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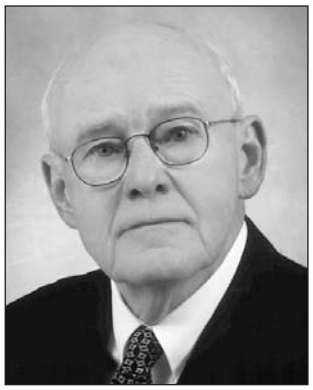
NYSBA

Message from the Chair



This past August our Association President, Tom Levin, asked me to represent the NYSBA, in his place, and attend a conference on "Strengthening the Guiding Hand of Counsel: Reforming Capital Defense Systems," which the ABA had organized in cooperation with Hofstra University School of Law.

The conference was held on October 24, 2003 at Hofstra and addressed how high quality legal representation can be achieved in capital cases. ABA President Dennis Archer attended, as did leaders from other state bars throughout the country. Among the speakers were: Prof. Monroe Freedman, President Archer, Prof. Eric Freedman, Barry Sheck and many others.

Many horror stories were told about the lack of representation standards in many states and ineffective assistance in capital cases. Throughout the conference I couldn't help but think of what must be happening in non-capital cases and the need for us in the criminal justice field to keep up with our education in law and forensics.

Among the speakers was Ray Krone who spent more than a decade in prison, some of it on death row, before DNA testing cleared his name. He was the 100th former death row inmate freed because of innocence since the reinstatement of capital punishment in the United States in 1976. Prior to his arrest, Krone had no previous criminal record, had been honorably discharged from the military, and had worked in the postal service for seven years. An Arizona prosecutor tried him twice on the flimsiest evidence I've ever heard. Not only was Krone cleared but also the DNA led the police to the real killer.

I will put the "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" on the agenda at the next meeting of the Executive Committee of the Criminal Justice Section.

Incidentally, I was watching our former First Lady, Barbara Bush, being interviewed on television the other night and she was asked if she favored the death penalty and her answer was "Yes." When pressed by the interviewer about all the people proven innocent lately, her response was that "They have such good DNA now that that's not a problem anymore." The problem is that everyone now seems to assume that every capital crime will have DNA evidence that will point directly to the defendant. God help the poor guy convicted by eyewitness testimony because there was no DNA at the scene or the police didn't find it—or his DNA was at the scene but had no connection to the crime.

In closing I wish to express my gratitude to our Editor Spiros A. Tsimbinos and Barry Kamins for this *Newsletter*. It will be a great asset to our members. I also wish to thank Paul Cambria, Chair of our Continuing Legal Education Committee, and Jim Subjack, District Attorney of Chautauqua County, and all the fine speakers they rounded up for our CLE program, "Criminal Law Boot Camp," which was highly praised throughout the state.

I hope to see you all at the January meeting.

Sincerely,
Michael T. Kelly, Esq.
Chair, Criminal Justice Section
New York State Bar Association

From 1981 until February of this year, Mike Kelly was the Regional Director of the Attorney General's Medicaid Fraud Bureau, covering the Buffalo region (composed of eight counties). Prior to that, he was Chief of the Organized Crime Bureau in the Erie County District Attorney's Office. Mike is a 1973 graduate of Albany Law School and received his undergraduate degree from Canisius College. He has lectured throughout the country for the National College of District Attorneys, the Police Foundation and various bar associations on Trial Tactics, Investigations and Forensic Evidence. In 1986, Mike was elected Chairman of the Jurisprudence Section of the American Academy of Forensic Sciences and was elected a Fellow of the Academy in 1988. In 1989, Mike was honored by the Criminal Justice Alumni Association of the State University College at Buffalo, receiving their annual award for "Performance Exemplifying Professionalism in Criminal Justice."

Message from the Editor

I am happy to report that the second issue of our *Criminal Law Newsletter* contains even more feature articles and information on developing issues in criminal law than were contained in our initial issue. This issue emphasizes developments in the area of sentencing of persistent felony offenders and of various post-sentencing programs, which can actually affect the time served by an inmate. We also focus in detail on developments occurring in the New York Court of Appeals as Governor Pataki names the new selection to sit on that court as a replacement for Judge Richard C. Wesley.

I wish to thank Lawrence Gray, Edward Hammock, and Barry Kamins for their articles and contributions to this issue. As I indicated in our initial issue, we will be publishing four times a year and I urge members to submit articles for publication. The deadlines for our Spring and Summer Issues are February 2 and May 3, respectively. I hope that you will contribute to our *Newsletter* and that you are enjoying our publication.

Spiros A. Tsimbinos, Esq.

Inconsistent and Repugnant Verdicts

By Lawrence Gray

A jury's deliberations are generally immune from second-guessing by the courts. This reluctance to intrude into its deliberative process by speculating on how it perceived and weighed the evidence adduced before it is reflected by the law's limitation on attacks on jury verdicts to a showing of improper influence, while excluding for purposes of verdict impeachment "proof of the tenor of deliberation."[1] Repugnance—nothing else—is the key.[2]

"Where a verdict's inconsistency causes an individual to be convicted of a crime on which the jury has actually found that he did not commit an essential element of it, that is, a repugnant *verdict, a court must set it aside."*

Inconsistency in a verdict does not invalidate it since each count must be treated separately.[3] Even an inconsistent verdict that acquits on a predicate offense but convicts on its compound offense, which logically depends on the predicate, is within the definition of an inconsistent, not a repugnant verdict. It is always possible that a jury will reach a correct guilty verdict on the compound offense—and then, through mistake, compromise, lenity, plain stupidity or laziness arrive at an inconsistent verdict on its predicate offense. The crimes of Grand Larceny and Offering a False Instrument for Filing have starkly different elements even though the larceny, here by false written pretenses, may have been accomplished through the filing of false reimbursement claims with the state. Acquittal on the false filing counts and conviction on the larceny count do not amount to repugnant verdicts. False filing requires an intent to defraud while larceny includes an intent to steal. These are not the same types of intent. Being charged in separate indictment counts, the divergent verdicts are of no legal moment.[4] It has been said that "to speculate why the jury voted as it did is at best an exercise in futility."[5] As explained by Justice Oliver Wendell Holmes, "If separate indictments had been presented against the defendant . . . , and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold."[6]

Where a verdict's inconsistency causes an individual to be convicted of a crime on which the jury has actually found that he did not commit an essential element of it, that is, a *repugnant* verdict, a court must set it aside. Repugnancy is possible only where different counts charge crimes containing identical elements and they are based on the same evidence.[7]

There may be many reasons for a jury to render inconsistent, even irrational, verdicts. We are human beings. The jury may be exercising mercy toward a defendant.[8] "Juries do forget, at times, that the question of mercy is something with which they should have no concern."[9] Or, jurors may have simply decided to ignore a court's instructions on the law and inconsistently acquit in the interests of justice.[10] Sometimes a jury may show leniency simply "because 'the victim deserved what he got'—a rough but not unknown form of justice."[11] Colloquially referred to as "street justice," it is, tongue-in-cheek, praised sometimes for being swift, sure, with no appeal. Such homespun leniency is not a basis for setting aside a jury's verdict.[12] In most cases, an inconsistent verdict is the result of compromise. This phenomenon is virtually inevitable in a system where unanimity of verdict is required.

> Judges and lawyers know that it is not unusual for one juror to sway the other eleven to compromise their conclusions so as to obtain a unanimous verdict. It is the mandate that the verdict be unanimous that makes such compromise a rather common occurrence. To read some legal conclusion into such compromise is truly bootstrapping.[13]

Looked at differently, "Ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may . . . be deemed a price for securing the unanimous verdict that the Sixth Amendment requires."[14]

Sometimes jurors will suspend their own disbelief as to one element of one crime charged in an indictment count while bringing the force of common sense to all the elements of all the other crimes charged in other counts.[15] The reason is, as they say, anyone's guess.

In sum, unless jury verdicts in New York are repugnant ones, inconsistent ones—whatever their origin—must be ignored. In the words of Justice Holmes

> the most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real convictions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity. That the verdict may have been the result of a compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.[16]

With regard to the proper procedure to be followed by trial counsel, with respect to a claim that a verdict is repugnant, it must be emphasized that appellate courts have held that the issue must be preserved at trial in order to be considered on appeal. It has been clearly held by the New York Court of Appeals that as a general rule alleged errors must be raised at a time when they can be corrected at trial. Thus, in jury cases any claim that the verdict is repugnant must be made before the jury is discharged.[17] This permits the court to resubmit the matter to the jury to obtain a consistent verdict even if that may require changing an "acquittal" on one or more counts to a conviction.[18]

In non-jury cases the issue may be raised at a later stage by moving to set aside or modify the verdict pursuant to Criminal Procedure Law § 330.30, since the Court as the trier of the facts as well as the law is still available to correct repugnancies in the verdict if there be any.[19]

Endnotes

1. *People v. Tucker,* 55 N.Y.2d 1, 7 (1981), *quoting People v. Brown,* 48 N.Y.2d 388, 393 (1979).
2. *People v. Goodfriend,* 64 N.Y.2d 695 (1984).
3. *People v. Cwilka,* 40 A.D.2d 40, 45 (1st Dep't 1977); *People v. Pugh,* 36 A.D.2d 845, *aff'd* 29 N.Y.2d 909, *cert. denied* 406 U.S. 921 (1972); *see also Harris v. Rivera,* 454 U.S. 339, 345 (1981) *citing Dunn v. United States,* 284 U.S. 390, 393 (1932) (Holmes, J.*), reaffirmed in United States v. Powell,* 469 U.S. 57 (1984).
4. *United States v. Powell,* 469 U.S. 471 (1984).
5. *People v. David,* 92 A.D.2d 177, 185 (1st Dep't 1983).
6. *Dunn v. United States,* 284 U.S. 390, 393 (1932) (Holmes, J.).
7. *People v. Bullis,* 30 A.D.2d 470 (4th Dep't 1968).
8. *People v. Rodriguez,* 81 A.D.2d 513 (1st Dep't 1981).
9. *People v. Cohen,* 223 N.Y. 406, 430 (1918).
10. *People v. Williams,* 47 A.D.2d 262, 266 (2d Dep't 1975); *People v. Blandford,* 37 A.D.2d 1003 (3d Dep't 1971).
11. *People v. Rivera,* 77 A.D.2d 538 (1st Dep't 1980).
12. In 1972, as recalled by the author, a thug beat up a helpless old lady on the street. By the time her neighbors were done with him, the thug spent six months in the hospital—ultimately appearing in court on crutches for his arraignment on assault charges, next to those charged with almost killing the thug by beating him with everything including a small, door-less refrigerator that had been at the curbside awaiting sanitation department pick-up.
13. *People v. Davis,* 92 A.D.2d 177, 186 (1st Dep't 1983).
14. *Andres v. United States,* 333 U.S. 740, 748 (1948), *cited in United States v. Mayberry,* 274 F.2d 899 (2d Cir. 1960).
15. *See, e.g., People v. Haupt,* 247 N.Y. 369 (1928).
16. *Dunn v. United States,* 234 U.S. at 393–394. In a 1995 decision, the Court of Appeals, speaking though Chief Judge Kaye, cited and applied prior precedent but curiously stated: "A verdict is inconsistent or repugnant—the difference is inconsequential—where the defendant is convicted of an offense containing an essential element that the jury has found the defendant did not commit . . . ." *People v. Tappier,* 87 N.Y.2d 55, 58 (1995). The statement does not represent a change in the law as much as it reflects careless language.
17. *See People v. Satloff,* 56 N.Y.2d 745 (1982); *People v. Stahl*, 53 N.Y.2d 1048 (1981).
18. This certainly puts a defense attorney in an excruciating dilemma whereby raising the issue in order to preserve the issue on appeal leads to the correction of the error and the conviction of his client. *See People v. Salemmo*, 38 N.Y.2d 357 (1976); *People v. Robinson*, 45 N.Y.2d 448 (1978).
19. *See People v. Alfaro*, 66 N.Y.2d 985 (1985).

Lawrence Gray is a former Special Assistant Attorney General in the appellate section of the Attorney General's Medicaid Fraud Control Unit. He was previously a Special Assistant Attorney General in the Office of the Special State Prosecutor for the Investigation of the New York City Criminal Justice System; prior to that he was an Assistant Attorney General in the Bureau of Real Estate, Securities Fraud and Theatrical Syndications. He began his career as an Assistant District Attorney in Bronx County. Mr. Gray is a 1969 graduate of St. John's University School of Law, where he was an associate editor of the *St. John's Law Review*. His other publications include *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's Law Review 337 (1998); *Judiciary and Penal Law Contempt in New York: A Critical Analysis*, Brooklyn Law School Journal of Law and Policy, Vol. III, No. 1 (1994); *The Criminal Contempt Handbook*, New York State Criminal Justice Services (2000); *Criminal Contempt Under New York's Penal and Judiciary Laws* (1992); *Direct Examination* (1983); *The Role of Counsel at the Grand Jury* (NYSBA, 1987); *Extradition* (1991); *Evidentiary Privileges*, 4th Ed. (NYSBA, 2003); and he is Editor-in-Chief of NYSBA's *New York Criminal Practice Handbook* Supplements.

The Sentencing of Persistent Felony Offenders

By Spiros A. Tsimbinos

The defendant who poses some of the most serious problems for the criminal justice system and society at large is the repeat or persistent felony offender. To deal with this individual, the New York State Penal Law provides for specific and more severe sentencing for the repeat offender who has committed serious crimes. The New York statutory scheme first of all provides for a separate sentencing statute under Penal Law § 70.08, which deals with persistent violent felony offenders. This statute provides for the mandatory imposition of certain sentences depending on the category of felony conviction. Under Penal Law § 70.08, a persistent violent felony offender is defined as a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04.

In Penal Law § 70.10, sentences of imprisonment are provided for persistent felony offenders, but the imposition of these sentences is discretionary with the sentencing court depending upon the meeting of certain criteria. Under Penal Law § 70.10, a persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

The differences between the two statutory provisions were specifically noted by the Appellate Court in *People v. McClemore*.[1] There, the Court (on page 37) observed:

> There are two prerequisites to a defendant's being sentenced as a persistent felony offender. First, defendant must stand convicted of a felony and have two or more prior felony convictions (see, Penal Law 70.10 [1]). Second, the court must determine that "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (Penal Law 70.10 [2]). With respect to the second prerequisite, defendant is entitled to present evidence "relevant to the issues of whether or not [he] should be sentenced as a persistent felony offender" (CPL 400.20 [9]). As one commentator has noted, the procedure utilized to determine whether a defendant is to be sentenced as a persistent felony offender differs from the procedures set forth in the other felony recidivist statutes because sentencing as a persistent felony offender is not mandatory, but rather, "it is available for use in the discretion of the court. * * * [T]he court's exercise of discretion to impose the enhanced sentence must be based not only upon the requisite predicate offenses, but also upon facts regarding the over-all history and character of the defendant" (Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL 400.20, at 274).[2]

In determining whether the history and character of the defendant justifies sentencing as a persistent felony offender, such factors as the number of prior convictions and the length of the criminal history are extremely relevant to the court's determination. Thus, in *People v. Pelkey*,[3] the sentencing court's imposition of a persistent felony offender sentence was upheld where the defendant had 5 prior felony convictions, 17 prior misdemeanor convictions, and a history of criminal conduct spanning 16 years.

It should be noted that in *People v. Pelkey*, *supra*, the Appellate Court also upheld the constitutionality of the persistent felony offender statute under Penal Law § 70.10. In light of the recent Supreme Court decisions, in *Lockyer v. Andrade*[4] and *Ewing v. California*,[5] upholding California's "three strikes" law, any further doubts regarding the constitutionality of New York's persistent felony offender statutes now appears to be settled. In *Ewing v. California*,[6] the Supreme Court specifically noted:

> The constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge. Recidivism has long been recognized as a legitimate basis for increased punishment. *See Almendarex-Torres v. United States,* 523 U.S. 224, 230, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (recidivism "is as typical a sentencing factor as one might imagine"); *Witte v. United States*, 515

> U.S. 389, 399, 115 S.Ct. 2199. 132 L.Ed.2d 351 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense . . . [is] 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'" (quoting *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948)).
>
> California's justification is no pretext. Recidivism is a serious public safety concern in California and throughout the Nation.

A review of the persistent violent felony offender statute under Penal Law § 70.08 and the persistent felony offender provision under Penal Law § 70.10, reveals, however, certain deficiencies in the statutory enactments which should be reviewed and addressed by the state Legislature.

At the beginning of 1996, following my review of the Sentencing Reform Act of 1995, I pointed out that there was a glaring and troublesome omission in Penal Law § 70.08 dealing with persistent violent felony offenders with respect to the minimum term to be applied to a class E persistent violent felony offender.[7] Referring to the situation as the case of the missing sentence, I pointed out that the New York Court of Appeals had attempted to temporarily fill the gap through its decision in *People v. Green*, but that the changes brought about by the Sentencing Reform Act of 1995 required that the situation should be immediately addressed by legislative action. I was encouraged when in the Spring of 1996 a multi-sponsored bill was introduced into the Legislature to correct the situation. However, I am sorry to report that no legislation was ever actually enacted and that the Court of Appeals was again recently forced to deal with this situation because the Legislature has still failed to act.

The problem arose because in 1978, when the Legislature passed the original sentence of imprisonment for persistent violent felony offenders, to wit, Penal Law § 70.08, although specifying that the maximum term of imprisonment for all classes of violent felony offenders who would be punished as persistent violent felony offenders would be life imprisonment and specifically listing minimum terms of imprisonment for class B, C and D felonies the Legislature neglected to specify such a minimum term for a class E violent felony offense. The mystery of what the minimum term for a class E violent felony offense would be remained ambiguous and unresolved until the New York Court of Appeals determined in *People v. Green*,[8] that it could, by judicial interpretation, decide what minimum would be applicable.

In *People v. Green*, *supra*, the defendant had negotiated a plea of guilty to Attempted Criminal Possession of a Weapon in the Third Degree, a class E violent felony offense. The trial judge had determined that he could impose a minimum sentence of two years to life but, because of the lack of clarity on the issue, had invited the appellate courts to make a definitive ruling on the issue. After the Appellate Division First Department simply affirmed the determination without opinion, the Court of Appeals took it upon itself to analyze the question and to make a definitive decision.

The Court of Appeals first examined the definition of a persistent violent felony offender as set forth in subdivision (1)(a) of Penal Law § 70.08. Pursuant to that subdivision, a persistent violent felony offender is defined as a person who stands convicted of a violent felony offense as defined in subdivision 1 of section 70.02 after having previously been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04. Under section 70.02 a class E violent felony offense is specified as an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivisions 4 and 5 of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the Criminal Procedure Law.

Using the statutory definitions and the legislative scheme with respect to both persistent violent felony offenders and second violent felony offenders, the Court of Appeals indicated that the legislative intent could be easily ascertained and that the trial court had correctly concluded that the minimum term for a class E violent felony offender who is also being sentenced as a persistent violent felony offender was two years. The Court of Appeals reached this result by stating that the second violent felony offender statute, to wit, Penal Law § 70.04, provided for a mandatory minimum sentence of two years for predicate felons convicted of a class E violent felony. The Court of Appeals reasoned that the minimum set forth in Penal Law § 70.04 should logically apply to persistent offenders. Any other construction would impede the legislative attempt to permit enhanced sentencing for defendants who persist in committing serious crimes.[9] The Court of Appeals specifically observed that utilization of the minimum contained in Penal Law § 70.04 was plainly fair to defendants, since they had notice of what the sentence would be if sentenced as a second violent felony offender.

Although the Court of Appeals had specifically pointed out in *People v. Green*, *supra*, that a statutory gap existed in Penal Law § 70.08 with respect to the minimum term to be imposed upon a class E violent felony offender, the Legislature, in modifying the sentences imposed on persistent violent felony offenders as part of the new Sentencing Reform Act of 1995, continued to fail to specify a minimum term to be imposed upon such an offender. Thus the new amendments to Penal Law § 70.08 effective for crimes committed on or after October 1, 1995 again specified minimum terms only for class D, C and B violent felony offenses as listed below.

Term to be Imposed

Crimes Involved	**Min. Term**	**Max. Term**
Class B Violent Felonies:	At Least 20 yrs. At Most 25 yrs.	Life
Class C Violent Felonies:	At Least 16 yrs. At Most 25 yrs.	Life
Class D Violent Felonies:	At Least 12 yrs. At Most 25 yrs.	Life

Since the Legislature had failed to act, the courts were again faced with the task of determining what an appropriate minimum term would be with respect to a class E persistent felony offender. Thus in *People v. Tolbert*, Judge Rothwax, using the *Green* reasoning but not the *Green* sentence, imposed a minimum term of 4 years to life. Judge Rothwax' determination was affirmed by the Appellate Division, First Department, and in *People v. Tolbert*,[10] the Court of Appeals on April 1, 1999, finally determined the issue. In the Court of Appeals the defendant argued that since the Legislature had failed to act the prior judicially imposed term set forth in *People v. Green* was applicable. The Court of Appeals, however, correctly ruled that the logic of *Green* was applicable and not necessarily its result. The Court of Appeals, in a unanimous decision written by Judge Wesley, stated (at page 88):

> The courts below properly construed *People v. Green* as holding that the amended determinate sentence for class E second violent felony offenders should also be applied as the minimum sentence for class E persistent violent felony offenders. . . .
>
> Defendant's argument that he should receive a minimum sentence of two years overlooks the clear legislative goal (reiterated and amplified by the 1995 amendments) to provide enhanced sentences for persistent violent felons (*People v. Green*, *supra*, 68 N.Y.2d, at 153). Indeed, defendant's position would result in making a class E persistent violent felony offender eligible for release after a shorter period of incarceration than a class E second violent felony offender. In *Green* we rejected the notion that the legislative purpose behind the sentencing laws can be facilely turned on its head. Moreover, the sentence here is consistent with the over-all scheme of the 1995 amendments, which substantially increased the minimum terms for all persistent violent felony offenses.[11]

Although the Court of Appeals in *People v. Tolbert* has now set the minimum sentence for a class E violent felony offender being sentenced as a persistent to either three or four years, it is still imperative that the Legislature act to set the appropriate minimum term by statutory legislation. Using the *Tolbert* analysis, the disparity between the minimum for a class D violent felony offender and a class E violent felony offender is in fact nine years. This is more than double the minimum disparity between any of the other felony charges. Thus, since each lower category of felony for persistent violent felony offenders appears to result in a reduction by four years, the Legislature should follow the existing statutory format and set the minimum for E felony offenders at eight years. In addition, under the *Tolbert* analysis, the maximum minimum can only be set at four years while the minimum sentence under any of the other felony categories can go up to 25 years. The proper minimum range for E felony offenders which the Legislature should thus set should be 8-25 years.

Increasing the minimum term by statutory enactment would also be more consistent with the minimum possible sentence which can be imposed for a persistent felony offender under Penal Law § 70.10. Under that provision, although imposition of the enhanced sentence is discretionary rather than mandatory, if such a sentence is imposed it must involve a minimum of from 15 to 25 years with the maximum term being life. It thus appears incongruous that the minimum sentence for a persistent violent felony offender who is being sentenced on an E felony should presently be set at three years, or at most four years.

An examination of Penal Law § 70.08 relating to sentences of imprisonment for persistent violent felony offenders and Penal Law § 70.10 relating to sentences of imprisonment for persistent felony offenders in fact reveals an interesting and perhaps an illogical situation with respect to the minimum sentences to be imposed

under the various categories of felony offenses. Under Penal Law § 70.08 specific mandatory terms are listed for violent felony offenders to accompany the maximum of life imprisonment. When it comes to Penal Law § 70.10, however, with respect to persistent felony offenders, the authorized sentence for all categories of felonies is 15 years to life, that which is authorized for an A-I felony. Even though the sentence is discretionary, with respect to persistent felony offenders rather than the mandatory terms required by Penal Law § 70.08 for persistent violent felony offenders, it appears illogical why the same or a lesser minimum sentence is not available for persistent felony offenders than for the more serious persistent violent felony offenders.[12]

Under current law, for example, a person being sentenced as a persistent violent felony offender for a class D felony sentence can receive a minimum sentence of 12 years to life. A person being sentenced as a persistent violent felony offender for a class E felony can receive a minimum of 3 to life. A person being sentenced as a persistent felony offender, for a similar class D felony would be subject, however, to a minimum of 15 years to life, as would a person being sentenced on an E felony. This possible scenario seems inconsistent with the concept of providing greater punishment for those committing violent felony offenses over non-violent offenses. Lower courts have recognized the unfairness of the situation and have specifically urged legislative action. Thus Judge Kleinman in *People v. Velez*,[13] specifically stated:

> This court recommends to the Legislature that consideration be given to amending Penal Law § 70.10 giving the court more discretion in fixing the minimum sentence for nonviolent persistent felons. Given that discretion, this court has not doubt that more criminals who engage in a continuous life of crime would be sentenced as persistent felony offenders.

A legislative change could easily bring about a fairer and more balanced approach to the situation by simply inserting at the end of subdivision 2 of section 70.10 the language "may impose the sentence of imprisonment authorized by § 70.8" in place of the current provision which reads "may impose the sentence of imprisonment authorized by that section for a class A-I Felony."

It is hoped that this year the Legislature after more than 25 years of inaction, finally proceeds to statutorily set an appropriate minimum sentence for the class E felony offender being sentenced as a persistent violent felony offender and that it further correct the anomaly which exists with respect to the minimum terms available for persistent felony offenders *vis-a-vis* persistent violent felony offenders. The time for these corrective actions is long overdue.

Endnotes

1. 276 A.D.2d 32 (4th Dep't 2002).
2. *See also People v. Garcia*, 267 A.D.2d 247 (2d Dep't 1999).
3. 294 A.D.2d 669 (3d Dep't 2002).
4. __ U.S. __ 123 S. Ct. 1166 (2003).
5. 538 U.S. __, 123 S. Ct. 1179 (2003).
6. 123 S. Ct. 1179 (2003) at p. 1188.
7. "The Case of the Missing Sentence," N.Y.L.J., Jan. 9, 1996, p. 1.
8. 68 N.Y.2d 151 (1986).
9. Citing *People v. Morse*, 62 N.Y.2d 205, 221 (1984).
10. 93 N.Y.2d 86 (1999).
11. *See also People v. Bryant*, 273 A.D.2d 320 (2d Dep't 2000).
12. The statement of the Appellate Division First Department in *People v. Mason*, 277 A.D.2d 170 (1st Dep't 2000), that "There is nothing anomalous about the fact that the persistent felony offender in certain situations is subject to higher minimum sentence than a persistent violent felony offender" fails to take into account the wide disparity that can exist and fundamental difference between violent felony offenders and non-violent defendants.
13. 163 Misc. 2d 571 (Sup. Ct., N.Y. Co. 1994).

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 35 years. A graduate of New York University School of Law, he served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is a past president of the Queens County Bar Association and has been a frequent lecturer on legal topics. Mr. Tsimbinos has authored many articles that have appeared in the *New York Law Journal*, the New York State Bar *Journal*, the *Queens Bar Bulletin* and other legal publications.

What Happens to Criminal Defendants After Sentence Is Imposed?

By Edward R. Hammock

Criminal law practitioners spend most of their time in the criminal courts representing or prosecuting those charged with crime. For many years those of us on the defense side of criminal cases felt that our duty to our client ended with the imposition of sentence by the court. The defense bar has become increasingly aware, however, that situations occur after the defendant is sentenced which may warrant continued counseling and representation of the client. It is therefore important for criminal law practitioners to have a working knowledge of the various post-sentence programs and issues which affect criminal defendants. Thus, programs such as early release, conditional release, parole and post-release supervision have become increasingly important matters for our clients and consequently, for us. In this article, I will discuss these various programs in an effort to provide criminal law practitioners with the latest up-to-date developments in the important area of post-sentence concerns.

The Pre-Sentence Report

Any discussion of what might happen to a defendant after he has been sentenced must start with a discussion of the pre-sentence report, which basically provides the foundation or cornerstone for post-sentence occurrences. The pre-sentence report is of the utmost importance to our clients who are jail and prison bound. In connection with other matters I had occasion to review a comment made by Anthony Annucci, the current Deputy Commissioner, Counsel to the New York State Department of Correctional Services. He said, and I quote:

> The single most important document is the pre-sentence report. It is of enormous importance not only in making security and classification decisions, but also in terms of making program assignments. This report follows the inmate throughout his incarceration.

Executive Law § 259-i(1)(a) mandates that the guidelines utilized by the State Board of Parole in making release decisions must take into account the information contained in the pre-sentence report.

The premier importance of the pre-sentence report is made absolutely clear in Criminal Procedure Law § 390.60. Paragraph one of the section talks about the things that are to accompany those who are committed as a part of their sentence to a jail or prison. Included in those items is the pre-sentence report. Paragraph two of the section makes clear that if the committed person is delivered to a correctional facility without the required reports, he may be refused admission until the required report is received. The section talks about reports including the pre-sentence report. Of the reports mentioned, the one that is deemed absolutely essential by correctional facilities is the pre-sentence report. It is the document that tells the correctional facility who the defendant is and what he did to get there.

Defendants committed to jail and prison can benefit from having access to their pre-sentence reports. Criminal Procedure Law § 390.50(2) authorizes counsel to get a copy of the pre-sentence report at least one day prior to sentencing. The section says that counsel may even copy the report. Get the report for your client.

For defendants who are to be committed to prison, it is very important that counsel get a copy of the report for the defendant's information and use. It is equally as important that counsel for the defendant make an effort to have removed from the report gratuitous pejorative information (for example, the comments of case detectives about the defendant). Erroneous information must be contradicted and counsel must be prepared, should it be necessary, to request an evidentiary hearing to get erroneous, damaging information out of the report.

Department Counsel Tony Annucci said the following:

> Hence, if a pre-sentence report contains inaccurate information it behooves the affected party to make appropriate motion to correct the report before the defendant enters the state prison system.

The importance of the opportunity at the sentence proceeding to correct any erroneous information in the pre-sentence report is highlighted by the fact that under Criminal Procedure Law § 380.70 the minutes of sentence must also be delivered to the Corrections Department institution where a defendant has received an indeterminate or determinate sentence of imprisonment.

Early Release Programs

Temporary Release

There are no work release programs for most jailed inmates in the state of New York. However, there is statutory authorization for work release programs in the city of New York and the counties of the state. Work release for New York City Corrections is set out in Correction Law Article 6-A, §§ 150-157. Work release for county jails is provided for in Correction Law Article 27, §§ 870-879. The programs, where implemented, provide for the temporary release of inmates from the jail setting for purposes of work, education, etc.

Some state prison inmates are eligible for temporary release to the community. The statutory provisions for temporary release programs can be found in Correction Law Article 26, §§ 851-861. At one time, not so long ago, the only inmates not eligible for participation in temporary release programs were those who had a previous conviction for the crimes of escape or absconding from a temporary release program. Today, most inmates are not and will not become eligible for participation in temporary release programs.

Currently, eligibility for the programs is governed principally by Executive Orders of the Governor.[1] Both were issued by the Governor sometime around 1995. Executive Order 5.1 bars from participation in any temporary release program, any inmate convicted of a violent felony offense that involved the infliction of serious physical injury upon a victim, the use or threatened use of a deadly weapon or dangerous instrument. Therefore, some inmates convicted of violent felonies are still eligible for participation in temporary release. Where an inmate's crime of conviction does not involve any of the restricting factors, he may apply to the Department for a Violent Felony Over-ride. At that point, an attempt will be made to determine the exact elements of the inmate's conviction crime. If it did not include any of the restricting factors, he is eligible for participation in temporary release.

Executive Order 17 bars from participation in any temporary release program, any inmate convicted of an offense defined in Penal Law Articles 125 and 130, or Section 255.25 (incest), or for any attempt or conspiracy to commit any such offense.

The following constitute the Department's temporary release programs:

- work release—release from a prison for purposes of work in the community.
- furlough—release for any of a number of purposes for up to seven days.
- community services program—generally, participation in volunteer work in the community at or near the facility of confinement.
- leave of absence—usually of limited duration and for purposes of attending a funeral of a close relative.
- educational leave—means what it says. The inmate can be gone from the prison for up to 14 hours per day.
- industrial training leave—release from prison for up to 14 hours in a day to attend a training program.

Eligibility for participation in temporary release comes to an inmate serving an indeterminate sentence when he is within two years of his parole eligibility date (last day of his minimum sentence). If the inmate is eligible for Merit time release, he will be eligible for work release when he is two years from his Merit release date. If the inmate is serving a determinate sentence and is otherwise eligible, he can apply for the program when he is within two years of his conditional release date.

By regulation, the Department has created a point score mechanism that says an inmate is not eligible for participation in temporary release unless he has a minimum of 30 points. With 30 points he can participate in the furlough program. He needs 32 points for the other temporary release programs. The point score mechanism takes into account prior convictions, prior probations and paroles. An inmate can earn points while incarcerated for good behavior and program participation. The regulations governing temporary release can be found in 7 N.Y.C.R.R. § 1900.

Shock Incarceration

Pursuant to Correction Law Article 26-A, §§ 865-867, inmates are selected for the shock incarceration program directly at reception centers. They will serve a period of six months in a shock facility which shall provide rigorous physical activity, intensive regimentation and discipline, and rehabilitation therapy and programming. An eligible inmate is one who has been sentenced to an indeterminate sentence and was between the ages of sixteen and forty at the time of the commission of the crime upon which his/her sentence is based. However, at the time of selection for the program he/she cannot have reached his/her fortieth birthday. Such inmate must become eligible for parole within three years. An otherwise eligible inmate is disqualified if his/her conviction is for a violent felony offense, an A-1 felony offense, manslaughter in the second degree, vehicular manslaughter in the first and second degrees, criminal-

ly negligent homicide, rape in the second and third degrees, sodomy in the second and third degrees, attempted sexual abuse in the first degree, attempted rape in the second degree, and attempted sodomy in the second degree. Included also are any escape or absconding convictions.

Inmates who are eligible for the program upon paper review at the reception facilities are sent to the Shock facility at Lakeview for further screening. The actual selection of inmates for the program is made at Lakeview. An inmate approved for the program will be either retained at Lakeview for participation or sent to one of the other three Shock facilities. Lakeview is south and west of Buffalo. Monterey is near Elmira in the southern tier. Summit is outside of Albany in Schoharie County. Moriah is north of Lake George and south of Plattsburgh.

Upon the successful completion of the Shock program, the inmate is given a Certificate of Earned Eligibility pursuant to Correction Law § 805 and is immediately scheduled for an appearance before a panel of the Board of Parole. Parole release is granted in spite of the fact that the minimum sentence may have more than two years to run.

Merit Time

Merit time was a gimmick devised by the Pataki administration to speed the release of non-violent offenders.[2] Eligible inmates must be serving indeterminate sentences where the minimum is in excess of one year. They cannot have been convicted of an A-1 felony offense, a violent felony offense, manslaughter second, vehicular manslaughter second, vehicular manslaughter first, criminally negligent homicide, any Article 130 offense, incest or any offense defined in Penal Law Article 263, sexual performance by a child.

Inmates given Merit time earn up to one-sixth off their minimum term or the period of their sentence. However, the allowance can only be granted to inmates who earn Earned Eligibility Certificates and who obtain a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate following at least six months of vocational programming or who perform at least four hundred hours of service as part of a community work crew. An inmate can be barred from Merit time if he engages in serious disciplinary behavior or brings a frivolous lawsuit against a state agency while an inmate.

Legislation passed in April, 2003 made A-1 drug felons eligible for Merit time. However, the Merit time award for them is one-third rather than one-sixth. Consequently, an A-1 drug felon serving a sentence of 15-to-life can become eligible for release to parole after serving only ten years of his/her minimum sentence.

The Earned Eligibility Certificate

All inmates committed to the Department of Correctional Services will be assigned a work and treatment program. For those inmates serving an indeterminate sentence with a minimum term of eight years or less, where the Commissioner determines that the inmate has successfully participated in the work or treatment program assigned to him, the Commissioner may issue the inmate a Certificate of Earned Eligibility.[3] The Certificate can be issued no sooner than two months prior to the inmate's eligibility to be paroled. Inmates receiving the Certificate shall be paroled unless the Board of Parole determines that there is a reasonable probability that, if released, the inmate cannot live and remain at liberty without violating the law and that his release is incompatible with the welfare of society.

Presumptive Release

The 2003 Legislature added a new section to the Correction Law. Section 806 provides for presumptive release. That is, release by the Department without an appearance before the Board of Parole. Inmates so released are supervised for the balance of their sentences by the Division of Parole. The Board of Parole sets the conditions of their release. Eligible inmates are those who have been awarded a Certificate of Earned Eligibility and who have not been previously convicted of, nor are they presently serving a sentence imposed for, a class A-1 felony, a violent felony offense, manslaughter second, vehicular manslaughter first and second, criminally negligent homicide, incest and a crime involving the sexual performance of a child. The inmate can have no serious disciplinary infractions and cannot have brought a frivolous lawsuit against an agency of the state.

An inmate who qualifies for Merit time will get one-sixth credit against his minimum term and can be presumptively released by the Department at the Merit, rather than the parole, date. Eligible inmates will apply for conditional release.

Parole

Parole release to eligible inmates is granted in the discretion of the Board of Parole. The Board's jurisdiction for the release of inmates extends only to those serving indeterminate sentences. The advent of presumptive release and the existence of determinate sentences has seriously restricted the releasing authority of the Board of Parole. For the release function, they are limited to old law cases and non-violent felony cases

where the defendant is committed to the Department of Correctional Services to serve his term. Old law cases are all the indeterminate sentences imposed prior to creation of determinate sentences in 1995 (the Sentencing Reform Act). In addition to the non-violent felons, the Legislature has continued the use of the indeterminate sentence to punish our most serious offenders. Therefore, all those defendants convicted of class A-1 and class A-2 felonies continue to receive indeterminate sentences.

The statutory supports for the paroling process can be found in Penal Law § 70.40 and more fully in the Executive Law Article 12-B, §§ 259-259-r. In order to make the parole release decision, the Board of Parole must meet personally with the eligible inmate in a facility of the New York State Department of Correctional Services. The Board meets in panels of two or three members at the facility of the inmate's confinement. Inmates are scheduled to meet with the Board at least two months prior to their Merit or parole eligibility dates. This is done in order to permit sufficient time for the field investigation of the inmate's submitted plan for community living. An inmate will not be released until the field staff notifies the institution that the plan for community living has been approved. A majority vote of the panel is needed in order for an inmate to be released. Where there is a two-member panel and the members cannot agree on release, the matter is adjourned for the next month's panel of the Board.

The standards for parole release are set forth both in statute and in the Board's regulations. They are required by statute and regulation to use guidelines to structure their release discretion. The guideline's time ranges are supposed to represent the amount of time that the Board has required similar offenders to serve prior to their release to parole. The regulations say that an inmate shall be released if he has served an amount of time that is within the guidelines established by the Board. That is, unless the Board articulates an aggravating factor or factors that warrant a decision of release denial. The regulations governing parole release and the guidelines can be found in 9 N.Y.C.R.R. Part 8002.

Unfortunately for inmates subject to the exercise by the Board of its release discretion, the Board's guidelines have not been revised since 1985 and therefore the Board does not follow them. The courts have been resorted to by inmates consistently over the years because decisions above the guidelines, without written justification therefor, have been rendered by Board panels denying release to eligible inmates. In spite of the legislative intent that mandated the Board's use of guidelines, and the language of both the statute and regulations regarding them, the courts have consistently held that the guidelines are merely advisory and just another factor for the Board to take into account in rendering a release decision.

The standards for release are set forth in Executive Law § 259-i(2)(c) and read as follows:

> Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law.

Current panels of the Board, in denying release to eligible inmates, rarely cite to the statutory standards or offer written, detailed, explanations of their decisions. The usual parole release written reasons in support of a decision of denial merely cite to elements of the inmate's crimes of conviction and conclude that the crime is so serious that release is not warranted.

Parole release can come at any time after the service of the Merit time or the minimum of the indeterminate sentence. If release is not granted to an inmate eligible for Merit time, he will be seen at his regularly scheduled Board (i.e., at the end of his minimum term). If release is denied, a Board panel has to give a denied inmate a reappearance date that is no longer than two years after the prior appearance. Over the last several years the Board has adopted the habit of giving two year reappearance dates to almost all inmates denied release. If release is consistently denied to an inmate, when he has served two-thirds of his maximum sentence, he can be conditionally released (the "CR date"). An inmate will be conditionally released when he is eligible for conditional release and he signs the conditions of parole thereby agreeing to be bound by them.

Inmates serving 85 percent of their determinate sentences with no loss of good time can be released if they agree to be supervised by the conditions of parole for the period remaining on their determinate sentence.

Parole Supervision Sentences

Criminal Procedure Law § 410.91 defines and describes the parole supervision sentence. It is targeted at those defendants who have a history of controlled substance dependency and for whom that dependency is a significant contributing factor to the criminal con-

duct. The option exists for second felony offenders now convicted of an offense listed in paragraph five of the section. Such defendants will not qualify for the sentence option if their previous felony offense was a violent felony offense, a class A felony, or a class B felony and they are not subject to an undischarged term of imprisonment.

The qualifying felonies are class D's and E's. If the conviction felony is a class D, the District Attorney must consent. The defendants are sentenced to indeterminate sentences; however, they are committed to the New York State Department of Correctional Services for classification and transportation to the Willard Drug Treatment Center. They will be involved in the Willard program for a period of 90 days. Upon successful conclusion of the Willard program, the inmates are released to parole supervision for the balance of their indeterminate sentence. Defendants benefitting from this program are supervised by the Division of Parole in similar fashion to parolees granted release from prison by the Board of Parole. They are subject to the same and similar conditions.

Local Conditional Release

New York City and all the counties in the state have Local Conditional Release Commissions. The Commissions have at least three members who have educational and experiential backgrounds similar to those selected for the Board of Parole. The Commissions review the cases of local jail inmates who apply for conditional release from their jail sentences. The sentences must exceed 90 days and the inmate must serve at least 60 days of his sentence prior to being released. If released, the defendant is under the jurisdiction of the Commission for the remainder of his sentence. Supervision is handled by the county probation department.

If the officer supervising a conditional releasee determines that the releasee has violated one or more of the conditions of his release in an important respect, he can arrest the releasee and the releasee will be held for a hearing before the Commission to determine the facts of the allegations. If the releasee is found by the Commission to have violated a condition of his release in an important respect, the releasee can be returned to the local jail to complete the service of his original sentence.

Post-Release Supervision

Jenna's Law, put on the books by the Legislature in 1998 brought in determinate sentencing for all violent felony offenses. It also brought in a new form of community supervision to take effect after prison release. Defendants sentenced to determinate sentences must serve 85 percent of their sentences before they can be conditionally released. At the point of release, the inmate is now subjected to a period of post-release supervision by the Division of Parole. As stated earlier, the Board of Parole determines the conditions of release prior to the inmate's actual release.

The period of post-release supervision is a part of the defendant's sentence and is imposed at the same time the period of incarceration is set. Probation is not an option for those sentenced to determinate sentences. The period of post-release supervision is determined by the sentencing court at the time of sentence. For those convicted of class D and E violent felonies, the period of post-release supervision can be no less than one-and-one-half years and no more than three years. For those convicted of class B and C violent felonies, the period of post-release supervision is to be set by the sentencing court at the time of sentencing. The minimum period is two-and-one-half years and the maximum period is five years. The periods may be set in one-half year increments.[4]

Interestingly, when an inmate is released to post-release supervision, his good time earned is held in abeyance until the successful completion of the period of post-release supervision. Only then will that time be credited to the releasee's sentence. The sentence will then resume running until maximum expiration. Releasees returned to prison for a violation of a period of post-release supervision must serve at least six months before they will be given consideration by the Board of Parole for re-release to the community.

The sentence maximums for the four affected classes of violent felonies remain at the levels previously set by the Legislature. However, the minimum determinate sentences are now set at one-and-one-half years for class E felonies, two years for class D felonies, three-and-one-half years for class C felonies and five years for class B felonies.

The calculation of indeterminate and determinate sentences running at the same time and the calculation of periods of community supervision and post-release supervision for a single person serving multiple sentences are quite complicated. Where the practitioner is having difficulty with the calculations, help can be obtained by calling Richard DeSimone of Counsel's Office at the New York State Department of Correctional Services. His number is (518) 457-4652.

Conclusion

New York now has a most complicated system of sentences for felonies. As was indicated above, New York still uses the indeterminate sentence for our non-

violent offenders and our most serious offenders. Indeterminate sentences have a minimum term imposed by the sentencing court, and a maximum sentence, also imposed by the court at the time of sentencing. An inmate serving an indeterminate sentence is eligible for parole release consideration at the end of the Merit time, if he has earned Merit consideration or at the end of the minimum sentence. If release is not granted, the inmate will be seen when rescheduled for reconsideration by the Board. (Not to exceed two years.) If the inmate has not been paroled by the Board and he has now served two-thirds of his maximum sentence, he can be conditionally released unless he has lost good time for bad behavior. He can then be released after he has served the good time lost. Please note that inmates serving sentences with life maximums have no Conditional Release dates. Theoretically, they continue to serve their sentences until their deaths.

The Sentencing Reform Act of 1995 brought the determinate sentence to New York. At that time, the sentences for violent felony offenders were changed to require that the minimum sentence equal one-half the maximum sentence imposed. Determinate sentences were to be imposed on those convicted of a second violent felony offense and those predicate felons whose instant offense was a violent felony offense. In addition, the life without parole sentence became law in New York.

Thus, in recent years, as a result of various legislative enactments and executive orders, a sentenced defendant may face a variety of options regarding his eventual release from incarceration. I hope that this article has shed some light on the various programs and will assist criminal law practitioners in providing relevant information to clients when they ask, "What will happen to me after I am sentenced?"

Endnotes

1. Executive Order 5.1 and Executive Order 17.
2. *See* Correction Law § 803 (i)(d).
3. *See* Correction Law § 805.
4. *See* Penal Law § 70.45.

Mr. Hammock is an attorney in private practice. He previously served as an Assistant District Attorney and a Special Assistant General Attorney of the State of New York. He was the Chairman of the New York State Board of Parole from 1976-1984. He has also held positions as an adjunct professor at St. John's Law School and at the John Jay College of Criminal Justice. He has written extensively and is the author of many legal articles which have appeared in various legal publications. Mr. Hammock's article is based upon a recent lecture he gave at the Queens County Bar Association.

New York Court of Appeals Review

Listed below under appropriate subject headings are several decisions issued by the New York Court of Appeals during the months of September and October 2003.

2002 Amendment to CPL § 450.90(1) Held Not Retroactive

***People v. Desmond Jones*, __ N.Y.2d ___, 2003 WL 22201949 (Sept. 18, 2003)**

The Legislature in the year 2002 enacted an amendment to CPL § 450.90 (1), which provided the authority to the Court of Appeals to grant leave to appeal from an order granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of counsel. This amendment had been passed to correct a deficiency which had existed for some 15 years and which the Court of Appeals in *People v. Bachert*[1] had invited the Legislature to correct. The new amendment provided for its effective date to take place on November 1, 2002.

On September 18, 2003, the New York Court of Appeals had occasion to again discuss CPL § 450.90(1) and the new amendment when it was faced by a defendant's claim that the new amendment should be applied retroactively. The New York Court of Appeals rejected this argument. The Court in a unanimous decision held that the 2002 amendment should be accorded prospective application only and that it authorized motions for permission to appeal from only those appellate division orders made on or after the statute's effective date. Since under the facts of the *Jones* case, the Appellate Division order was made before the effective date of the statute, the Court dismissed the appeal.

Changes in Defendant's Prison Sentence Precluded by CPL § 430.10

***People v. Richardson*, decided October 21, 2003 (N.Y.L.J., 10/22/03, p. 20)**

In a unanimous decision, the Court of Appeals determined that the authority of a trial judge to modify a lawful sentence that has commenced is limited to situations where the record in the case clearly indicates the presence of judicial oversight based upon an accidental mistake of fact or inadvertent misstatement that creates ambiguity in the record.

In the case at bar, the trial court did not specify whether a sentence was to run consecutively or concurrently to an undischarged term of imprisonment on an unrelated conviction and prison authorities proceeded to treat the terms as being concurrent. Subsequently, the People moved to reopen the sentencing proceeding to indicate that the court had intended the new sentence to run consecutively to an undischarged term of imprisonment. As a result of the People's motion, the court ordered the new sentence of 50 years to life to run consecutively to the undischarged prison term.

Upon appeal, the defense had argued that CPL § 430.10 prohibited any such re-sentencing. The Court of Appeals agreed with the defendant's position and ordered the reinstatement of the original sentence, which provided for a concurrent term with the earlier undischarged sentence.

The Court of Appeals, relying upon its prior decision in *People v. Minaya*[2] held that the propriety of the trial court's action turned on whether it fell within a sentencing court's inherent power to modify a lawful sentence or constituted a prohibited re-sentencing under CPL § 430.10. The court indicated that the inherent power of a trial court relates to mistakes or errors which may be termed clerical in nature and where the record clearly indicates that a mistake or error occurred at the time sentence was imposed. In the case at bar, the judge was silent on the issue and there was nothing to indicate an intention to make the sentence consecutive rather than concurrent.

Defendant's Presence at Sidebars

Review of Trial Records Fails to Establish Defendant's Absence from Sidebar Conferences or Lack of Sufficient Waiver of Right to Be Present

***People v. Velasquez* and *People v. Foster*, decided October 23, 2003 (N.Y.L.J., 10/24/03, p. 18)**

In a 5-1 decision, the Court of Appeals upheld a robbery and murder conviction where the record was less than clear as to whether the accused had taken part in sidebars or knowingly waived his presence. In *People v. Foster*, the court reporter had failed to note in the record whether the defendant was present at a robing room conference. Relying on the presumption of regularity attached to judicial proceedings, the Court of Appeals held that the defendant failed to overcome this presumption. In *People v. Velasquez*, the Court of

Appeals found that references in the record indicated that the defendant had waived his right to be present at the sidebar.

The issue of the defendant's presence at sidebar conferences arises from the Court of Appeals decision in *People v. Antommarchi*.[3] While adhering to the *Antommarchi* decision, which received substantial criticism when it was issued, the Court of Appeals appears to be seeking ways to limit its burdensome effects. Thus, the court in concluding its decision, issued the following admonition:

> Finally, while in both cases we conclude that defendant's rights were not violated, greater attentiveness to indicating defendants' presence, or absence, in the trial record would both protect defendants' *Antommarchi* rights and avoid protracted disputes years later.

The one dissenting opinion in the case was issued by Judge George Bundy Smith who took the position that the matter should be remanded to the trial court for a hearing to determine whether the defendants were in fact present or whether an adequate and voluntary waiver of their presence had been made.

Incompetency to Stand Trial

Dissociative Personality Disorder Not Sufficient to Establish Incompetency to Stand Trial

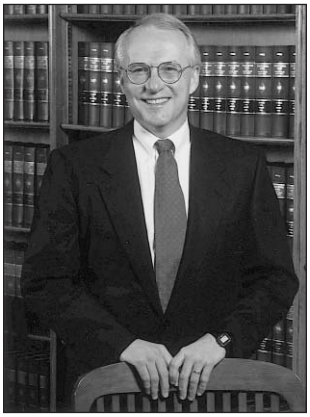
***People v. Mendez*, decided October 23, 2003 (N.Y.L.J., 10/24/03, p. 19)**

In a unanimous decision, the Court of Appeals affirmed a defendant's manslaughter conviction and rejected a defendant's claim that she lacked a functional understanding of the charges against her. The defendant who had stabbed her boyfriend through the heart had a lengthy history of psychiatric illness suffering from a dissociative identity disorder. The Court of Appeals held that despite the psychiatric history, the conviction was affirmed because psychiatric experts had unanimously found the defendant competent and the trial court, which had an opportunity to observe the defendant's behavior and to evaluate the testimony of the psychiatrist found no reason to override the psychiatric opinion. The Court of Appeals, thus deferred to the trial court's discretion on the issue and found no basis to disturb the lower court's findings.

Endnotes

1. 69 N.Y.2d 593 (1987).
2. 54 N.Y.2d 360 (1981).
3. 80 N.Y.2d 247 (1992).

A Profile of Former New York Court of Appeals Judge Richard C. Wesley



Judge Richard C. Wesley recently left the New York Court of Appeals to accept appointment to the United States Court of Appeals Second Circuit. Judge Wesley served with distinction in the New York Court of Appeals for over six years and was highly regarded by members of the New York State Bench and Bar. He recently kept his close contacts with the New York Bench and Bar by serving as the luncheon speaker at our Section's Fall Meeting in Ithaca, New York. We wish Judge Wesley all the best on his new appointment and commend him for his many years of service to the people of New York. The following is a biography of Judge Wesley.

Richard C. Wesley, Associate Judge of the Court of Appeals, was born in Canandaigua, New York on August 1, 1949. He obtained his B.A. (summa cum laude) from the State University of New York at Albany, and his law degree from the Cornell Law School, where he was a member of the Law Review. After several years in private practice, Judge Wesley was appointed assistant counsel to Assembly Republican Leader James L. Emery, and in 1982, was himself elected to the Assembly.

In 1986, Judge Wesley was elected a Justice of the Supreme Court in the Seventh Judicial District, and in January 1991 was appointed Supervising Judge of the Criminal Courts there. In 1993, he instituted a Felony Screening Program in Monroe County and worked with criminal justice agencies to develop the JUST Program (a comprehensive program monitoring pre-plea and pre-sentence defendants and providing program alternatives to jail without compromising public safety). On March 25, 1994, Governor Cuomo appointed Judge Wesley to the Appellate Division, Fourth Department. On December 3, 1996, Governor Pataki nominated him to the Court of Appeals, and he was confirmed by the Senate on January 14, 1997. In 2003, he was appointed by President Bush and confirmed by the United States Senate to serve on the United States Court of Appeals Second Circuit.

Judge Wesley has been a member of the Board of Trustees of United Church of Livonia, Chances and Changes (a community-based organization that provides safe housing to battered women), the Charles Settlement House, the Center for Dispute Resolution, the Pre-Trial Services Corporation and Family Services of Rochester. He has also been active in local youth sports programs, and volunteer community groups. Judge Wesley resides in Livonia, with his wife, Kathryn, and their two children.

* * *

Governor Pataki Names New Court of Appeals Judge

Following the vacancy created in the New York Court of Appeals as a result of Judge Wesley's appointment to the U.S. Circuit Court of Appeals for the Second Circuit in June, on October 16, 2003, the Commission on Judicial Nominations forwarded to the Governor a list of seven candidates to fill Judge Wesley's seat.

The candidates included three sitting judges, to wit, Justice Eugene F. Pigott, Jr. of the Appellate Division, Fourth Department; Justice Helen Freedman from the Manhattan Supreme Court; and Steven W. Fisher, Administrative Judge of the Supreme Court, Queens County. The list included Daan Braveman, the former dean of Syracuse Law School. The remaining candidates, to wit, Guy Miller Struve, Stephen J. Friedman, and Robert S. Smith, come from the private practice sector. Of some concern to criminal law practitioners is the fact that some of these seven candidates have little criminal law experience and the level of prior criminal law experience on the New York Court of Appeals is less than in prior years. Perhaps the heyday of active criminal law practitioners in the Court of Appeals were the panels which included Judges Stanley Fuld and Charles Breitel, former Chiefs of the Appeals Bureau of the Manhattan District Attorney's Office.

Justice Pigott had been viewed as the frontrunner for the position since he comes from the same part of the state as Judge Wesley and is also a Presiding Justice of the Appellate Division. However, as we were going to press, it was in fact announced by the Governor that his choice for the vacant position was Robert S. Smith, Esq., a corporate litigation attorney from Manhattan.

It is expected that the new appointee will be able to join the Court sometime in January. We will provide a detailed profile of the new appointee in our very next issue.

* * *

New York Court of Appeals Deals with Issue of Whether Failure to Advise Alien Defendants of Possible Deportation Invalidates Guilty Pleas

Changes made several years ago in federal law which now mandate deportation when a foreigner is convicted of certain crimes have further complicated New York criminal law when dealing with alien defendants. In response to the changes in the federal statutes, an amendment was made to CPL § 220.50 as part of the provisions of the Sentencing Reform Act of 1995. The amendment required that prior to accepting a plea of guilty to a felony offense, the court must advise the defendant of the possible deportation consequences of a conviction if the defendant is not a United States citizen.

The effects of the new requirement, however, appear to be somewhat nullified by a further specific proviso that the failure to so advise does not affect the voluntariness of the plea or the validity of the conviction nor would it afford the defendant any additional rights in a subsequent deportation or naturalization proceeding. Despite this specific proviso, the appellate courts have been faced with claims of ineffective assistance of counsel when defense attorneys fail to provide advice to deportable aliens regarding possible deportation or provide inaccurate information. Thus, the New York Court of Appeals is presently considering two cases, to wit, *People v. Bruce McDonald* from the Third Department,[1] and *People v. Jian Jing Huang* from the First Department.[2] In both of those cases, shortly after the defendants' plea, they were notified of deportation proceedings. In *McDonald*, the defendant had lived in the United States for over 25 years and pleaded guilty to marijuana charges after his attorney had wrongfully informed him that his plea would not result in his ouster from the country. In *Huang*, a Chinese defendant had pleaded guilty to a lower kidnapping charge only after being assured by his attorney and the prosecutor that he would not be deported. In both cases, the Appellate Divisions upheld the guilty pleas with the First Department in *Huang*, sharply dividing with a 3-2 decision. The Court of Appeals heard oral arguments in these cases in October and when our readers receive this issue, the Court of Appeals will probably have reached a determination on the matter. We will report on any Court of Appeals determination in our next issue, which will be forthcoming in the early Spring.

Endnotes

1. 296 A.D.2d 13 (2002).
2. 302 A.D.2d 90 (2002).

For Your Information

Annual Report From the Lawyer's Fund for Client Protection

The lawyer's fund for client protection recently issued an interesting and informative annual report dealing with the issue of reimbursement for law clients for losses caused by dishonest attorneys. The report indicated that since 1982, when the fund was established, some $97 million has been reimbursed to some 5,428 clients. As of the end of the year 2002, there were 229 pending claims involving $10.2 million. In 2002, 499 claims were actually filed with the fund, representing a nine percent decrease from 2001. The maximum award that can be made from the fund is $300,000 per individual.

Since 1982, the number of dishonest attorneys causing client reimbursement from the fund amounted to 708 with the largest number, some 326, being in the Second Department—with 216 from the First Department, 108 from the Fourth Department, and 61 from the Third Department.

The main cause of improper conduct involving reimbursement was theft or misallocation of real property escrow funds. As of the close of 2002, the fund has $5.4 million in available revenue to handle any new claims.

The fund is administered by a Board of Trustees who are all appointed by the Court of Appeals. The Trustee Board is currently comprised of seven members.

Recent U.S. Supreme Court Decisions Dealing with Criminal Law

Compiled by Spiros A. Tsimbinos

The United States Supreme Court during its last term handed down many significant decisions in the area of criminal law which also have an effect on New York criminal practice.

In *Lockyer v. Andrade*[1] and *Ewing v. California*,[2] the Court upheld California's "three strikes" law which allowed a 50-year sentence for a shoplifter who took videotapes and a 25-year sentence for a man who stole three golf clubs. In upholding the persistent offenders sentencing statutes, the Court held that they do not violate the Constitutional ban on grossly disproportionate sentences. The Court's determination was based on a 5-4 decision. The Supreme Court's determination in effect shields New York's persistent violent felony offender and persistent felony offender statutes from any further constitutional challenges.

In *Smith v. Doe*,[3] the Court upheld a retroactive application of the sex offenders registration provisions. The Court, in a 6-3 ruling, held that the states may demand the registration of sex offenders whose crimes were committed before a "Megan's Law" was passed. In a companion Megan's Law decision, the Court, in a 9-0 decision, held that publicizing convicts' names without determining whether they are still dangerous does not violate the Constitutional guarantee of due process of law.

Also in the criminal law area, the Court, in a 6-3 decision, ruled in *Sell v. U.S.*[4] that mentally ill defendants who are not violent can be forced to take anti-psychotic drugs so they are competent to stand trial. Finally, in *Wiggins v. Smith*,[5] the Court, in a 7-2 determination, held that a death penalty defendant's right to effective assistance of counsel was violated when his attorney did not look into his background for mitigating evidence to produce at sentencing.

In a case of particular importance to immigrants and attorneys practicing immigration and criminal law, the Court held in *Demore v. Kim*,[6] a 5-4 decision, that legal immigrants who face legal deportation because of a past conviction can be jailed automatically without bail. The ruling applies to foreigners who are permanent residents and have been convicted of a crime that can lead to deportation.

In a criminal case involving the issue of free speech, the Court also decided a widely publicized case, *Virginia v. Black*,[7] regarding the issue of cross burning. The Court held in a 6-3 decision, which rejected a free speech claim, that the states may prosecute people for burning crosses, but there must be evidence of an intention to intimidate someone. The ruling bars the prosecution of those who burn crosses at rallies and marches as acts as political expression not aimed at anyone in particular.

The Supreme Court also issued a highly controversial 6-3 decision in which it struck down the Texas Same-Sex Sodomy law on due process grounds. The Court held that state laws barring intimate consensual relations between gay adults are unconstitutional. In rendering its decision, the Court, in effect, overturned its prior 1986 ruling in *Bowers v. Hardwick*.[8] In writing for the majority viewpoint, Justice Kennedy declared in the majority opinion that, "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

In the area of criminal law, the decisions of the Supreme Court reflect a conservative approach with an emphasis on law enforcement. In analyzing the numerous decisions issued by the Supreme Court in its 2002-2003 term, one of the most significant factors which emerges is the importance of Justice Sandra Day O'Connor as an important "swing vote." Of the 20 major rulings recently surveyed by *USA Today*, in an article issued on June 27, 2003, it was revealed that Justice O'Connor was in the majority on 18 of those decisions, more than any other Justice in the Court. It appears that in deciding where to cast her vote, Justice O'Connor is considering a combination of legal precedent, a desire to recognize and accommodate evolving changes in American society and an adherence to a "Centrist Position" rather than a firm commitment to either a liberal or conservative philosophy.

Since there have been some recent pronouncements that both Justice O'Connor and Justice Rehnquist may be considering retirement from the Court, the makeup and future pronouncements from the Supreme Court should be of continuing interest to practitioners and they should keep a careful eye on developments and decisions coming out of this year's 2003-2004 term.

Endnotes

1. 538 U.S. 63, 123 S. Ct. 1166 (2003).
2. 538 U.S. 11, 123 S. Ct. 1179 (2003).
3. 538 U.S. 84, 123 S. Ct. 1140 (2003).
4. 123 U.S. 2174 (2003).
5. 123 S. Ct. 2527 (2003).
6. __ U.S. __, 123 S. Ct. 1708 (2003).
7. __ U.S. __, 123 S. Ct. 1536 (2002).
8. 478 U.S. 186 (1986).

Recent Cases in the Area of Search and Seizure

Compiled by Barry Kamins

I. General Fourth Amendment Principles

A. Standing

1. When a suppression court denies suppression but fails to address the issue of standing in its decision, there is no procedural bar for an appellate court to consider the issue.

People v. Myers, 758 N.Y.S.2d 68 (2d Dep't 2003).

a. Standing may be raised by the prosecutor before an appellate court even if:

(1) The People did not raise the issue of standing before the suppression court.

2. A pretrial detainee has an expectation of privacy within his prison cell sufficient to challenge a search of his cell for evidence relating to a crime unrelated to his detention.

People v. Couser, __ A.D.2d __, 756 N.Y.2d 686 (4th Dep't 2003).

3. An inmate has no expectation of privacy that prison officials will not open his mail.

People v. Butti, __ A.D.2d __, N.Y.L.J., June 30, 2003 (2d Dep't 2003).

B. Exclusionary Rule

A confession obtained from a suspect must be suppressed when there is no probable cause for the suspect's arrest.

Kaupp v. Texas, __ U.S. __, (U.S. Sup. Ct., May 5, 2003).

C. Probable Cause

Probable cause can be based upon a defendant's body movement in addition to an officer's observations.

People v. Alvarez, __ N.Y.2d __ (2003).

II. Street Encounters

A. Pursuit by Police

1. The First Department has recently defined police pursuit only as a "limited detention."

People v. Steven McC., __ A.D.2d __, 757 N.Y.S.2d 259 (1st Dep't 2003).

2. Police pursuit must be distinguished from police surveillance or observation which does not require reasonable suspicion.

People v. Foster, __ A.D.2d __, 756 N.Y.S.2d 239 (2d Dep't 2003).

B. Encounters are fluid and frequently escalate from level one (request for basis information) to level four (arrest).

People v. Hill, __ A.D.2d __, 755 N.Y.S.2d 169 (4th Dep't 2003).

C. A frisk may be based upon the observation of a nondescript waistband bulge in combination with other factors.

People v. Celaj, __ A.D.2d __, N.Y.L.J., June 12, 2003 (1st Dep't 2003) *leave granted*.

III. Arrests

A security sweep of a house is lawful even though it follows an arrest in the backyard.

People v. Lasso-Reina, 758 A.D.2d 652 (1st Dep't 2003).

IV. Search and Search Warrants

A. When there is probable cause to search for specific items, a search warrant will be overbroad if it authorizes the seizure of "papers of the defendant" relating to a specific homicide.

People v. Couser, __ A.D.2d __, 756 N.Y.S.2d 686 (4th Dep't 2003).

B. Staleness of Probable Cause

When an application for a search warrant contains information of a single drug sale that is one month old, and there is no information indicating continued drug activity between the sale and the application for the warrant, there is a lack of probable cause.

People v. Rodriguez, 758 A.D.2d 172 (3d Dep't 2003).

C. Protection of Confidential Informant

When a confidential informant provides information that constitutes both probable cause for a warrantless search of an automobile and probable cause to obtain a search warrant for a second car, a court may use a combination of procedures in *Castillo* and *Darden* to protect the confidential informant's identity, assuming the prosecutor can establish a sufficient danger to the confidential informant.

People v. Merejildo, 305 A.D.2d 143 (1st Dep't 2003).

D. Strip searches of individuals charged with a misdemeanor may be conducted if there is a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee and/or the circumstances of the arrest. Reasonable suspicion can exist even when a motorist is charged only with a traffic infraction.

People v. Kelly, 306 A.D.2d 699, (3d Dep't 2003).

V. Stops and Searches of Automobiles

A. Roadblocks and Checkpoints

A roadblock is unconstitutional if the prosecution fails to establish that its primary purpose is not merely to further general crime control.

People v. Jackson, 99 N.Y.2d 125 (2002).

B. Searches of Automobiles

1. A limited search of an automobile for a weapon is lawful when it is based upon an officer's actual and specific fear of a weapon even when the search commences in the back seat and extends into the trunk.

People v. Mundo, 99 N.Y.2d 55 (2002).

2. A preliminary and limited inventory search of an automobile can be conducted, under certain circumstances, at the scene of an automobile stop and before the car is removed to the precinct.

People v. Johnson, 298 A.D.2d 281 (1st Dep't 2002), *leave granted* (2003).

VI. Motions to Suppress and Suppression Hearings

A. Unless a defendant specifically challenges the reliability of information conveyed from one officer to another, reliability may be presumed and the burden does not shift to the prosecution to establish reliability; the prosecution need only prove the sufficiency of the information.

People v. Shabazz, 99 N.Y.2d 634 (2003).

B. Defendant counsel's failure to raise an issue at a suppression hearing that appears not to be supported by the facts, does not constitute ineffective assistance of counsel.

People v. Rodriguez, 303 A.D.2d 783 (3d Dep't 2003).

Cases of Interest in the Appellate Divisions

At the end of October, the Appellate Division Third Department decided several cases of interest to criminal law practitioners. Summaries of these cases follow:

People v. Ferraiolo[1]**—**a trial court's suppression of evidence was reversed by the Appellate Division as it ruled in favor of the prosecution with respect to a pretextual vehicle stop. The matter involved a drunk and driving prosecution and the facts show that a police officer had observed the defendant driving in the wrong direction on a one-way street. The officer had testified at the suppression hearing that he had no intention of ticketing the motorist. The trial court had suppressed evidence that the defendant failed two of four field sobriety tests and registered a blood alcohol level of 0.11 percent. The Third Department reversal of the trial court ruling was unanimous and relied upon the United States Supreme Court in *Whren v. U.S.*[2] and the New York Court of Appeals decision in *People v. Robinson*.[3]

People v. Terry[4]—the Third Department ordered a new trial for a robbery defendant who had been denied an opportunity after the close of the evidence to testify in his own defense. In the case after the defense rested, the defendant had advised the court that he wanted to testify but his attorney would not discuss the issue. The trial judge directed the defendant to consult with his attorney but then allowed the trial to resume with summations. A subsequent defense motion to set aside the verdict was denied upon the grounds that the request to reopen the proof had not been timely. The Appellate Court in a unanimous decision held that there was no way to tell whether the outcome would have been different had the defendant been allowed to testify. Based upon the fundamental nature of the defendant's right to be heard, the Appellate Court thus ordered a new trial.

People v. Delaney[5]—the Third Department ordered a new trial in a drug case where the trial court failed to submit an agency defense to the jury. The matter involved a sting operation where the investigator posed as the brother of an inmate who was friends with the defendant's brother. The investigator had asked the defendant to purchase heroin and to bring the drugs to the correctional facility. The Appellate Court held that there was a question of fact as to whether the defendant was acting as an extension of the buyer or supposed buyers and that therefore an agency charge was warranted.

The above three cases were reported in the *New York Law Journal* of October 27, 2003, pages 1-2.

Endnotes

1. 2003 N.Y. App. Div. LEXIS 10926 (3d Dep't Oct. 23, 2003).
2. 517 U.S. 806 (1996).
3. 97 N.Y.2d 341 (2001).
4. 2003 N.Y. App. Div. LEXIS 10925 (3d Dep't Oct. 23, 2003).
5. 2003 N.Y. App. Div. LEXIS 10919 (3d Dep't Oct. 23, 2003).

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