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Inside

NYSBA

Message from the Chair

As the newly elected Chair of the Criminal Justice Section, I would like to take this opportunity to thank the Section for showing their support by electing me and the other officers—Jim Subjack, Vice-Chair, and Marvin Schechter, Secretary—to serve as the Section's leadership for the next two years. I also want to thank Roger Adler, immediate past Chair of the Section, for his tireless service and commitment to the Section. The Criminal Justice Section will greatly benefit from Roger's hard work for many years to come. On a personal note, I would also like to thank Roger for his friendship and wisdom as he was extremely generous with both such gifts. I am hopeful that Roger, like so many other dedicated past Chairs of this Section, will continue to provide his sound advice to the Section. With such outstanding advisors, our Section is assured great success in the next term.

In my view, the "next term" will be a very exciting time for our Section. Our state has elected a new Governor who is a former prosecutor and has publicly announced his intentions to implement many new criminal justice initiatives. I believe that our Section will have excellent opportunities to influence the formulation of such initiatives, and to that end, I will endeavor to develop a meaningful relationship between this Section and Governor Spitzer's Administration. The Section's officers will also continue to promote and seek support for the Section's past legislative proposals from Congress, the legislature and the Spitzer Administration. These proposals include, but are not limited to, improving the quality of indigent representation, further reform of the Rockefeller Drug Laws, electronic recording of interrogations and cameras in the courtroom.

Our Section has a rich history of service to the citizens of the state and to the legal profession. In the past, we have responded when called upon to evaluate laws, practices and procedures of the criminal justice system that have raised concerns about the quality of justice in the state. The Section has taken on these assignments with exceptional sensitivity to the needs of the various individuals and entities that play a major role in dispensing justice in our state. We have dedicated significant time and effort to preserving the rights of crime victims and defendants alike. The new leadership will continue in this fine tradition of service.

Our Section also enjoys a long history of professional and ideological diversity. Whether the Section focused on matters concerning police conduct, attorney-client relationships or judicial decisions, it has spoken with a representative voice consistent with its membership, which has always consisted of defense attorneys, prosecutors and judges. Many Section members have said that the professional and ideological diversity of this Section is its biggest challenge and its greatest asset. But it has been my personal experience and pleasure to see that when this Section reaches consensus on controversial matters of criminal justice, our voice is heard by a larger audience and our message holds even greater credibility. In the coming years I will work to increase this Section's diversity on all levels with the understanding that our representative voice will be even more powerful in the future.

In closing, I would just like to reiterate that these are very exciting times for the Criminal Justice Section, and Jim Subjack, Marvin Schechter and I would like to encourage all of you to participate in the very compelling work of this Section. We make a difference.

With warmest regards, I look forward to working with all of you in the upcoming term.

Jean Walsh

Message from the Editor

We are pleased to present in this issue an interesting article by a leading criminal law practitioner on the important topic of felony murder. David Blackstone advances the position that there is almost always a reasonable doubt in a felony murder case and calls for the state legislature to revisit the felony murder statute. I am sure our readers will gain some valuable insights from Mr. Blackstone's detailed discussion.

A little more than one year after Judge Samuel Alito assumed his position on the United States Supreme Court, we are also providing an assessment of both the man and his role in some 17 criminal law decisions in which he has participated. I believe this analysis will be both interesting and informative and will provide clues as to possible positions which Judge Alito may take in the future in criminal law cases.

We congratulate our new Section officers and we wish Jean Walsh, James Subjack and Marvin Schechter the best of luck in their new positions. We also wish to thank outgoing chair, Roger Adler, for his years of service and his implementation of several successful innovations with the respect to the operation of our Section.

I also wish to draw the attention of our readers to several important new decisions which have been issued from both the United States Supreme Court and the New York State Court of Appeals. These cases are discussed in detail in the Section dealing with those courts.

As I write this message, I have just learned of the dismissal of all charges against the Duke lacrosse players and have listened to the comments of the North Carolina Attorney General regarding his investigation and ultimate disposition in this matter. This case will surely go down as an example of some of the worst prosecutorial handling of a criminal case and should remind us all of the necessity for both vigilant defense and the ethical responsibilities of prosecutors to fairly investigate and prosecute cases. All of us in the criminal justice system have a responsibility to do what is right and just and hopefully the tragedy of the Duke lacrosse case will never happen again.

I again thank our membership for their support of our publication and I continue to encourage comments and submission of articles for possible publication.

Spiros A. Tsimbinos

Request for Articles

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

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Articles should be submitted in Microsoft Word or WordPerfect. Please include biographical information.

Why There is Almost Always a Reasonable Doubt in a Felony Murder Case

By David Blackstone

On Wednesday, January 30, 2007, a jury acquitted three defendants, Roneck Wyatt Earp, Julian Enoe and Jayson Enoe, totally exonerating them and convicting a fourth defendant, Larry Mnyin, of a skimpy Class C felony of "Gang Assault" in a murder trial before Justice Michael Obus in Manhattan Supreme Court. The absolved Roneck Wyatt Earp, whom I represented, then cautiously walked the walk to freedom from the defense table past the guardrail into the embracing arms of Tiffany Clark, his fiancée who was waiting for him in the courtroom as the verdict was read. Roneck and Tiffany then quietly departed together from the Halls of Justice at 100 Centre onto the beckoning street.

The defendants had been incarcerated on the murder charges at Rikers Island, awaiting trial for eighteen months. After a prior hung jury, and a subsequent one-month trial, three of them at last obtained their "pass to freedom" while the convicted fourth, the most deeply implicated, pretended to be seriously displeased about the result. Larry Mnyin was convicted of Gang Assault in the Second Degree and was eventually sentenced to ten years' imprisonment. The minimum sentence he could have received was seven years in prison and the maximum was fifteen years.

I submit that there is almost always a reasonable doubt in a felony murder prosecution, and the four defendants tried before Justice Obus and a jury were charged with that crime. Under New York's felony murder statute (Penal Law Section 125.25(3)), anyone involved in a robbery, kidnapping, etc., no matter how minutely and disconnected from its commission, can be convicted of Murder in the Second Degree (meaning 15 years minimum to a mandatory life sentence), even when the victim, using his own unlawfully gotten gun, accidentally shoots and kills himself in the course of a struggle with one of the participants in the predicate crime. Such was the convoluted state of affairs in *People v. Roneck Wyatt Earp et al.*, which unfolded before the jury in Justice Obus's Manhattan courtroom.

It was just four ounces of Purple Haze ("Piff") that Larry Mnyin, in town from Philadelphia, Pennsylvania, sought to buy at the drug "spot" on West 151st Street in Manhattan. He was planning to purchase the weed for $1,600 from Jayda, who had a "proprietorship interest" in the location. On August 25, 2005, Larry Mnyin, with Julian Enoe at the wheel of a borrowed silver limo bearing Pennsylvania plates, pulled up to brother Jayson Enoe's house in the Bedford-Stuyvesant section of Brooklyn for a family reunion before proceeding with the "buy" which was later planned up in Harlem. Coincidently, childhood buddy Roneck Wyatt Earp was already there with Jayson. Roneck appeared behind the wheel of his fiancée's brand-new blue Honda Civic bearing New York plates. Larry Mnyin apparently believed driving through Harlem in a car with New York plates would avoid police scrutiny. Therefore, the foursome drove together in the Honda to the drug spot with Roneck seated in the rear passenger seat just along for the ride. The nineteen-year-old did not have a driver's license.

The West 151st Street drug spot had been successfully camouflaged from the 30th Precinct one block away since the start of spring. Its operators included Cuts, D-Lo, Jayda, Mic-ese, and D Jones who took advantage of an abandoned building's scaffolding at number 518 off the corner of Amsterdam Avenue, three or four women seated in beach chairs who were planted for cover, a few of the women's children and four or five men (including the principals of the drug spot) playing poker at a card table on the sidewalk beneath the scaffolding. The Honda, driven by Julian Enoe, pulled up and parked directly underneath the scaffolding. Mnyin reached Jayda by cell on Jayda's walkie-talkie. Jayda told Mnyin that he was in the Bronx, but that his "man" D Jones was at the card table playing poker with Cuts and D-Lo and could "do the deal." D Jones then approached the Honda and negotiated the deal. Larry Mnyin, trusting Jayda's word, gave D Jones $1,600. D Jones replied, "I'll be back in a couple of minutes with the four ounces of Piff."

Over two hours passed and Larry Mnyin was still seated in the Honda with his buddies waiting for delivery of the merchandise. Roneck Wyatt Earp became impatient because he was very late picking up Tiffany at her mid-town Manhattan workplace. Larry Mnyin kept asking Cuts and D-Lo, who were still playing cards, "Why you trying to burn us?" Cuts told Larry Mynin, "My man is coming, chill." D-Lo called D Jones on D Jones's Nextel walkie-talkie and told him "Hurry up, these guys think we're jixin' them."

Finally, D Jones comes strolling up 151st Street from Amsterdam Avenue holding a large black plastic bag containing 100 percent fake "weed" and handed the plastic bag to Larry Mnyin, who was then standing underneath the scaffolding, stating to him as the merchandise was handed over "This is what you came for." Larry Mynin, who had been in the business for at least ten years, just took a whiff and told D Jones, "This is beat, give me my

money back." D Jones, who had a cannabis blood level so high he could hardly stand, backed up and said "No, this is yours, keep it." Larry Mnyin went for D Jones's right pants pocket to get his money back. Roneck tried to assist but D Jones pushed Roneck away. D Jones and Larry Mnyin in the tangle both entered D Jones's pocket at about the same time and emerged holding a fully operable, loaded and cocked .25 caliber semi-automatic pistol that accidentally discharged in the struggle, inflecting a single gunshot wound three inches below D Jones's right armpit and resulted in his tragic but accidental death.

Mnyin and his buddies sped away from the scene in the Honda. In the rear seat for unexplainable reasons was the bag of fake weed and D Jones's .25 semi-automatic. Julian Enoe, driving in the getaway, took the FDR drive heading back to Brooklyn. Just before they heard the police sirens, Larry Mnyin tossed the gun out the car window. Within 15 minutes of the shooting, all four of them were apprehended and arrested at 96th Street and the FDR drive.

Lead Detective Kassim Williams from the 30th Precinct and Detective Joseph Litrenta from Manhattan North Homicide conducted the investigation. They quickly learned from interviews of unreliable sources—including D-Lo, Cuts and D-Lo's domestic partner, Taffanie Mars, who was sitting in one of the beach chairs during the shooting—that somebody from the Honda screamed, "Pop the trunk" as the tussle began. Additional witnesses from the drug spot came forward to claim that D Jones was actually put in the trunk of the Honda or that the trunk of the Honda was opened or that D Jones was put inside the back seat of the Honda or that the car door rear driver's side was opened.

Veteran homicide prosecutor Eugene Hurley was assigned to the case. He was determined to find a way to prosecute all four defendants on a murder charge. Accordingly, the defendants were arrested and indicted for a felony murder on the theory that all of them attempted to commit the crime of kidnapping, in the course of which D Jones died accidentally with his own gun, with his own finger on the trigger. The defendants were each assigned an experienced lawyer. Larry Mynin got Tom Dunn; Julian Enoe, David Perlmutter; Jayson Enoe, David Touger; and Roneck Wyatt Earp, me (David Blackstone).

The first trial in May 2006 was flawed from the outset because the defense attorneys in an incredible miscalculation allowed a liberal Acting State Supreme Court justice to be seated as a juror. That jury hung 11 to 1 for acquittal, the holdout for conviction being the liberal Acting State Supreme Court justice.

In the second trial the defense made no such mistakes. The prosecution put on its civilian witnesses, mostly members of the drug spot (and a few innocent bystanders). Larry Mnyin testified for the defense. The evidence of an accidental shooting was overwhelming, based on the ballistics evidence that no live round from the magazine entered the .25 semi-automatic's chamber after the first bullet was discharged (indicative of a struggle interfering with the rearward movement of the slide), no blood in the trunk or back seat of the impounded Honda despite evidence that the deceased profusely bled, and a bullet entry wound—two inches below the right armpit—and a track of the wound through the body downward at a 30- to 45-degree angle that is inconsistent with an intentional shooting and consistent with a struggle and an accidental weapons discharge. After one full day of deliberations, the jury cut Roneck Wyatt Earp, loose, along with brothers Jayson and Julian Enoe and acquitted Larry Mynin of murder and attempted kidnapping but convicted him of Gang Assault in the Second Degree.

This brings me back to the topic why there is almost always a reasonable doubt in a felony murder case. It is an unmerciful strict liability criminal statute that ignores authentic culpability. Under the felony murder statute a participant in the predicate crime is guilty of murder even if death was accidental, and the participant played no part in the accident. That scenario is a hard sell to a Manhattan jury. Perhaps the time has come for the New York State Legislature to re-visit the felony murder statute and interject an element of fairness to an unusually harsh statute.

David Blackstone is a practicing criminal lawyer in New York City. He has tried to conclusion more than 45 murder cases and served as a New York State Deputy Capital Defender. He is a graduate of Columbia Law School and is a member of several Bar Associations.

Justice Samuel Anthony Alito, Jr.— The Man and His Criminal Law Decisions

By Spiros A. Tsimbinos

Justice Samuel Anthony Alito, Jr., the newest member of the United States Supreme Court, was confirmed by the Senate on January 31, 2006 and was officially sworn in as a member of the Court on February 1, 2006. He began hearing his first cases as a member of the Court a little over a year ago. During this time, Justice Alito has participated in several important cases in the field of criminal law and it appears appropriate to take a look at the man and the judge in an effort to make an early forecast as to how he will be inclined to vote on issues which will be of interest to criminal law practitioners.

Justice Alito—The Man

Justice Alito was born on April 1, 1950 in Trenton, New Jersey to Italian-American parents. Justice Alito's father immigrated to the United States in 1914 and later worked as a teacher for much of his career. His mother was also a dedicated public school teacher and the judge credits both of his parents with instilling in him a love of learning. Justice Alito graduated from Steinert High School in New Jersey and attended Princeton University. He also attended Yale Law School where he served as editor of the *Yale Law Journal* and received his Juris Doctor degree in 1975.

After graduation from law school, he was commissioned as a Second Lieutenant in the United States Army and served in the Army Reserve. Early in his legal career, Justice Alito served as a clerk to the Hon. Leonard I. Garth of the U.S. Court of Appeals for the Third Circuit. Subsequently, he served as an attorney in the Department of Justice for 12 years. During his tenure in the Department of Justice, he argued 12 cases before the Supreme Court of the United States. He was subsequently appointed as the U.S. Attorney for the District of New Jersey where he served from 1987 to 1989. In 1990, he was appointed to the United States Court of Appeals for the Third Circuit.

During his career, Justice Alito has also served as an adjunct professor at Seton Hall University School of Law, where he taught classes in Constitutional Law. He has also been active in various professional associations including the American Bar Association, the New Jersey State Bar Association and the Federalist Society. The Judge is also an avid reader and particularly enjoys reading biographies and history.

Justice Alito was married in 1985 and he and his wife, Martha-Ann, have two children, Philip and Laura. At the time of the announcement of his nomination to the Court, Justice Alito expressed his warm appreciation of his family stating that his wife and children were the "pride of his life." During his confirmation hearings, friends and colleagues described Justice Alito as being quiet, intelligent, well-mannered, generous, with a great deal of integrity and family-oriented. During his confirmation hearing, the Judge illustrated his devotion to family and heritage and provided the following comments:

> My father was brought to this country as an infant. He lost his mother as a teenager. He grew up in poverty. Although he graduated at the top of his high school class, he had no money for college. And he was set to work in a factory but, at the last minute, a kind person in the Trenton area arranged for him to receive a $50 scholarship and that was enough in those days for him to pay the tuition at a local college and buy one used suit. And that made the difference between his working in a factory and going to college.
>
> After he graduated in 1935, in the midst of the Depression, he found that teaching jobs for Italian-Americans were not easy to come by and he had to find other work for a while.
>
> But eventually he became a teacher and he served in the Pacific during World War II.
>
> His story is a story that is typical of a lot of Americans both back in his day and today. And it is a story, as far as I can see it, about the opportunities that our country offers, and also about the need for fairness and about hard work and perseverance and the power of a small good deed.
>
> My mother is a first-generation American. Her father worked in the Roebling Steel Mill in Trenton, New Jersey. Her mother came from a culture in which women generally didn't even leave the house alone, and yet my mother became the first person in her family to get a college degree.
>
> She worked for more than a decade before marrying. She went to New York City to get a master's degree. And she continued to work as a teacher and a principal until she was forced to retire.

With his formal swearing in, Justice Alito becomes the 110th Justice of the United States Supreme Court.[1]

Justice Alito's Criminal Law Decisions

When Justice Alito was appointed to the Court, many who practice in the criminal law area immediately placed him in the conservative wing of the Court and predicted that he would be largely pro-prosecution when it came to deciding cases. An analysis of the 17 significant criminal law decisions, which Justice Alito has participated in since his ascendancy to the Court, reveals that these early predictions were too simplistic and overexaggerated. Although Justice Alito's pro-prosecution vote on one important criminal case might tend to support the early predictions in several other important criminal law matters, his vote was on the side of the defense.

His first important pro-prosecution decisions came in May and June of 2006 in two matters involving the issue of search and seizure. In *Hudson v. Michigan,* 126 S.Ct. 2159 (June 15, 2006), Justice Alito cast the deciding vote in a matter which had to be reargued on May 18, 2006 after the Court had obviously split on 4-4 basis. The majority opinion which was written by Justice Scalia basically held that a violation of the knock-and-announce rule did not require the suppression of all evidence found during a search. The decision basically broke new ground with respect to previously stringent requirements for knocking and announcing before search and seizure. Justice Alito joined in Justice Scalia's decision along with Chief Justice Roberts and Justices Kennedy and Thomas.

On May 22, 2006, in the case of *Brigham City, Utah v. Stuart*, 126 S.Ct. 1943 (2006), Justice Alito also voted to uphold a warrantless search by a police officer on the grounds that the officers' actions were reasonable under the circumstances. The decision declared that the police officers' manner of warrantless entry into a home was reasonable for Fourth Amendment purposes where, after observing ongoing physical altercations between the occupants from outside the premises, one officer opened the screen door, yelled "Police" and then entered. Although the Brigham City decision can be characterized as being pro-prosecution, Justice Alito participated in a decision which was unanimous by the Court.

Justice Alito delivered his first written opinion for the Court on May 1, 2006 in the case of *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006). In this decision, Justice Alito issued a pro-defendant result which was concurred with by the unanimous Court. The decision concluded that a criminal defendant's Federal constitutional rights were violated by a South Carolina evidence rule under which the defendant was not allowed to introduce forensic evidence that, if believed, strongly supported a not guilty verdict. The rule which was applied by the State Supreme Court violated a defendant's right to have a meaningful opportunity to present a complete defense.

On June 5, 2006, in the case of *Zender v. United States*, 126 S.Ct. 1976 (2006), Justice Alito issued another written opinion again with a pro-defendant result and for a unanimous Court. Justice Alito found in that case involving the Federal Speedy Trial Act, that a defendant may not prospectively waive the application of the Act "for all time" and that any effort to do so was ineffective.

On June 19, 2006, in *Youngblood v. West Virginia*, 126 S.Ct. 2188 (2006), in a 6-3 result, Justice Alito was again part of a pro-defendant decision holding that a reversal of a conviction on a Brady violation was required upon a showing that favorable evidence could reasonably be taken to put the whole case in such a different light as to undercut the original verdict. Justice Alito joined with Chief Justice Roberts and Justices Ginsberg, Breyer, Souter and Stevens to form the six-judge majority. Justices Scalia, Thomas and Kennedy dissented.

Also on June 19, 2006, Justice Alito participated in another 6-3 decision but this time the result can be categorized as being pro-prosecution. In *Samson v. California*, 126 S.Ct. 2193 (2006), the Court held that the Fourth Amendment does not prohibit police officers from conducting a suspicionless search of a parolee. Voting with Justice Alito in the majority were Justices Scalia, Thomas, Kennedy, Ginsberg and Chief Justice Roberts. In dissent were Justices Souter, Stevens and Breyer.

In a combination decision involving two cases, Justice Alito also participated in an important criminal decision involving the extent of the Court's prior ruling in *Crawford v. United States*, 541 U.S. 36, 124 S.Ct. 1354 (2004). The two cases in question were *Davis v. Washington*, 126 S.Ct. 2266 (June 13, 2006) and *Hammon v. Indiana*, 126 S.Ct. 2266 (June 13, 2006). In *Davis,* Justice Alito was part of a unanimous vote upholding the admissibility of certain out-of-Court statements as being elicited as a result of an emergency, not as a result of investigatory questioning. In *Hammon,* he again sided with the eight-member majority in holding that statements elicited as part of an investigatory process were inadmissible and should have been suppressed. Only Justice Thomas dissented in *Hammon* on what can be considered a pro-defendant result.

In *Hill v. McDonough*, 126 S.Ct. 2096 (June 12, 2006), Justice Alito also concurred in a unanimous ruling written by Justice Kennedy in which the Court held that a death row inmate could challenge the use of a lethal injection in a *habeas corpus* petition.

In the closing days of the Court's 2005–2006 term, Justice Alito also participated in two additional decisions which could be characterized as pro-prosecution positions. In *Dixon v. U.S.*, 126 S.Ct. 2437 (June 22, 2006), the Court held in a 7-2 decision that jury instructions did not run afoul of the due process clause when they place the burden on a defendant to establish a duress defense by a preponderance of the evidence. Justice Alito sided with

the seven-judge majority with Justices Breyer and Souter dissenting.

In *U.S. v. Gonzalez-Lopez,* 126 S.Ct. 2557 (June 26, 2006), the Court in a 5-4 decision held that a defendant was denied his Sixth Amendment right to counsel when his attorney was disqualified from representing him. The majority opinion written by Justice Scalia stated that no prejudice needed to be shown. Justice Alito, in his first written dissent on a criminal case, stated that he believed some sort of prejudice would have to be shown in order to reverse a conviction and that he would also apply a harmless error doctrine. Justice Alito's dissent was joined in by Chief Justice Roberts and Justices Kennedy and Thomas.

With the opening of the Court's new term in October, 2006, Justice Alito participated in some additional criminal law decisions which again resulted in pro-prosecution positions. In *Ayers v. Belmontes*, 127 S.Ct. 469 (November 3, 2006), the Court held in a 5-4 decision that there was no reasonable likelihood that a trial court's instructions regarding the death penalty phase of the trial violated the defendant's constitutional rights. Justice Alito was in the five-judge majority joined by Justices Roberts, Kennedy, Thomas, and Scalia. In dissent were Justices Stevens, Ginsberg, Souter and Breyer.

On December 11, 2006, in *Carey v. Musladin,* 127 S.Ct. 649 (2006), the Court held that a reversal of a conviction was not required where spectators in the courtroom were allowed to wear buttons bearing the victim's name. The Court voted unanimously with respect to the result with Justice Alito participating in the main decision along with Chief Justice Roberts and Justices Scalia, Ginsberg, Breyer and Thomas. Justices Stevens, Kennedy and Souter concurred in individual decisions.

On January 9, 2007, in *U.S. v. Resendiz-Ponce*, 127 S.Ct. 782 (2007), in an 8-1 decision, the Court reinstated the Federal indictment finding that it was not defective for lack of specificity. Justice Alito participated in the majority vote with Justice Scalia dissenting.

On January 22, 2007, in the case of *Cunningham v. California*, 127 S.Ct. 856 (2007), Justice Alito issued a vigorous dissent and took what could be categorized as a pro-prosecution position in an important case which involved the application of the *Apprendi* and *Booker* cases to the sentencing structure in the State of California. California had a tier system for sentencing violent offenders and allowed a trial judge to impose an upper term sentence based upon the findings of certain aggravating circumstances. In a 6-3 decision, with the majority opinion being written by Justice Ginsberg, the Supreme Court determined that the California sentencing structure was unconstitutional since it allowed the trial judge, by a preponderance of the evidence, rather than the jury beyond a reasonable doubt, to determine a sentence based upon factors which had not been involved in the jury verdict. The majority found that this system violated the Sixth Amendment right to a jury trial and that the result was mandated by the Court's prior decisions from *Apprendi*, to *Blakely* and through *Booker*. The Court's majority opinion was greeted with great consternation by law enforcement officials and the State of California estimated that some 40,000 offenders might have to be resentenced to lower terms based upon the High Court's decision.

Justice Alito, in an effort to save the California statute, relied upon the approach taken by the Court in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), where the Federal sentencing guidelines were held to be advisory rather than mandatory, thereby salvaging the Federal sentencing scheme. Justice Alito in dissent, specifically stated:

> The California sentencing law that the Court strikes down is indistinguishable in any constitutionally significant respect from the advisory Guidelines scheme that the Court approved in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005). Both sentencing schemes grant trial judges considerable discretion in sentencing; both subject the exercise of that discretion to appellate review for "reasonableness"; and both—the California law explicitly and the federal scheme implicitly—require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury's verdict. Because this Court has held unequivocally that the post-*Booker* federal sentencing system satisfies the requirements of the Sixth Amendment, the same should be true with regard to the California system. I therefore respectfully dissent.

Although Justice Alito's position in the *Cunningham* case was on the side of the prosecution, the split within the Court in *Cunningham* was highly interesting with Justice Breyer, who is normally considered on the liberal side, joining Justice Alito in dissent. Justice Kennedy also joined in Justice Alito's opinion. Joining Justice Ginsberg in the majority result were Justices Scalia, Thomas and Chief Justice Roberts, normally characterized as being on the conservative side of the Court.

In *Lawrence v. Florida*, 127 S.Ct. 1079 (Feb. 20, 2007), Justice Alito again evidenced a pro-prosecution position, siding with the five-judge majority in holding that the one-year statute of limitations for seeking Federal *habeas corpus* relief from a State court judgment was not tolled during the pendency of a *certiorari* petition to the United States Supreme Court. Justice Alito joined in the opinion written by Justice Thomas and was joined by Chief Justice

Roberts and Justices Scalia and Kennedy. Arguing in dissent that a more flexible approach was warranted to prevent the occurrence of injustices, Justice Ginsberg, along with Justices Stevens, Souter and Breyer, voted to apply the tolling rule.

On February 28, 2007, Justice Alito had occasion to author and deliver the unanimous opinion of the Court in *Whorton v. Bockting*, 127 S.Ct. 1173 (2007). In this case, which can also be characterized as pro-prosecution, the Court held that its prior *Crawford* decision on the admissibility of hearsay statements, which was adopted on March 8, 2004, did not apply retroactively to cases on *habeas* review and was only applicable to matters which had not become final and which were still on direct appellate review at the time of the new decision.

Conclusion

Of the 17 decisions in which Justice Alito has participated from the period May, 2006 to March 1, 2007, 12 can be categorized as being pro-prosecution and 5 can be said to be pro-defense. This amounts to a pro-prosecution rating of approximately 70.6 percent. The number of pro-prosecution decisions rendered by the entire court was 11 while 6 can be categorized as being pro-defense. This represents a pro-prosecution rating by the entire court of approximately 64 percent. Several of the pro-prosecution decisions have also been unanimous decisions or have carried a significant majority of the Court. In a few controversial cases, particularly involving issues of search and seizure, Justice Alito has supplied the critical fifth vote to reach a pro-prosecution decision. On the other hand, with respect to significant issues involving constitutional rights of defendants, he has exhibited a sensitivity for the protection of defendants' rights. It appears that he clearly is not the most liberal member of the Court when it comes to criminal defense issues; however, he is certainly not the most conservative or pro-prosecution member of the Court. He appears to be somewhat toward the middle, quite close to Chief Justice Roberts and also close to Justice Kennedy. Justice Kennedy in fact had the same pro-prosecution score card to wit: 12-5 while Chief Justice Roberts had 11 pro-prosecution decisions and 6 pro-defendant decisions.

Many of the appellate courts throughout the nation have a very high percentage of pro-prosecution decisions and Justice Alito's score of 70 percent is in no way unusually high. Our own Court of Appeals in the year 2006 was reported in a *New York Law Journal* article by Paul Schechtman to have had a pro-prosecution rating of slightly over 64 per cent. Thus, although Justice Alito in the last year has clearly rendered more pro-prosecution decisions than pro-defense decisions, he cannot be said to be out of the mainstream and does not hesitate to vote for the defense when he deems it appropriate.

I hope this analysis of Justice Alito, both the man and his criminal law decisions, after approximately 15 months of his service on the Court, will provide criminal law practitioners with some insight into what we can expect in the future.

Endnote

1. Most of the biographical information on Justice Alito was taken from the *Quarterly Journal of the Supreme Court Historical Society*, Issue No. 1, 2006, published in February, 2006.

Spiros A. Tsimbinos is a former President of the Queens County Bar Association and is currently the Editor of the *Criminal Law Newsletter* for the New York State Bar Association. He is a graduate of New York University School of Law.

A Book Review:
Criminal Law Slanguage of New York

By Spiros A. Tsimbinos

In an unusual and interesting book by criminal law attorneys Glenn Edward Murray and Gary Muldoon, a detailed compilation of criminal law expressions is presented over the course of 160 pages. Arranged in alphabetical order in the form of a dictionary, thousands of terms and expressions are explained for the benefit of the layperson and beginning practitioner. *Criminal Law Slanguage of New York* contains terms that are briefly defined and in some instances immediately followed by a cross reference to another listing.

Many definitions are preceded by "State," indicating they are applicable only in New York State courts. "Federal" designates terms which are applicable only in Federal courts and the term "State and Federal" means that they applicable in both the State and Federal systems. The authors also include case citations after many definitions as well as several frequently cited books which deal with the subject matter. The compilation has resulted from years of work by the authors. At the back of the book the authors have also provided a valuable bibliography listing by name and author some of the leading treatises in criminal law, which further define and explain many of the terms used in the dictionary portion of the book.

Glenn Edward Murray has practiced over 20 years in the State and Federal courts with a strong emphasis on criminal defense. He is a former Army Prosecutor and Military Defense Counsel and served as a Village Prosecutor for the Village of Williamsville in Erie County. He is a graduate of Albany Law School and currently maintains a law office in Buffalo, New York. He has also authored many legal articles and has provided seminars and lectures to various bar associations.

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The authors have provided a valuable service to criminal law practitioners by making available in one compact treatise numerous terms and expressions which relate to the criminal law field. This title is published by Gould Publications and information regarding the book can be obtained by contacting the Matthew Bender Company at telephone number 800-833-9844.

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 February 2, 2007 to May 1, 2007.

MODE OF PROCEEDINGS ERROR

***People v. Kisoon* and *People v. Martin, III*, decided February 13, 2007 (N.Y.L.J., Feb. 14, 2007, p. 18)**

In a single opinion covering two cases, the New York Court of Appeals held that a mode of proceedings error had occurred in both matters and that, therefore, the Appellate Divisions in each case were correct in reversing the defendant's conviction and ordering a new trial.

In *People v. Kisoon*, the Trial Court had received a jury note during jury deliberations which basically related that the jury was not unanimous and believed that further deliberations would not change the decision. The Trial Judge merely summarized the content of the jury's note without reading it in its entirety and without consulting with counsel regarding any further action to be taken. The jury was then told to continue deliberations and the next day the jury convicted the defendant.

The Court found that in *Kisoon*, the Trial Court had committed a critical failure by not disclosing the full contents of the jury note and, therefore, the issue could be considered as a mode of proceedings error even in the absence of preservation.

In *People v. Martin*, the Trial Court, due to a clerical error, failed to read or respond to a first note which had been submitted by the jury. The Court of Appeals also concluded in *Martin* that the defendant was denied a core right to have the assistance of counsel in responding to the jury's request. The Court found that the *Martin* situation also involved a mode of proceedings error which could be reached in the absence of objection and preservation. In rendering its decisions in both cases, the Court of Appeals relied upon its 1991 decision in *People v. O'Rama*, 78 N.Y.2d 270. Both cases were decided unanimously by a five-judge vote, with Judge Pigott and newly appointed Judge Jones taking no part.

RESTITUTION

***People v. Tzitzikalakis*, decided February 15, 2007 (N.Y.L.J., Feb. 16, 2007, p. 22 and Feb. 20, 2007, pp. 1 and 2)**

In a unanimous decision, the New York Court of Appeals ruled that the defendant was entitled to a new restitution hearing on the issue of proving offsets since the Trial Court had improperly shifted the burden of establishing out-of-pocket loss to the defendant. In the case at bar, the defendant was the owner of a construction company which was accused of overbilling the city for work done under a contract. After being sentenced to a prison term, the defendant was ordered to pay restitution in the amount of $340,000. The New York Court of Appeals found that, in determining that amount, the Trial Judge had improperly placed the burden of showing that the City did not receive any benefit from certain work performed on the defendant, rather than the prosecution.

The Court of Appeals, in a 5-1 opinion, held that a new restitution hearing had to be ordered and that the People bear the burden of proving the victim's out-of-pocket loss and the amount necessary to make the victim whole by a preponderance of evidence. To meet that burden, the People are required to show both components of the restitution equation, to wit: the amount taken minus the benefit conferred. Chief Judge Kaye wrote the opinion for the majority and indicated that if there were to be a change in the procedure, the legislature would have to act to amend the current restitution statute. Judge Robert S. Smith issued a dissenting opinion and Judge Jones took no part in the determination.

FAILURE TO PRESERVE ISSUES

***People v. Williams*, decided February 15, 2007, (N.Y.L.J., Feb. 16, 2007, p. 25)**

In a unanimous decision, the Court of Appeals upheld a defendant's murder and robbery conviction and ruled that his claims raised on appeal with respect to the denial of a fair trial were not adequately preserved for appellate review. The defendant claimed that the prosecutor had improperly denigrated defense witnesses and had disparaged the defendant's alibi. No objections had been raised regarding these matters during the trial. The Court concluded that the Appellate Division was correct in determining that the defendant was not deprived of due process or a fair trial and there was no basis to further review the defendant's unpreserved claims.

NOTICE OF PRETRIAL PHOTOGRAPHIC IDENTIFICATION

***People v. Grajales*, decided February 20, 2007, (N.Y.L.J., Feb. 16, 2007, p. 21)**

In a 4-2 decision, the New York Court of Appeals affirmed a defendant's conviction and found that the failure to provide specific notice of a February 4, 2003 pretrial photographic identification did not require a reversal for a new trial. In the case at bar, the victim had been shown two photographic arrays from which he picked

the defendant out as the robber. The defendant was subsequently also identified by the victim on February 11th, when he saw the defendant on the street. The People had provided notice of identification testimony under CPL Section 710.30 in a general manner without specifying the February 4th photo identifications. The Court of Appeals determined that CPL Section 710.30(1)(b) only mandates preclusion in the absence of timely notice specifying the pretrial identification evidence intended to be offered at trial. In the case at bar, evidence of the witness's pretrial photographic identification was not admissible in the prosecution's case in chief and the People never offered it at trial. Under these circumstances, the majority opinion determined that the notice provided in the case at bar was adequate and that the defendant had sustained no prejudice.

Judges Ciparick and Kaye dissented, arguing that the statutory provision requires notification to the defendant of all police-arranged photo arrays and that failure to do so required preclusion without any showing of prejudice. Newly appointed Judge Jones took no part in the decision.

HARMLESS ERROR DOCTRINE APPLIED TO ADMISSIBILITY OF TESTIMONY REGARDING UNCHARGED CRIMES

***People v. Jackson*, decided February 22, 2007 (N.Y.L.J., Feb. 23, 2007, p. 23)**

In a 6-1 decision, the New York Court of Appeals affirmed a rape conviction, even though the Trial Court had improperly admitted evidence of prior uncharged crimes. A five-judge majority found that under the circumstances, any error which occurred was harmless due to the strong evidence which was presented in the case. The Court pointed out that the underage victim's testimony was bolstered by her prompt outcry the following morning. Evidence established that the defendant had a key to the victim's home giving him full access to the apartment. Medical testimony was also presented. Thus, under all the circumstances, there was no significant probability that the jury would have acquitted the defendant if not for the error and therefore any error which occurred was deemed to be harmless.

Judge Richard Smith concurred in the result to affirm the conviction but did so based on his conclusion that no error had been committed since the introduction of the evidence of uncharged crimes was properly admitted under the Molineux doctrine to demonstrate the defendant's motive. Judge Eugene Pigott dissented and voted to reverse the conviction, finding that not only was the evidence improperly admitted but that it had deprived the defendant of a fair trial and therefore could not be considered harmless.

LACK OF PRESERVATION

***People v. Melendez*, decided March 22, 2007 (N.Y.L.J., Mar. 23, 2007, p. 25)**

In a unanimous decision, the Court of Appeals affirmed an order of the Appellate Division which upheld the defendant's conviction. In the Court of Appeals, the defendant raised the issue that during the testimony of a non-English speaking witness, the Trial Court required the defendant's court-appointed interpreter to stand at the back of the courtroom and interpret for the entire Court rather than solely for the defendant. The Court of Appeals determined that this issue—as well as other constitutional issues which the defendant raised such as the violation of his right to counsel, his right to be present, and his right to participate in his own defense—were not raised before the Trial Court and therefore were not preserved for review. Under these circumstances, the Court upheld the Appellate Division's determination affirming the conviction.

SEARCH AND SEIZURE

***People v. Dallas*, decided March 22, 2007 (N.Y.L.J., Mar. 23, 2007, p. 25)**

In a unanimous decision, the Court of Appeals upheld the search of a defendant's apartment on the grounds that the police had properly acted under the Emergency Doctrine, stating that the applicability of the Emergency Doctrine involved a mixed question of law and fact. The Court of Appeals determined that the determination of the Court below was supported by the record and that any further review was beyond the jurisdiction of the Court of Appeals. The Court of Appeals held that under its prior ruling in *People v. Mitchell*, 39 N.Y.2d 173 (1976), the Emergency Doctrine required three elements: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by an intent to arrest and seize evidence; and (3) There must be some reasonable basis approximating probable cause to associate the emergency with the area or place to be searched. Utilizing the principles in question, the Court of Appeals upheld the defendant's conviction.

WITHDRAWAL OF GUILTY PLEA

***People v. Rowland*, decided March 29, 2007 (N.Y.L.J., Mar. 30, 2007, pp. 6 and 23)**

In a 5-2 decision, the Court of Appeals vacated a guilty plea that the defendant had entered to a criminally negligent homicide charge and a separate charge of weapons possession. The plea had been entered with the promise that he would serve 4-8 years which would run concurrently with the prior conviction which contained a promise of a prison sentence of 3-7 years. The conviction

for which he received the 3-7 year term was eventually reversed upon appeal and he was subsequently sentenced on that matter to a term of 1 year. He subsequently claimed that he would not have entered the plea on the criminally negligent homicide conviction if he had known that he was facing a lesser time on the original conviction. The Court of Appeals, in its majority decision, agreed with the defendant that he would not have entered the subsequent plea had he known that he would have faced far less time in prison because of the vacated conviction. The Court then ordered a new trial since the original Court promise could not be kept. The majority opinion was written by Judge Robert S. Smith and was joined in by Judges Ciparick, Reed and Jones and Chief Judge Kaye. The majority opinion relied upon the Court's prior decision in *People v. Pichardo*, 1 N.Y.3d 126 (2003).

Judges Graffeo and Pigott dissented, arguing that there was ample support in the record for the conclusion that the defendant would have accepted the plea offer even if he had not been previously convicted of the original charge.

INEFFECTIVE ASSISTANCE OF COUNSEL

***People v. Ramchair*, decided March 29, 2007 (N.Y.L.J., Mar. 30, 2007, pp. 6 and 24)**

In a unanimous opinion, the Court held that appellate counsel was not ineffective when he failed to argue in the Appellate Division that the Trial Court should have granted his motion for a new trial based upon the trial judge's denial of the defense attorney's request to testify regarding occurrences at the police lineup. Defense counsel was allegedly to have testified that he was present at what the defense claimed was an unfair police lineup.

The Court of Appeals determined that appellate counsel had submitted a comprehensive brief to the appellate division, raising other strong claims on the defendant's behalf. It also concluded that appellate counsel's failure to raise the issue in question may have been related to a strategy to rely upon issues which had a greater likelihood of success. The Court reviewed the standard for effective assistance of appellate counsel under both the State and Federal constitutions and reiterated that if meaningful representation was provided, an ineffective assistance of counsel claim would not be upheld. In the case at bar, appellate counsel had the latitude to decide which points to advance and under the circumstances in question, the defendant's contentions were denied. Judge Jones who was recently appointed to the Court took no part in the decision.

IMPOSITION OF CONSECUTIVE SENTENCES

***People v. Dean*, decided April 3, 2007 (N.Y.L.J., Apr. 4, 2007, pp. 8 and 21)**

In a unanimous decision, the Court of Appeals modified a defendant's sentence so that the sentences imposed would run concurrently rather than consecutively. In the case at bar, the defendant had pleaded guilty to three counts of possessing a sexual performance by a child. He thereafter received three 1-3 year sentences which were made to run consecutively. The Court of Appeals ruled however that prosecutors failed to include in the indictment during the plea allocution the date and time of each of the incidents so that it could not be determined whether they constituted separate and distinct acts under Penal Law Section 70.25. Under these circumstances, the imposition of consecutive sentences could not be supported. The Court cited its prior decision in *People v. Ramirez*, 89 N.Y.2d 444 (1996) in support of its position.

FIFTH AMENDMENT VIOLATION

***People v. Havrish*, decided April 3, 2007 (N.Y.L.J., Apr. 4, 2007, pp. 8 and 19)**

In a unanimous decision, the Court of Appeals dismissed a conviction for criminal possession of a weapon against a defendant who asserted his Fifth Amendment rights against self-incrimination were violated. The defendant had an Order of Protection imposed against him which directed him to turn over his firearms to police. The defendant produced an unlicensed handgun and was subsequently charged with Possession of a Weapon in the Fourth Degree. The Court of Appeals determined that in complying with the police order, the defendant was faced with an impossible situation—either he had to turn over the handgun to comply with an order of protection secured by his ex-wife or not surrender the gun and possibly be in contempt of the order of protection. The Court of Appeals determined that the defendant's Fifth Amendment rights were implicated and that the privilege protected the defendant from being compelled to provide evidence against himself. The Court found that both of the elements of the "act of production doctrine" had been met and that the defendant's surrender of the unlicensed handgun was privileged under the Fifth Amendment and suppression of the evidence was therefore warranted. The decision was written by Judge Graffeo and Judge Jones took no part in the determination.

INDECENT TEXT MESSAGES

***People v. Kozlow*, decided April 26, 2007 (N.Y.L.J., Apr. 27, 2007, pp. 1, 2 and 23)**

In a 5-2 decision the New York Court of Appeals reinstated the conviction of a Manhattan defendant who had sent indecent text messages and e-mails to an undercover investigator who he believed was a teenage boy. The

Appellate Division, Second Department had thrown out the conviction on the grounds that Penal Law Section 235.22 applied only to photographs or graphics and not to text-only communications. The Court of Appeals majority however disagreed, finding that the term "depicts" should be liberally construed to include representing or portraying in words as well as images. Judge Pigott, who wrote for the majority, stated that the legislature clearly intended to broadly interpret "depicts" because they were trying to criminalize the use of the Internet by sexual predators on adolescents. The five-judge majority consisted of Judge Pigott, Chief Judge Kaye and Judges Ciparick, Graffeo and Read.

Judge Robert Smith issued a written dissent arguing that the reading of the Penal Law statute led to the conclusion that the term "depicts" was to be used in its primary and narrow sense. Judge Smith also pointed out that the Attorney General's office, in arguing two prior appeals, had stated that the statute referred only to images and not words. Newly appointed Judge Theodore T. Jones joined Judge Smith in dissent. It was Judge Jones' first dissent since he joined the Court on February 12, 2007.

Recent United States Supreme Court Decisions Dealing with Criminal Law

During the last several months, the United States Supreme Court has begun issuing a series of important decisions in the area of criminal law as follows:

Lawrence v. Florida, 127 S.Ct. 1079 (Feb. 20, 2007)

In a 5-4 decision issued on February 20, 2007, the United States Supreme Court ruled that a Florida death row prisoner lost his right to challenge his conviction in the Federal Court system because he missed the one-year filing deadline which was implemented as part of the Federal Anti-Terrorism and Death Penalty Act of 1996. In the case at bar, the defendant Lawrence argued that the one-year limitation for filing a writ of *habeas corpus* in Federal courts was tolled during the pendency of a writ of *certiorari* to the United States Supreme Court.

The majority opinion, which was written by Justice Thomas, stated that the language of the statute was clear and that prisoners were required to comply with the one-year filing deadline and that the deadline is not tolled by an application to the United States Supreme Court since the statute makes no such provision. Justice Thomas pointed out that the setting of a time period was necessary to prevent state prisoners from engaging in delaying tactics regardless of the merits of their claim. Joining Justice Thomas in the majority opinion were Chief Justice Roberts and Justices Scalia, Kennedy and Alito.

Judge Ginsberg issued a dissenting opinion, joined by three of her colleagues, to wit Justices Stevens, Souter and Breyer, which basically argued that the one-year time limit was tolled because the defendant had petitioned the United States Supreme Court and that a more flexible interpretation of the statute was required to prevent the occurrence of injustices. In addition, the dissenting opinion argued that as a practical matter, the majority's ruling will spark the simultaneous filing of two pleadings seeking essentially the same relief. A petitioner denied relief by a state's highest court will have to file, contemporaneously, a petition of *certiorari* in the United States Supreme Court and a *habeas* petition in Federal District Court. Only by expeditiously filing for Federal *habeas* relief will a prisoner ensure that the limitation period was not run before the Supreme Court has disposed of his or her *certiorari* petition.

Whorton v. Bockting, 127 S.Ct. 1173 (Feb. 28, 2007)

In a unanimous decision, the United States Supreme Court held that its earlier *Crawford* decision on the admissibility of hearsay statements did not apply retroactively and could not be applied to proceedings which had already become final, since the ruling was not a watershed rule of criminal procedure which implicated fundamental fairness and the accuracy of criminal proceedings.

The Court, continuing to deal with the effects of its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (Mar. 8, 2004), specifically addressed the issue of retroactivity of its landmark ruling in the case at bar. In the unanimous decision written by Justice Alito, it was found that the rule which was announced in the *Crawford* decision qualified as a "new rule," which is generally applicable only to cases still on direct review and could not be applied to a *habeas corpus* proceeding which was commenced by a defendant after his conviction had already become final. In the case at bar, the defendant had been convicted long before the *Crawford* decision and thereafter filed a Federal *habeas* petition seeking to obtain the benefits of that new rule.

The United States Supreme Court, relying upon *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989) and *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004), held that *Crawford* announced a new rule which was procedural and not substantive. Further, the narrow exception to the retroactivity rule did not apply since fundamental fairness in the accuracy of the criminal proceeding was not involved. The unanimous Court thus concluded that since *Teague*, the Court had rejected every claim that a new rule has satisfied the requirements necessary to qualify as a watershed exception. Since the *Crawford* rule did not meet the two requirements for retroactive application, it could only be applied to non-final determinations which were still on direct appeal.

Roper v. Weaver, 127 S.Ct. __ (May 21, 2007)

On May 21, 2007, the United States Supreme Court declined to issue a ruling with respect to the issue of whether a prosecutor's remarks to the jury during the death penalty phase of the trial were so inflammatory and improper as to have denied the defendant a fair trial thereby requiring a reversal. In the case at bar, the defendant was convicted of a 1987 murder of a key witness in a Federal drug case. The prosecutor told the jurors to think beyond the defendant and to send the message to all drug dealers by returning a sentence of death.

The Missouri Supreme Court had denied the defendant's claim of an unfair trial and had affirmed the defendant's death sentence. Following a *habeas corpus* petition however, a Federal judge had thrown out the death sentence and the Federal Court of Appeals for the 8th Circuit

had upheld this ruling, finding that the prosecutor's remarks were improper and had denied the defendant's constitutional rights.

The United States Supreme Court in a 6-3 vote based upon procedural grounds voted to dismiss the *writ of certiorari* petition which had been granted and declined to rule on the merits. The procedural issue involved the question of whether the 1996 Antiterrorism and Effective Death Penalty Act had adopted a more stringent standard for *habeas corpus* relief, which made the Court of Appeals ruling improper, and that lower courts would have to consider those procedural issues before a determination on the merits could be made.

Justices Scalia, Thomas and Alito dissented, arguing that since the case had been briefed and argued the Court should decide the merits, otherwise the Eighth Circuit's erroneous ruling would continue to stand.

Boumediene v. Bush and *Odah v. United States*, 127 S.Ct. 1478 (April, 2007)

In early April, the United States Supreme Court declined to hear additional appeals from Guantanamo detainees seeking to challenge their detention in Federal Court. In denying review of the case, the Justices determined that the detainees had not yet exhausted their local remedies. The Court indicated that the detainees were still obligated to appeal their designation as enemy combatants to the U.S. Court of Appeals for the D.C. Circuit. That appeal is limited by the Detainee Treatment Act which was passed in 2005. In declining to hear the defendants' *habeas corpus* petition, Justice Stevens and Justice Kennedy indicated that a Supreme Court review may still be open in the future once initial determinations have been made by the Pentagon panels and reviewed by the D.C. Circuit. The Supreme Court's determination to decline review at the present time was based upon a 6-3 decision, with Justices Breyer, Souter and Ginsberg voting to hear the issue during the Court's current term.

Cases of Interest in the Appellate Division

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

People v. Perez (N.Y.L.J., Feb. 2, 2007, pp. 1 and 6 and Feb. 5, 2007 p. 18)

In a unanimous decision, the Appellate Division, First Department, reversed a robbery conviction because the Trial Court had taken insufficient measures to correct a prosecutor's improper use of his peremptory challenges to remove black jurors from the panel. The Appellate Court found the defendant had established that two Batson violations had occurred and ruled that the Trial Court should have provided the defendant with additional peremptory challenges or should have fashioned some other remedy to cure the error which occurred. The Appellate Court granted a reversal and ordered that a new trial be held.

People v. Hill (N.Y.L.J., Jan. 31, 2007, pp. 1 and 20 and Feb. 5, 2007, pp. 22 & 28)

In a 3-2 decision, the Appellate Division, First Department, upheld a re-sentencing of a defendant to include a 5-year post-release supervision instead of the vacature of the defendant's plea. In the case at bar, the defendant had pleaded guilty in 2002 in exchange for a 15-year sentence. Two years later, he moved to vacate the decision on the grounds that he was not advised that the sentence would include a term of post-release supervision. The Trial Court thereafter re-sentenced the defendant to 12 ½ years in prison and 2 ½ years of post-release supervision, making his total sentence equal to the originally bargained for 15-year term.

In the Appellate Division, the defendant argued that he was still entitled to a vacature of the plea rather than a resentencing, relying upon the recent decisions of the New York Court of Appeals in *People v. Catu*, 4 N.Y.3d 242 (2005) and *People v. Van Deusen*, 7 N.Y.3d 744 (2006). Justice McGuire, writing for the three-judge majority, found that the defendant had not been prejudiced by the resentencing and that there was no unequivocal mandate from the New York Court of Appeals requiring vacature of the plea for every *Catu* violation. Justice McGuire further pointed out that the defendant actually benefited from the modification, since his original 15-year jail sentence was reduced to 12 ½ years with the other 2 ½ years to be spent on post-release supervision. Further, the majority found that there was a state interest in finality and that a modification of his sentence to include a period of post-release supervision was better than vacating pleas in certain cases. Justice McGuire further argued that the key to distinguishing the instant case from the *Catu* and *Van Deusen* decisions was the Trial Court's ability to modify the defendant's sentence so as to put him in a better position than the original sentence imposed. Joining Justice McGuire in the majority opinion were Justices Gonzalez and Catterson.

Justice Marlow issued a vigorous dissent, arguing that the clear language in the recent Court of Appeals decision in *People v. Van Deusen*, *supra* required that the plea be vacated. Justice Marlow argued that the statutory language of CPL Section 430.10, which made the imposition of post-release supervision part of the sentence, required that the defendant be informed of its imposition as part of any plea agreement and that therefore the original plea disposition had to be vacated and could not be modified by simply changing the sentence. Justice Marlow was joined in dissent by Justice Saxe. Based upon the strong Court of Appeals language in *People v. Van Deusen*, *supra*, and the sharp 3-2 split in the instant case, we await further Court of Appeals action on this matter.

People v. Georgiou (N.Y.L.J., Feb. 6, 2007, p. 22)

In a unanimous decision, the Appellate Division, Second Department, affirmed a defendant's conviction of Murder in the Second Degree and determined that trial counsel had not been ineffective even though he failed to seek a jury instruction on an affirmative defense to felony murder. During the trial, the Court on two occasions suggested that statements made by the defendant could provide a basis for the affirmative defense to the felony murder charge. The Court indicated that there was no allegation that either the defendant or his accomplice was armed in the course of the claimed robbery and the affirmative defense would have required the defendant to prove by a preponderance of evidence that he did not commit the homicidal act and that he had no reasonable ground to believe that his accomplice intended to engage in conduct likely to result in death or serious physical injury. Defense counsel, however, never asked the Court to instruct the jury on the affirmative defense. Instead, defense counsel presented his case on the grounds that the evidence was insufficient to establish the elements of the crime.

The Appellate Division, although determining that defense counsel may have made a mistake in forgoing the affirmative defense, felt it was but one mistake in an otherwise entirely competent representation. The Court thus then framed the issue as whether the single error was sufficiently prejudicial to compromise the defendant's right to a fair trial. The Appellate Division determined that it was not and that on the record before the Appellate Court

it was clear that had the affirmative defense been submitted to the jury, it would have had little or no chance of success. The Appellate Court further found that since the defendant had been found guilty of depraved indifference murder, the conviction reflected the jury's view that the defendant had been culpable in the victim's death and that they would not have ruled favorably on the affirmative defense. Under all the circumstances, the Appellate Division concluded that defense counsel's failure to request the submission of the affirmative defense did not compromise the defendant's right to a fair trial and therefore he was not deprived of the effective assistance of counsel. In reaching its ruling, the Court relied heavily on the New York Court of Appeals decision in *People v. Russo*, 85 N.Y.2d 872 (1996).

People v. Hall (N.Y.L.J., Feb. 7, 2007, pp. 1 and 2 and Feb. 13, p. 22)

In a unanimous decision, the Appellate Division, First Department, held that two New York City police officers did not conduct an unreasonable search and seizure when they extracted a plastic bag from a defendant's rectum following his arrest for selling drugs. The Appellate Court found that under the circumstances, the visual body cavity search which was initially conducted was justified and reasonable. Following the defendant's arrest and while a strip search was being conducted, the officers saw a string dangling from the defendant's rectum. When the defendant refused to remove the string, two officers forcibly removed it and recovered a plastic bag containing rocks of crack cocaine wrapped in plastic. The Appellate Division, in reaching its decision, relied upon the U.S. Supreme Court decision in *Bell v. Wolfish*, 441 U.S. 520 (1979) which upheld the constitutionality of a policy to require visual body cavity searches of all pretrial detainees after they see visitors. In reaching its decision, the court also distinguished the earlier Supreme Court decision in *Schmerber v. California*, 384 U.S. 757 (1966). In reaching its conclusion, the unanimous panel stated:

> While the scope of the intrusion is substantial in view of the degrading nature of the procedure, the manner and place of the search were reasonable, and importantly, the visual body cavity search procedure was justified by the facts known to the police, including their experiences with the common practices of drug sellers in the neighborhood, and the officer's observation of defendant selling drugs, packaged in small packets, during which the seller had to temporarily retreat to an unseen spot prior to completing the transaction in order to retrieve the goods he sold.

People v. Cuadrado (N.Y.L.J., Feb. 15, 2007, pp. 1, 2 and 24)

In a 4-1 decision, the Appellate Division, First Department, held that a prisoner's post-conviction attack on a procedure which was used to structure his plea and sentence was expressly barred by a provision in the Criminal Procedure Law. Both the prosecution and the defense agreed that a procedure used under which the defendant entered a plea and received a sentence resulted in a greater term than should have been imposed. The originally imposed sentence however had been affirmed on a direct appeal and when the defendant moved nearly 12 years later to vacate the judgment pursuant to the post-conviction 440 statute, the Appellate Division concluded that since the issue could have been raised on the original appeal he was barred from obtaining relief under the 440 procedure. The majority of the Court determined that it was improper to accord defendants two opportunities, both on direct appeal and on a collateral attack and that this applied even to jurisdictional questions. Justice Andrias dissented, stating that despite the plan language of the statutory provision, the error which had occurred in the instant case implicated the integrity of the process and required correction.

People v. Velez (N.Y.L.J., Feb. 16, 2007, p. 22)

In a unanimous decision, the Appellate Division, Second Department, ordered a new suppression hearing before a different judge when witnesses at the trial contradicted the very testimony that led the Hearing Court to deny the defendant's motion to suppress. In the case at bar, two police officers testified to circumstances which caused the Hearing Court to determine that probable cause existed to arrest the defendant. At trial, however, the People called additional witnesses which basically contradicted the testimony given by the two officers at the hearing. Defense counsel then moved to reopen the original suppression hearing. The Appellate Division concluded that defense counsel was justified in its application and that under the circumstances a new suppression hearing should be held before a different judge so that the credibility of old witnesses could be reviewed and examined.

People v. Ortiz (N.Y.L.J., Feb. 28, 2007, pp. 1 and 8 and Mar. 1, 2007, p. 28)

In a unanimous decision, the Appellate Division, First Department, reversed a felony conviction for bail jumping, finding that the trial judge had improperly failed to remove a prospective juror for cause when a juror failed to unequivocally express the ability to separately evaluate three different incidents which were the basis of the indictment. The defendant had been convicted by a jury of bail jumping and two counts of obstructing govern-

mental administration. The case involved three separate incidents from which the charges against the defendant arose. During the *voir dire*, one of the jurors stated that she thought if the defendant was guilty with respect to one of the incidents that he would be guilty of all of them. Although the Court gave some curative instructions to the entire panel, it failed to personally question the individual prospective juror with regard to this matter. Under these circumstances, the Appellate Division held that a reversal was required, since it was clear that the juror in question never unequivocally expressed her capability to evaluate the defendant's guilt as to the various charges relating to the three separate incidents.

People v. Johnson (N.Y.L.J., Feb. 28, 2007, pp. 1 and 8 and Mar. 1, 2007, p. 28)

In a unanimous decision, the Appellate Division, First Department, ordered a new suppression hearing finding that the trial attorney during the original hearing had failed to provide the effective assistance of counsel because she had declined to contest the admissibility of critical evidence. In the instant matter, at the end of the suppression hearing, the defense attorney had declined to argue against the admission of a recovered gun and the victim's identification of the defendant. Counsel in question had merely stated to the court, "You heard all the evidence and I ask you to rule on the evidence in the case. I'm not going to say things that I cannot support. I don't think it would be fair to try to do that to any judge sitting in that spot." The Appellate Division found no legitimate strategy behind the attorney's decision to concede on this critical point and that she failed to pursue a number of potentially successful arguments. It therefore determined that a new hearing with different counsel should be held. In issuing its ruling, the Appellate Panel found that the victim was the only witness to the robbery and therefore the question regarding the suppression of the gun as well as the victim's identification of the defendant was the core of the prosecution's case.

People v. Johnson (N.Y.L.J., Mar. 16, 2007, p. 1 and 6 and Mar. 21, 2007, p. 18)

In a unanimous decision, the Appellate Division, Third Department, dismissed a defendant's appeal who challenged the constitutionality of his sentence for burglary in the second degree as a violent felony offender. The defendant, who had been sentenced to 10 ½ years, claimed that his sentence was unconstitutional since his classification as a violent felony offender was improper because no violence had been used or proven in the case.

The Appellate Division, Third Department, determined that it was the legislature's function to classify crimes and to distinguish among the ills of society which require a criminal sanction and to prescribe punishments which it deems appropriate. The Court noted that the state was within its prerogative to classify all burglaries of residences as violent whether or not violence actually transpired. The legislature had a rational basis for its classification since there is a potential for violence in all home invasions. In addition, legislative enactments are presumed to be constitutional and the defendant was unable to show any arbitrary action for denial of constitutional rights in the legislative treatment of the matter.

People v. Suarez (N.Y.L.J., Apr. 2, 2007, p. 18)

People v. Suarez was one of the several cases where the Court of Appeals reversed the defendant's conviction for depraved indifference murder on the grounds that it was error to submit that count to the jury since the evidence was legally insufficient to support it. The matter had been remitted to the Appellate Division, First Department, to determine the appropriate remedy. The Appellate Division in a 4-1 decision concluded that the defendant, after being acquitted of intentional murder, and the Court of Appeals' reversal of this conviction for depraved indifference murder could still be tried for intentional manslaughter, a charge which had been included in the indictment and which was submitted to, but not considered by, the jury. The Court concluded that such a remedy did not violate double jeopardy principles. In a lengthy opinion written by Justice Milton Williams, the majority concluded that neither State nor Federal decisions regarding the double jeopardy clause prevented a retrial for intentional manslaughter, since that charge had different elements from the original murder counts.

In a dissenting opinion, Justice Peter Tom argued that the majority's analysis was flawed because the jury had neither failed to return a verdict resulting in the declaration of a mistrial nor did it return a partial verdict so as to warrant a retrial. Justice Tom stated that the defendant was acquitted on intentional murder in the second degree and that manslaughter in the first degree is a lesser included offense. Thus it constitutes the same offense for double jeopardy purposes. Due to the sharp split in the Court, and the interesting issue raised, it appears likely that *People v. Suarez* may again be before the New York Court of Appeals.

People v. Danielson (N.Y.L.J., Apr. 2, 2007, p. 18)

In a 4-1 decision, the Appellate Division, First Department, concluded that the evidence was sufficient to support a defendant's depraved indifference murder conviction despite the jury's acquittal of the intentional murder charge. The majority opinion found that the defendant had failed to preserve his legal sufficiency claim and his weight of the evidence argument failed to demonstrate that the jury's credibility determinations were in error. The Court further refused to apply its interest of

justice jurisdiction, finding that the defendant's argument for appellate reversal rested on the unseemly assertion that he was entitled to relief because he intentionally murdered the victim rather than having recklessly caused his death. The prosecution's evidence in the case at bar showed that the defendant and two accomplices who were all members of the Bloods gang executed a plan to kill the victim because he wore the colors of a rival gang. Witnesses testified that the defendant was one of three shooters and that the deceased victim was struck by 11 shots. Although the evidence raised a strong inference that the defendant acted with intent to kill, the majority opinion determined that that question was exclusively for the jury and that there was sufficient leeway in the evidence presented, including the credibility of the witnesses, so as to sustain a jury's determination that the act had been committed with depraved indifference. Justice Mazzarelli dissented, finding that under recent Court of Appeals determinations regarding the issue, the evidence to support a depraved indifference conviction was lacking.

People v. Mack (N.Y.L.J., Apr. 9, 2007, pp. 1 and 6 and Apr. 12, 2007, p. 18)

In a unanimous decision, the Appellate Division, Third Department, held that a trial judge had committed reversible error when he waited more than six months to accept a murder defendant's request to change his attorney. The defendant had been represented by a public defender and after his plea and before sentencing he had stated that he was dissatisfied with his attorney and wanted to hire private counsel to represent him. The judge did not rule on the request but delayed making a determination on the matter for more than six months. The Appellate Panel found that the long delay violated the defendant's Sixth Amendment right to counsel at a critical stage. The Third Department concluded that although the trial judge may have had some concerns about the defendant's mental state, these concerns were not sufficient to warrant the long delay in acting on his request to substitute retained counsel and discharge his assigned attorney.

People v. Taylor (N.Y.L.J., Apr.16, 2007, pp. 1 and 2 and Apr. 20, 2007, p. 22)

In a unanimous decision, the Appellate Division, Second Department, held that a defendant convicted of kidnapping a child is subject to the Sex Offender Registration Act even though the crime was not sexual in nature. The Court stated that the state had a rational basis to include as sex offenses subject to registration, crimes that lacked sexual contact or motivation as an element to wit: unlawful imprisonment and kidnapping of a child younger than age 17. The Court noted that its ruling brings New York into compliance with Federal law and tracks conduct that is often a precursor to a sexual offense. The Second Department ruling reverses an earlier trial court determination that the registration requirements were unconstitutional as applied to the defendant's circumstances.

People v. Jenner (N.Y.L.J., Apr. 30, 2007, pp. 1 and 4 and May 2, 2007, p. 18)

In a unanimous decision, the Appellate Division, Third Department, upheld a conviction of a defendant under Penal Law Section 490.20 for making terrorist threats. The defendant had threatened the Department of Social Services in Syracuse when they took custody of his girlfriend's child. He told people at the agency "I'll walk into Madison County DSS. I'll get a gun. You think Columbine was something? I got nothing to lose." The defendant was convicted and was sentenced to 15 years to life. On appeal he argued that the type of behavior for which he was convicted was not the type that was intended to be covered under the state's statute. The statute had been passed shortly after and in response to the 9/11 situation. Defense counsel also raised arguments that the New York statute was vague and unconstitutional. The Appellate Division, Third Department, upheld the propriety of the defendant's conviction under the circumstances herein, stating that he was clearly intending to influence the policy of a state agency by intimidation and coercion. The Appellate Panel also found the statute to be constitutional. Defense counsel has indicated that he will seek leave to appeal to the New York State Court of Appeals in order to obtain a ruling on the constitutionality of the statute from our state's highest court.

For Your Information

Number of Women Prisoners Increases

Recent statistics from the U.S. Bureau of Prisons reveal that the number of women incarcerated in State and Federal prisons is steadily rising. In the year 2005, the number of women in prisons throughout the United States was listed as being 104,848. The number has been rising by approximately 2.5% for each of the last several years. The total prison population within the United States in 2005 was slightly over 2.1 million, thus setting the percentage of female prisoners at approximately 5%. The increase in the number of female prisoners as well as the general prison population as a whole is largely attributed to the imposition of mandatory sentences utilized in the last several years by both the State and Federal courts, especially with respect to various drug crimes. Mandatory Federal sentencing guidelines forced many judges to impose jail sentences on female prisoners. Correction officials have found the incarceration of large amounts of women offenders has created special problems for the Department of Corrections. These officials are currently considering new programs and rehabilitation options which might begin to reverse the trend of progressive increases in the number of female prisoners.

Judicial Pay Raises

New York judges were happy to learn that Governor Eliot Spitzer, in presenting his executive budget for the coming year, included more than $111 million to provide for substantial pay increases for all state judges. The pay increases averaged over 20% and were to be made retroactive to April 1, 2005. The salary of Court of Appeals judges was to be raised to approximately $185,000 from the current amount of $151,000. Appellate Division judges would go from $144,000 to $177,000. Supreme Court judges, Surrogates and Court of Claims judges were to be increased to $168,000. New York City Criminal Court judges would see an increase to $156,000.

The issue of judicial pay increases has been discussed for several years with no action having been taken and members of the judiciary becoming increasingly concerned that their salary levels were being far outpaced in comparison to salaries earned by attorneys in private practice. In urging support for the proposed pay increases, Governor Spitzer noted that the cost of living had increased more than 20% since the last judicial pay increase. He noted that as a matter of fairness and public policy, the proposed increase was justified.

In early April, however, due to disagreements between the Governor and the state legislature, Governor Spitzer suddenly announced that the actual budget agreement which was negotiated with the state legislature did not contain the money for judicial pay increases which he had proposed in his executive budget. The $111 million which had been set aside for judicial pay increases was applied to other spending purposes in order to reach an agreement with the state legislature with regard to the proposed budget.

The Governor's announcement immediately was met by outcries from members of the judiciary. Chief Judge Kaye also issued a special statement on April 9, 2007 denouncing the failure to provide for judicial raises in the budget and indicating that as a last resort if no action was taken by the end of June that she may consider instituting legal action. Such a step could create a great constitutional crisis reminiscent of the ongoing dispute between Chief Judge Wachtler and former Governor Cuomo in the early 1990s. Legislative leaders indicated that they were still attempting to find some method to salvage the judicial pay increases. In early May new proposals were in fact voted upon by the state Senate to provide for judicial pay increases. These proposals however were linked to the creation of a commission which would also be authorized to periodically increase the salaries of other statewide officials including members of the state legislature. Governor Spitzer has indicated his opposition to any linkage of judicial pay increases to increases for other statewide officials. This dispute has led to a continuing impasse with the final result presently undetermined. We will advise our readers of any final developments on this matter.

The issue of pay increases is also being raised with respect to federal judges. Chief Justice Roberts recently made several public statements calling for substantial increases in the pay of Federal judges as a means of keeping up with inflation and with rising salaries in the private sector. Currently, Federal district court judges are paid $165,200. Judges in the Federal Appellate courts make $175,100, Associate Justices of the Supreme Court earn $203,000 and the Chief Justice of the Supreme Court receives $212,100. Recently, Supreme Court Justice Anthony Kennedy appeared before a senate committee to urge that salaries for the Federal judiciary be increased. He pointed out that since the end of 2004, 19 Federal judges have left the bench in order to take higher paying positions in the private sector. Justice Kennedy and other members of the Supreme Court have urged the immediate passage of a legislated bill which would provide a 16% increase in

Federal judicial salaries. Any definitive action in Federal pay increases for the judiciary will also be immediately reported to our readers.

Survey Indicates Increase in Salaries for Attorneys

A recent 2007 salary guide from a California legal recruiting company reported that salaries for attorneys have increased slightly over the last few years and that the year 2007 should see this increase continue. The study reported that the national salary average for an attorney having more than four years of experience and working for a large firm was between $120,000 and $185,000. For those attorneys with the same experience working for a small firm, the national average was between $63,000 and $107,000. Within New York City, however, the average salary, as expected, was substantially higher. Those attorneys in a large firm with more than four years of experience had an average salary between $180,000 and $278,000. Those working for a small firm had a salary of between $94,000 and $161,000. The increase for those working for large law firms was approximately 1.2% over last year and those working for small firms saw an increase of approximately 2.6%.

The report also issued good news for first-year associates in that job prospects were good and that the average national salary for those serving in large firms was between $99,000 and $129,000. Those serving in small firms can expect to earn between $46,000 and $70,000 as starting salaries. First-year associates have basically seen an increase of approximately 5% in 2007 over 2006 salaries. The full name of the survey is the Robert Hall Legal Salary Guide and details on its various findings were reported in the *New York Law Journal* of February 9, 2007 on page 19.

Cameras in the Federal Courts

The issue of cameras in the courtroom is again being discussed with respect to the Federal Court system. Several senators on the Senate Judiciary Committee, including former Chair Arlen Specter of Pennsylvania, have been pushing legislation to allow Federal Court proceedings to be televised. Recently, Supreme Court Justice Anthony Kennedy testified before the Senate Judiciary Committee and voiced his strong opposition to allowing cameras in the courtroom. Justice Kennedy stated that if television cameras were in the courtroom, he would begin to worry about his colleagues speaking in sound bytes rather than probing legal issue sufficiently. He said that in his opinion a majority of the justices think that television would change the collegial dynamics of the Court and would be harmful to the process. Among the various justices of the Supreme Court, Justice David Souter is also on public record as being strongly against cameras in the courtroom. Chief Justice Roberts has also recently played down the value of televising hearings and has not made any effort to change the current procedures.

The Judicial Conference of the United States, which sets policy for the lower Federal Trial and Appellate Courts, currently prohibits cameras in trial courts based on the view that cameras would intimidate witnesses. Appellate judges who do their work without witnesses have been allowed to decide whether to allow cameras in specific cases. The Supreme Court itself has always barred cameras in the courtroom but has recently made available audio tapes of some recent controversial and important cases. Thus, both on the Federal level and with respect to New York State courtroom issues, the controversial issue of cameras in the courtroom continues and we will continue to keep our readers informed of any new developments in this area.

Governor Spitzer Appoints New Inspector General

In February, Governor Spitzer announced the appointment of a new State Inspector General who would be authorized to investigate any alleged corruption in state government. The Governor named Kristine Hamann to serve in that position. Kristine Hamann has served as an Executive Assistant District Attorney in Manhattan and spent almost 30 years in the Manhattan District Attorney's office. The Governor announced that she will be paid a salary of $145,500 in her new position and will be provided with an office staff of 70 people and a budget of approximately $7 million. The jurisdiction of the new Inspector General will cover any state government entity run by a governmental employee and which does not have its own Inspector General. We congratulate Kristine Hamann on her appointment and wish her well in her new position.

D.A. Morgenthau Reaches 32 Years of Service

As of late February, Robert M. Morgenthau, District Attorney of Manhattan, became the longest serving District Attorney in the County of Manhattan. He has now served for 32 years and has surpassed Frank Hogan in length of service. Mr. Morgenthau was recently re-elected to his position and continues to be viewed as the senior Chief Prosecutor in the State.

Lopez-Torres Decision to be Heard by United States Supreme Court

On February 20, 2007, the United States Supreme Court granted a writ of *certiorari* with respect to the New York Court of Appeals decision in *Lopez-Torres v. New York State Board of Elections*. This was the ruling which outlawed the system of judicial conventions utilized in New York State for selecting Supreme Court judges. The legislature has recently been considering different types of legislation to rectify the situation created by the *Lopez-Torres* decision and the Office of Court Administration has also recently announced the creation of numerous indepen-

dent screening committees to review the qualifications of judicial candidates. The decision by the United States Supreme Court to review the *Lopez-Torres* ruling has now added another element of confusion and high drama to the issue of judicial selection in New York State. It is expected that oral arguments in the case will be heard by the Supreme Court in October or November. A stay of the implementation of the decision has been granted pending the High Court's determination. We will continue to monitor and report to our readers any new developments on this important issue regarding judicial selection.

Civil Commitment of Sexual Offenders

In the middle of March, newly elected Governor Elliot Spitzer and the leaders of the state legislature announced that they had reached an agreement on passing a civil confinement measure which would make it easier to keep sexual offenders considered to be dangerous to the public behind bars after their prison terms have expired. The new legislation would involve the use of a panel of psychiatrists to make evaluations of the prisoners in question and would allow special hearings to be conducted before civil confinement is ordered. The issue of civil confinement has been a raging controversy for the last few years and the new legislation is a response to the recent Court of Appeals decision which nullified procedures utilized by Governor Pataki to arbitrarily order civil confinement through executive order.

Under Governor Pataki's executive order, several hundred sexual offenders were ordered civilly confined. Under the new legislation, it is estimated that approximately 200 sexually violent offenders will be confined past their prison terms each year. Governor Spitzer signed the new legislation in late March and the law became effective as of April, 2007. On April 16, 2007 the Mental Hygiene Legal Services agency reported that it had commenced a Federal suit challenging the constitutionality of the new act. The new legislation is formally known as the Sex Offender Management and Treatment Act. We will keep our readers advised of any new developments on this matter.

Controversy Arises over FBI's Use of National Security Letters

During the last several months, top officials of the FBI have acknowledged that its Federal Agents may have violated the agency's own rules and procedures regarding the utilization of national security letters, which authorize the obtaining of private telephone and financial records from citizens without the authorization of a judge. The recent disclosures regarding possible improper activity have led to congressional inquiry and consideration of possible legislation restricting the use of national security letters by Federal law enforcement officials.

On March 9, 2007, the Inspector General, before the Justice Department, criticized the FBI for its heavy use of national security letters, saying it had found many instances in which the Bureau had improperly and sometimes illegally used them to demand personal records. Following the Inspector General's report, FBI Director Robert Mueller himself conceded that his agency had on occasion improperly and sometimes illegally used the U.S.A. Patriot Act to obtain information about people and visitors. The FBI Director also acknowledged that in many cases the FBI's own procedures and policies for utilizing national security letters had been violated.

In late March and early April, several congressional leaders from both parties issued warnings that the FBI could lose the power to demand that companies turn over telephone, e-mail and financial records if it did not strictly correct the abuses in the use of national security letters which had been revealed. Hearings are currently being conducted by the House Judiciary Committee with a view toward possible legislation restricting the use of this investigative tool, which has to date allowed the Bureau to obtain certain documents without a judge's approval.

The use of national security letters began in 1986 and their utilization has greatly increased and expanded following the 9/11 situation and the adoption of the Patriot Act. The Associated Press recently summarized the history of the use of national security letters as follows:

NATIONAL SECURITY LETTERS

> In 1986, Congress first authorized the FBI to obtain electronic records without approval from a judge. Called national security letters, these demands could be used to acquire e-mail, telephone and travel records and financial information, including credit and bank transactions. The letters could be sent to telephone and Internet access companies, Universities, public interest organizations and nearly all libraries, plus credit and financial companies. Originally, the FBI could obtain records only for people suspected of being agents of a foreign power. In 1993, that was expanded to cover records of anyone suspected of communicating with foreign agents about terrorism or espionage. Finally, the Patriot Act in 2001 eliminated any requirement that the records belong to someone under suspicion. Now, any person's records can be obtained if FBI field agents consider him relevant to a terrorism or spying investigation.

We will continue to follow any developments regarding the continued use of national security letters by the FBI and will report any new occurrences to our readers.

New York City Questions Need for Additional Legal Aid Society Funding

The New York City Legal Aid Society, in March, requested an additional $4.4 million from the city with respect to its fiscal budget, which begins July 1, 2007. The Legal Aid Society currently has an operating budget of $80.9 million. The Society stated that its request for an increased budget was required to meet an increased case load and to provide for a 3% cost-of-living adjustment for its personnel.

The city's Criminal Justice Coordinator, John Feinblatt, at a recent appearance before the City Council's Committee on Criminal Justice Services questioned the propriety of granting the Legal Aid Society additional funds. Mr. Feinblatt reported that Legal Aid's per-case cost is $373, while other groups who have contracts with the city to represent indigent criminal defendants have a per-case cost of $308. In addition, Mr. Feinblatt questioned the projection of the Legal Aid Society that their case load would be increasing, pointing out that there has been a historic drop in the number of felony cases between 2002 and 2006. Overall, he said the number of cases handled by the courts in New York City have dropped 14% to 332,496 in 2006 from 387,094 in 2000.

The Legal Aid Society's Attorney in Chief, Steven Banks, also appearing before the City Council, supported the request for increased funding by arguing that the Society performs high-quality services and has certain specialized functions which cannot be reflected in the per-case cost analysis. He pointed out that the Society currently has a four-lawyer special litigation unit which enforces the requirement that defendants be arraigned within 24 hours after arrest, and the Society also provides training and training materials to the legal profession and the public in general. He also stated that during the first eight months of the current fiscal year, legal aid attorneys were handling more cases than during the same eight-month period a year earlier.

As is customary in the yearly budget process, it is expected that some compromise position will be reached with the various criminal justice agencies, including the Legal Aid Society, with respect to increased funding and that the final city budget will be approved some time around the end of June.

New York State Bar Association Conducts Summit Conference on Future of Indigent Defense Services

On March 26, 2007, in Albany, New York the New York State Bar Association conducted a special summit conference on the issue of the future of indigent defense services within the state. Mark H. Alcott, President of the New York State Bar, issued welcoming remarks and welcomed the various panelists and participants to the special program. Among the various speakers were Chief Judge Judith S. Kaye, former state Senator John R. Dunne and Albany County executive, Michael G. Breslin.

The issue of indigent defense services in New York has been in the public spotlight for several years and our Bar Association has been actively involved in issuing proposals and making recommendations for the creation of a unified system with proper state funding, oversight and accountability. Several members of our own Criminal Justice Section have been in the forefront of the effort to improve the system and they were included among the various panels. Among these were Jonathan E. Gradess, Executive Director of the New York State Defenders Association; Norman L. Reimer, Executive Director, National Association of Criminal Defense Lawyers; and Seymour W. James, Jr., Attorney-in-Charge, The Legal Aid Society, Criminal Practice Division. Many of the speakers stressed the need for any new agency appointed to operate a statewide indigent defense system to have fiscal independence and the ability to bring about uniform standards. Following the conference, the Bar Association also established a CLE training session on indigent defense, which was held on June 5, 2007 at the State Bar Center in Albany.

In late April 2007, 27 former Presidents of the New York State Bar Association also endorsed the call for the creation of a statewide commission to provide indigent defense services. The State Bar Association House of Delegates is scheduled to discuss this issue at its June meeting and to make further recommendations on the matter.

Vincent Doyle, III, past Chair of our Criminal Justice Section, has also been instrumental in the issuance of a special report by the New York State Bar Association on indigent defense services and we will be receiving periodic reports for transmission to our members regarding any new developments on this critical issue.

New York City Arrests on Increase

It appears that the long and steady decline in the crime rate throughout the nation and within the State and City of New York has come to an end and recent trends now indicate the crime rate may be back on the upswing. In addition to recent FBI statistics which have indicated slight increases in the number of violent crimes during the last year, recent New York City police statistics also reveal a significant increase in the number of arrests within New York City. Figures for the two-month period of January and February indicate that felonies increased 2.9% in 2006 over 2005 and then jumped another 6.4% in 2007 over 2006. Misdemeanors increased 1% in 2006 over 2005 and then jumped 14.9% in 2007 over 2006. The total number of arrests for all crimes in New York City in the period January-February, 2006 was 50,227 while in January-February, 2007, the number was 56,917 or a 13.3% increase. Felonies alone rose from 9,089 in

January-February 2006 to 9,671 in January-February, 2007 and misdemeanor arrests rose from 35,984 in January-February 2006 to 41,360 in January-February, 2007. The increase in arrests has also resulted in the need for additional arraignment shifts in the courts throughout the city and for additional staffing by both legal aid and defenders' organizations and the district attorneys' offices. The new statistical data on the increase in arrests was provided by a recent report from the Office of Court Administration.

New Effort to Include Cameras in New York Courtrooms

The long-simmering controversy in New York State to allow cameras in the courtrooms continues to rage with a state Senate Committee recently supporting a legislative bill to again allow for the filming of both criminal and civil trials. In 1997, a law which allowed cameras to be utilized at some trials lapsed and since that time no agreement has been reached on returning the practice. In late March, the Senate Judiciary Committee approved a bill to restore the use of cameras in the courtroom to some degree. Whether the Committee's recommendation will be acted upon by the full legislature remains questionable and we will report any new developments on this issue to our readers.

Immigrants Increasingly Choosing to Become U.S. Citizens

A recent study which was based upon the United States Census data from 1995 to 2005 revealed that in that ten-year period, 13 million people became American citizens. These new citizens had also chosen to become citizens in a much shorter time period than their predecessors. The average length of time for the group becoming citizens between 1995 and 2005 was 12 years after entering the United States. In the 1970s, new immigrants were taking an average of 23 years to become naturalized citizens.

The report also showed that the top six states containing new immigrants and newly naturalized citizens were California, New York, Florida, Texas, New Jersey and Illinois. The report also indicated that population growth in many of the large metropolitan areas has also been due to the arrival of new immigrants. This is especially true in such cities as New York, Los Angeles and Boston. The New York metropolitan area, which includes the suburbs, added 1 million immigrants from 2000 to 2006. It is estimated that without these immigrants, the region would have lost nearly 600,000 people. The Los Angeles metropolitan area would also have lost nearly 200,000 in population without increased immigration. The report also reveals that many smaller cities are also gaining in population as a result of increased immigration. Thus such smaller areas as Battle Creek, Michigan, Ames, Iowa and Corvallis, Oregon have witnessed significant population increases as a result of the arrival of new immigrants. In light of the current controversy on adopting new immigration legislation, the findings of the report provide additional relevant and useful information which should be considered in the drafting of any final legislation.

House of Delegates Approves Certification Plan for Court of Appeals Judges

At its early April meeting, the New York State Bar Association's House of Delegates voted to recommend that the age limit for Court of Appeals judges be extended to 76 from 70 and that they be subject to the current recertification procedure involving recertification every two years after turning 70. Our outgoing Section Chair, Robert B. Adler, was among the several delegates who spoke on the issue and supported the application of the certification procedure to Court of Appeals judges. The vote of the House of Delegates was 71-48. Any actual changes in the present procedure or on the general issue of age limits for the judiciary would require legislative and constitutional changes and is a current topic of discussion.

Second Circuit Upholds DNA Samples From Non-Violent Felons

On April 4, 2007 in the case of *United States v. Amerson*, the Second Circuit Court of Appeals upheld the requirement that even non-violent felons who are on probation must submit DNA samples. The court declared that such a regulation does not violate the Fourth Amendment and is a reasonable regulation which protects vital governmental interests. The court ruling upheld the provision of the Justice For All Act which in 2004 expanded DNA testing to include all persons convicted of any felony.

Senate Bill Introduced to Waive Residency Requirements for All New York City ADAs

Queens District Attorney Richard A. Brown announced in early April of 2007 that at his request a Senate bill had been introduced to waive the county residency requirement for all New York City Assistant District Attorneys. Section 94 of the New York City Criminal Court Act deals with the residency of Assistant District Attorneys. An amendment was enacted in 1962 to allow Manhattan District Attorneys to live anywhere in the state. Since that time Assistants in the other city offices have been required to live within New York City. The proposed legislation would allow all of the Assistants in New York City to live anywhere in the state similar to the present situation which exists in Manhattan. The Senate bill was introduced by Senator Serphin Maltese and bears Senate Number 1771. While calling for the new legisla-

tion, the Queens District Attorney and others within the city have indicated that they have not always applied the current residency requirements and have asserted authority to allow ADAs to live outside of the county and the city. The proposed legislation is an effort to provide uniformity throughout the city and to clarify any existing confusion regarding the application of the residency laws to the Assistant District Attorneys. Many of the other District Attorneys throughout the state have indicated that they will continue to uphold the residency requirements in their counties and have expressed the view that having Assistants who live in the county is beneficial and promotes community understanding.

2006 Report of Lawyers Fund for Client Protection

In April 2007 the Lawyers Fund for Client Protection issued its annual report for 2006. The report indicated that last year the fund paid out $7.1 million to reimburse clients for wrongful actions by dishonest attorneys. The amount paid in 2006 was $1 million dollars less than that paid in 2005. The number of claims in 2006 was 147, which was also 80 less than in 2005. As in the past, a small number of attorneys were responsible for the claims paid. In 2006 35 lawyers were responsible for the $7.1 million in required reimbursements. There are a total of 229,000 lawyers currently in New York State. A large number of the thefts continue to involve escrow funds by lawyers in the downstate and Long Island communities. These losses, however, were somewhat less in 2006 than in 2005. The report of the fund also noted that the total amount of claims had fallen in 2006 due to a large number of pending claims involving a single attorney who was convicted of conspiracy and mail fraud. However, it is expected that the total number of claims in 2007 will be large and will tax the financial resources of the fund which is currently at about $7 million.

Money for the fund is largely supplied by the allocation of $60 of $350 biennial registration fee required of lawyers in New York State. Small amounts are also raised through restitution, judicial sanctions and donations occasionally made to the fund. The maximum award the fund can make is $300,000. The median client award in 2006 was $13,000.

Governor Proposes Constitutional Amendments to Reform Court System

In late April Governor Spitzer announced that he will soon be introducing amendments to the State Constitution to bring about fundamental changes in the structure of New York State's Court System. Calling the proposals a blueprint for long-overdue judicial reform, the Governor stated that four amendments would be proposed.

1. To provide for the appointment of all State Court Judges.
2. To consolidate major trial courts into a two-tier structure with a single Supreme Court and a statewide network of District Courts.
3. To create an Appellate Division Fifth Department that would include some of the counties now covered by the Second Department.
4. To eliminate State Constitutional limits restricting the number of State Supreme Court Justices.

The Governor's proposals draw heavily from Chief Judge Kaye's 30-member commission which recently presented its own recommendations for judicial reform. Proposals for judicial reform and consolidation of the court system have also been supported by the New York State Bar Association and various other legal organizations. Although the Governor issued his call for changes in the state's judicial system, any eventual modifications face a long and difficult path to enactment. To become law, Mr. Spitzer's constitutional amendments would have to be passed by two separately elected legislatures and then be approved by voters in statewide balloting. The soonest that could occur is November 2009.

The Governor also proposed temporary measures to deal with the current issue of judicial selection in light of the *Lopez-Torrez* decision. The Governor recommended allowing a candidate not chosen by the judicial convention to proceed on a petition route in order to enter a primary election. The Governor also proposed that judicial candidates be included in any public campaign financing program.

State Senate Moves to Reinstate Death Penalty

Following the recent killing of two state troopers in upstate New York, the state Senate again voted to reinstate the death penalty at least when it involves the murder of law-enforcement personnel. The new legislation is aimed to correct the sentencing flaws which were found in the 1995 death penalty statute and which caused the New York Court of Appeals to effectively strike down the law in *People v. LaValle*, 3 N.Y.3d 88 (2004).

Although the Senate has repeatedly passed legislation to reinstate the death penalty, the state Assembly has refused to consider any reinstatement bill. Senate Majority Leader Joseph Bruno called on Governor Spitzer, who has publicly announced his support of the death penalty, to use his influence with the Assembly, which is controlled by the Democrats, to reach some kind of compromise position on the reinstatement legislation. Any movement on the part of the Assembly appears unlikely, but we will report on any new developments in our next issue.

About Our Section and Members

New Section Officers

At the January 2007 Annual Meeting, new Section officers were elected to serve effective June 1, 2007. Our new Section Chair is Jean T. Walsh. James P. Subjack was selected as Vice-Chair and Marvin E. Schechter was elected as Secretary. The new officers will serve for a two-year period. We congratulate them on their election and are certain that they will serve our Section well. Detailed below are some short biographical sketches of our new section officers.

Jean T. Walsh—Section Chair

Jean Walsh started her legal career in the Bronx District Attorney's Office where she served as Deputy Chief of the Homicide Bureau, Major Offense Bureau and Criminal Court Bureau and as Senior Trial Attorney. Jean left the Bronx D.A.'s Office to become an Assistant United States Attorney in the Southern District of New York where she worked in the General Crimes and Narcotics Units. Thereafter, Jean worked in the New York State Office of the Inspector General and served as a Deputy Inspector General and Special Counsel for the Inspector General. She investigated cases involving public corruption and financial fraud. Jean is presently working for the New York Stock Exchange. She began her tenure at the Stock Exchange in the Market Surveillance Division and is presently in the Office of the General Counsel serving as a Principal Rule Counsel. Jean has been active with the Criminal Justice Section of the New York State Bar Association for over six years, having most recently served as the Section Vice-Chair.

James P. Subjack—Vice-Chair

James P. Subjack currently practices in Fredonia, New York. He was admitted to the New York State Bar in 1975. He served as an Assistant District Attorney in Chautauqua County in upstate New York from 1976 to 1978. In 1993 he was elected as District Attorney of that County and served in that capacity until 1995. He currently is a partner in the firm of Lipsitz, Green, Scime & Cambria, LLP. He received his law degree from the University of Illinois and has also served as an adjunct professor lecturing on various criminal law topics. During his career, James has also received specialized training in various areas of the criminal law, including attendance at the FBI Academy at Quantico, Virginia. James has long been active in our Criminal Justice Section, having most recently served as Secretary.

Marvin Schechter—Secretary

Marvin Schechter is a practicing attorney with offices in Manhattan. He previously served as member of the Legal Aid Society and has been active with various defender organizations. He has also been active with our Criminal Justice Section for many years most recently serving as Chair of the Membership Committee and Program Chair of this year's annual CLE program. Marvin has also lectured widely to bar associations and law schools on a variety of criminal law topics. He is a graduate of Brooklyn Law School.

The newly elected President of the New York State Bar Association, Kathryn Grant Madigan, recently hosted a Section Leaders Conference on May 10, 2007 at the Harvard Club in New York City. The purpose of the conference was to provide additional training, an opportunity to exchange ideas and a chance to set goals for Section Programs and Membership increases. The conference was quite informative and was attended by our Section officers.

Depicted above from left to right are our new Section Officers, Marvin Schechter—Secretary, our immediate past Chair Roger Adler, Jean Walsh—Chair and James P. Subjack—Vice-Chair at January's Annual Meeting.

H. Elliot Wales appointed Chair of Appellate Courts Committee

H. Elliot Wales, a member of our Section, was recently appointed as Chair of the Appellate Court Committee of the New York State Bar Association. Elliot is a well known appellate practitioner with offices in Manhattan. He recently presided over the Appellate Committee's Annual Dinner, which was attended by judges of the New York Court of Appeals. Judge Albert Rosenblatt, who recently retired from the Court of Appeals, was also honored at the dinner and received a special presentation from the Committee.

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

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.

Anisha Abraham
Justin R. Adin
John Annechino
Leticia Astacio
Andrew B. Ayers
Brooks T. Baker
Sarah Jane Baumgartel
David Bernstein
Courtney Erin Black
Joshua M. Blumenfeld
Lynell D. Canagata-Jeffrey
Jay M. Cohen
Carleen M. Coleman
Alyson Catherine Culliton
Giovanni Di Stefano
Louis Diamond
Brian F. Fitzgerald
Kevin Douglas Fitzgerald
Stephen J. Foley
Jeffrey Frackman
Margo Lauren Gannes
Daniel Gershburg
Gary F. Giampetruzzi
Melissa Renee Gluck
Benjamin D. Gold
Suzette E. Gordon
Peter Guirguis
Paul Brian Halligan
Evan David Hochberg
Lynn Hodgens
Leo James Hurley
Jeffrey W. Johnson
Jared Andrew Kasschau
Peter Owen Kennedy
Terence L. Kindlon
Harry H. Kutner
Anthony M. La Pinta
Henry Lung
Kurt K. Lunkenheimer
Douglas J. Mahr
Jennifer Lynn McCann
Leann L. Michael
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Julia Nestor
Bryan Oathout
Amanda L. Ordyk
Inbal Paz
Kristin Michelle Pelletier
Christopher Charles Pennington
Benjamin Petrofsky
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Patrick T. Pyronneau
Brian Patrick Quinn
Donald L. Reynolds
Amir Hassan Sadaghiani
Nader J. Sayegh
Arthur W. Schneider
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Patrick Joseph Smith
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Publication and Editorial Policy

Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

Publication Policy: All articles should be submitted to:

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

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

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

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