign Terrorist Interrogation Bill

In late September, the Congress approved an interrogation bill to cover the situation regarding the holding and questioning of foreign terrorists. The new bill was prompted by the United States Supreme Court decision in *Hamden v. Rumsfeld*, 126 S. Ct. 2981 issued on June 29, 2006, which ruled that the present policy of military tribunals for non-citizen terrorist defendants was unconstitutional. President Bush signed the legislation on October 17, 2006, and the highlights of the new bill, as summarized by the Associated Press, are set forth below.

Rules for a Military Commission

A defendant would be selected for prosecution and assigned a military defense counsel. The defendant could retain civilian counsel if the counsel is eligible for access to classified information.

Statements obtained by torture would not be admissible as evidence.

Statements obtained using interrogation methods that violate a 2005 ban on "cruel, inhuman or degrading treatment" would be admissible as evidence if they were taken before the ban went into effect and a judge found the statements to be reliable and would serve the "interests of justice."

The commission could determine the punishment, including death.

A defendant would be allowed to examine and respond to any evidence given to a jury. If classified information is needed for prosecution, an unclassified summary would be provided.

When the government wants to protect classified information and an unclassified substitute is not available, the government could decide to drop the charges. Under the laws of war, the President would not be required to release the combatant.

Defendants would be barred from protesting their detention or treatment in civilian courts.

Who Is Covered

The system would apply to "unlawful enemy combatants" selected by the government. A combatant is a person "who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents."

The court would not be used to prosecute U.S. citizens or individuals fighting in foreign forces on behalf of a sovereign state.

The phrase "purposefully and materially" is intended to clarify that a person must knowingly support terrorist networks to be deemed an unlawful enemy combatant.

Interrogation Techniques

Specific war crimes are outlined. These include torture, cruel or inhuman treatment, murder, mutilation or maiming, serious bodily injury, sexual abuse, taking hostages, rape and biological experiments. An extensive definition of each crime is provided.

The President would not be allowed to authorize any interrogation technique that amounted to a war crime.

The bill does not include a provision the President wanted interpreting U.S. obligations under the Geneva Conventions, which set international standards on prisoner treatment. Bush wanted a provision that stated an existing 2005 ban on "cruel, inhuman or degrading treatment" was enough to satisfy the treaty's obligations. Republican senators said this would look like the United States was redefining the standard, which is much broader.

The President could "interpret the meaning and application" of the Geneva Conventions applied to less severe interrogations. Such a provision is intended to allow him to authorize methods that might otherwise be seen as illegal by international courts.

United States Reaches Population of 300 Million

We reported in our Fall issue that the United States was expected to reach a population of 300 million sometime in October. The Census Bureau, in fact, reported that this milestone was reached on October 17, 2006. In making this announcement the Census Bureau also issued a further report outlining the population demographics of the United States at the present time. The report compared the year 2006 with the prior years of 1967, when

the nation reached the 200 million mark, and the year 1915, when it had reached the 100 million mark. In 2006, 56.6% of the nation's population was White, 20.5% was Hispanic, 15.3% was Black and 3.9% was Asian. This compares with 1967 when 76.6% of the nation was White, 6.5% was Hispanic, 13.8% was Black and the Asian population was less than 1%. Going back to 1915, 88% of the population was White, with only 10% being Black and a Hispanic population of only 1%.

The report also revealed that although it had taken 52 years to go from 100 million to 200 million, it has taken only 39 years to gain an additional 100 million. The report further estimated that the 400 Million mark will be reached sometime around 2040. Other interesting facts revealed by the Census Report are that the number of homeowners has greatly increased with 68% of the population now owning their own home. The number of working women has also increased to 59% and the population of those 65 or older has jumped to over 12%. The education level of the United States population has also greatly increased, with 85% of the current population aged 25 or older possessing at least a high school diploma.

The fastest growing states continue to be out west and in the south. Between 1990 and 2000, all of the fastest growing states were out west, to wit: Nevada, Arizona, Colorado, Utah and Idaho. Between 2004 and 2005, Florida, Georgia, North Carolina and Texas were also among the fastest growing states.

About Our Section and Members

Membership Increase

We are happy to announce that our Section membership as of July 31, 2006, has increased over the same period in 2005. As of July 31, 2006, the Section has 1,461 members—an increase of 20 over the same period last year. This Section's financial situation has also improved dramatically due to the policy changes instituted by former Section Chair Michael Kelly and present Section Chair Roger Adler. The Section's accumulated surplus deficit, which we faced several years ago, has been dramatically reduced and our last two budgets have actually shown surpluses rather than deficits. We will continue to provide our members with details regarding the status of our Section. Several new members joined our Section during the months of September and October. We welcome these new members whose names appear on the following page.

Criminal Justice Section Fall Meeting Held in Buffalo

The Fall Meeting of the Criminal Justice Section was held at the Hyatt Regency Hotel in Buffalo, New York, on October 6 and 7. CLE Sessions were held on Friday and Saturday and the program concluded with a luncheon on Saturday afternoon. The CLE topics on Friday covered information regarding the state prison and parole system with the speakers being Anthony J. Annucci, Deputy Commissioner and Counsel of the New York State Department of Correctional Services, and Edward R. Hammock, a former chair of the New York State Board of Parole and currently a private practitioner. The CLE topics on Saturday involved an update on recent decisions from the Second Circuit Court of Appeals, which was presented by Richard Ware Levitt, a New York City practitioner; and an update on recent Court of Appeals decisions by Paul J. Cambria, Jr., a leading criminal law practitioner from Buffalo. The two-day CLE program was arranged by Co-chairs Norman Effman and Paul J. Cambria, Jr., two active members of our Section and we thank them for their efforts in organizing this well received event.

On Friday night, the participants in the Fall Meeting were treated to an outstanding and lavish dinner at the Tempo Restaurant in Buffalo. The 35 people who attended the dinner were treated to fine food, great fellowship and a wonderful evening.

The two-day session was capped off by an interesting address at our luncheon by the Honorable Eugene F. Pigott, Jr., former presiding Justice of the Appellate Division, Fourth Department, and the newest member of the New York Court of Appeals. Highlights of Judge Pigott's address and an interview which he provided are discussed in a separate article at page 23 of this issue. Photographs depicting the fall program are also presented herein.

Reminder—Winter Annual Meeting, New York Marriott Marquis. Our annual luncheon and CLE Program will be held on Thursday, January 25, 2007.

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.

Steven Alschuler
John P. Amuso
Kari K. Anderson
Jeffrey N. Bagnoli
Richard J. Barbuto
Nicole Christine Barnum
Alexander G. Bateman
Michele M. Bateman
Terrence Jay Baxter
Mary L. Bejarano
Taylor Y. Berlow
Stephen J. Binhak
Brett I. Bloom
Sarah M. Braen
Linda C. Braunsbergr
Melissa L. Breger
Michael A. O. Brown
Benjamin Samuel Burger
Stephen L. Buzzell
Kristine Faith Cangcuesta
Alexis Simone Celestin
Seth N. Chase
Ernest Gainhong Chin
Chi Chung
James R. Clark
Carla J. Cole Bashford
Mercedes Colwin
Rob Corbett
William F. Coughlin
Brian P. Degnan
Kristine M. Demo-Vazquez
Fatos Dervishi
Scott R. Eisenstein
Lawrence Elmen
Jodi Rae Erickson
Jacqueline E. Esposito
Joel S. Ezra
Janice Michelle Farrell
Richard K. Farrell
Vincent Filardo
Margaret J. Finerty
Stewart M. Finton
Lauren Rhea Fishman
Dennis M. Fitzgerald
Aaron Saul Fleisher
Mario Garcia
Jaime A. Giannetta
John W. Gibbon
Candace Baskin Glover
Maurice Gonzalez
Adam Brett Gottlieb
Daniel Grasso
Raymond B. Grunewald
David Allen Haggard
Charlotte Ann Hitchcock
Kevin Hynes
Joshua Kahn
John B. Kane
Amy Lyn Katcherian
Michael L. Koenig
Stephanie Edith Lary
Byron Lassin
Sarah Anne Leggio
Janice Ann Lewis
Thomas Francis Liotti
Michael James Livolsi
Elizabeth Diane Logsdon
Elizabeth Joan Mannion
Ruby Marin
John Martin
Ian M. McClatchey
Gabriel F. McKeen
Gordon Mehler
Brian P. Mitchell
Emanuel N. Mouganis
Jose A. Muniz
Orlando Munoz-Neira
Christina Nowak
Dennis B. O'Sullivan
Heather A. Parker
Christopher Pennington
Stacey Elaine Perkins Rock
Anna Pervukhin
Wendy G. Peterson
James Scott Porter
Charlotte Claire Powell
Harshal K. Purahit
Andrew M. Purdy
Dominick P. Revellino
Kim Eleazer Richman
Murray Richman
Daniel Riesel
Eve Rosahn
Timothy Aloysius Roulan
Alexander Roytblat
Jessica Butler Russell
Ricardo A. Salmon
Larry Schwartz
Wanda L. Selinger
Conrad D. Singer
John Robert Spagna
Bradley Aaron Thomas
Eric Anders Tirschwell
Elizabeth C. Tomson
John R. Trice
John C. Tunney
Penney Vachiraprapun
Radhika Varavenkataraman
George J. Villiere
Martin A. Wallenstein
Andrew M. Walsh
Rita Yulin Wang
Patricia J. Warth
Adam J. Wasserman
Seth B. Waxman
Kimberly M. Wells
Jackie Whalen
Mauro M. Wolfe
Christine Yong-Hwa Chi
John Eric Ziobro
Thomas P. Zugibe

Section Committees and Chairs

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

Section Officers

Chair
Roger B. Adler
225 Broadway, Suite 1804
New York, NY 10007

Vice-Chair
Jean T. Walsh
20 Broad Street
New York, NY 10005

Secretary
James P. Subjack
4 West Main Street
Fredonia, NY 14063

Executive Committee Liaison
Barry Kamins
16 Court Street, Suite 3301
Brooklyn, NY 11241

Committee Chairs

Appellate Practice
Mark M. Baker
767 Third Avenue, 26th Floor
New York, NY 10017

Mark R. Dwyer
One Hogan Place
New York, NY 10013

Awards
Norman P. Effman
14 Main Street
Attica, NY 14011

Capital Crimes
Barry I. Slotnick
1 Chase Manhattan Plaza, 35th Floor
New York, NY 10005

Comparative Law
Renee Feldman Singer
211-53 18th Avenue
Bayside, NY 11360

Continuing Legal Education
Paul J. Cambria, Jr.
42 Delaware Avenue, Suite 300
Buffalo, NY 14202

Correctional System
Hon. Mark H. Dadd
147 N. Main Street
Warsaw, NY 14569

Norman P. Effman
14 Main Street
Attica, NY 14011

Defense
Jack S. Hoffinger
150 East 58th Street, 19th Floor
New York, NY 10155

Drug Law and Policy
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007

Ethics and Professional Responsibility
Lawrence S. Goldman
500 5th Avenue, 29th Floor
New York, NY 10110

James H. Mellion
499 Route 304
P.O. Box 1135
New City, NY 10956

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

Evidence
Prof. Robert M. Pitler
250 Joralemon Street, Room 704
Brooklyn, NY 11201

John M. Castellano
125-01 Queens Boulevard
Kew Gardens, NY 11415

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

Judiciary
Hon. Cheryl E. Chambers
320 Jay Street - 25.49
Brooklyn, NY 11201

Juvenile and Family Justice
Hon. John C. Rowley
P.O. Box 70
Ithaca, NY 14851

Eric Warner
425 Riverside Drive
New York, NY 10025

Legal Representation of Indigents in the Criminal Process
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007

David Werber
199 Water Street, 5th Floor
New York, NY 10038

Legislation
Hillel Joseph Hoffman
350 Jay Street, 19th Floor
Brooklyn, NY 11201

Membership
Marvin E. Schechter
152 West 57th Street, 24th Floor
New York, NY 10019

Nominating
Roger B. Adler
225 Broadway, Suite 1804
New York, NY 10007

Michael T. Kelly
207 Admirals Walk
Bufalo, NY 14202

Prosecution
John M. Ryan
125-01 Queens Boulevard
Kew Gardens, NY 11415

P. David Soares
16 Eagle Street
Albany, NY 12207

Sentencing and Sentencing Alternatives
Susan M. Betzjitomir
8 Buell Street
Bath, NY 14810

Ira D. London
245 Fifth Avenue, Suite 1900
New York, NY 10016

Traffic Safety
Peter Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203

Rachel M. Kranitz
69 Delaware Avenue, Suite 900
Buffalo, NY 14202

Transition from Prison to Community
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007

Victims' Rights
James P. Subjack
4 West Main Street
Fredonia, NY 14063

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

Section Officers

ISSN 1549-4063 (print) ISSN 1933-8600 (online)

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

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155