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New York Criminal Law Newsletter

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of the New York State Bar Association

Inside

NYSBA

Message from the Chair

Thanksgiving Day 2009 now is but a distant memory for most of you. The leftover turkey is long gone, the two pounds we gained are still present and the memories made will linger through our lives. However, our Section needs to celebrate a second day of giving thanks to those who have helped steer our Section in the right direction.

First, to Jean Walsh, my immediate predecessor, for her leadership to the Section and her tutelage which made the transition from her leadership to mine. Thanks to all other past chairs who have imparted their wisdom and the suggestions they have made to help improve the Section. I would like to express my gratitude to former Treasurer, Malvina Nathanson, whose dedication and devotion to the Section has been exemplary and whose exhaustive efforts and painstaking devotion to detail in her volunteer, non-advance track position kept the Section's finances in good order and the officers fully apprised of our financial health. To current officers, Vice Chair Marvin Schechter and Secretary Mark Dwyer, kudos for their willingness to meet after hours for long periods of time to keep us abreast of issues relevant to our Section and practice and for their willingness to also serve on subcommittees on these matters. Thanks also to Paul Cambria, our CLE Chair, for orchestrating a top-notch informative meeting in October, to Spiros Tsimbinos, for producing this outstanding journal, and finally, to David Cohen, Kevin Kerwin and Barb Mahan for their invaluable assistance in keeping us in touch with the State Bar, and facilitating my numerous requests to them. One last thank-you to the countless others who have called or enabled ideas and recommendations for the betterment of our Section.

In closing, I would truly enjoy reading your suggestions for CLE topics for future meetings. To that end, I submit the same question as was posted to the Executive Committee.

What CLE program topics are of the greatest interest to you?

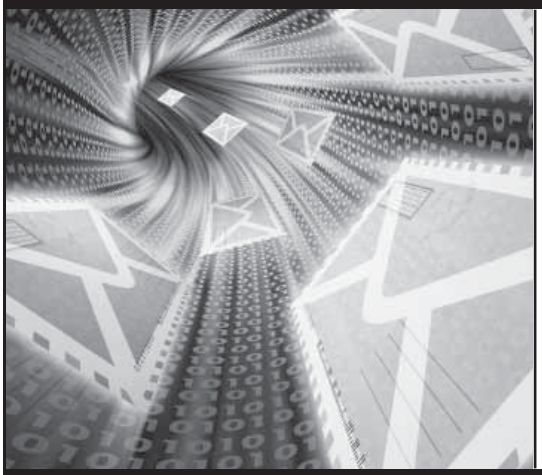
1. Motion practice
2. Trial preparation
3. Appellate practice
4. Court of Appeals and Appellate Division cases
5. Jury selection
6. Witness examination
7. Guantanamo Bay
8. Other

I encourage you to send your suggestions by e-mail or snail mail and we will then work to produce a program that comports with the majority of respondents' desires.

In closing, it is a goal of mine to insure our Section is kept abreast of developments in criminal law. In this regard, our Section has prepared an interesting CLE program on the future of forensics in the courtroom, which will be presented at our Annual Meeting in January. I hope to see many of you there.

James P. Subjack

Request for Articles



If you have written an article and would like to have it considered for publication in *New York Criminal Law Newsletter*, please send it to the Editor-in-Chief:

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
(718) 849-3599

Articles should be submittted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/CriminalLawNewsletter

Message from the Editor

With this issue, we begin our eighth year of publishing the *New York Criminal Law Newsletter*. We have tried over the years to make our issues both interesting and informative. We have attempted to cover a variety of issues affecting the practice of criminal law, and have endeavored to keep up to date with any new statutory or case law developments and to provide this information expeditiously to criminal law practitioners. I thank our members for their continued support, and continue to request articles for possible publication and comments regarding our publication.

In this issue, our feature articles focus on two recent decisions from the United States Supreme Court dealing with the right of confrontation and confessions. The first feature article is presented by Paul Shechtman, a leading criminal law practitioner and a frequent contributor to our *Newsletter*. The second feature article is written by Andrew Fine of the New York City Legal Aid Society, who is a first- time contributor to our publication. We thank both of these gentlemen for their informative articles, and I am sure that both articles will be of interest and practical value to our Section members. For a general overview of recent developments in the United States Supreme Court, we also provide a third feature article.

The New York Court of Appeals also commenced hearing cases in early September following its summer recess, and several significant cases in the criminal law area have been decided during the last few months. The United States Supreme Court also opened its new term on October 5, 2009, with newly appointed Justice Sonia Sotomayor assuming her place on the Court. Very few cases have been issued by the United States Supreme Court since the opening of the term, so it is still too early to assess Justice Sotomayor's impact on the Court and the direction in which the Court may be heading. We may be in a better position to make these determinations in the next one or two issues of our publication. As in the past, we will continue to highlight developments in the New York Court of Appeals and the United States Supreme Court as a major portion of our publication.

Also, as in the past, the New York State Bar Association and our Criminal Justice Section will be holding its Annual Meeting in New York City. This year the meeting will be held at the Hilton New York, and the luncheon and CLE program for the Section will be held on Thursday, January 28, 2009. Details regarding these events have been forwarded in separate mailings, and we hope that many of our Section members will be able to attend.

Spiros A. Tsimbinos

Corley v. United States—the United States Supreme Court Salvages the *Mallory* Rule

By Paul Shechtman

A remarkable chapter in criminal procedure came to a close on April 6, 2009, when the United States Supreme Court decided *Corley v. United States*.[1]

A.

The story begins in 1967, when Senator John L. McClellan, Democrat of Arkansas and chairman of the subcommittee on Criminal Laws and Procedures, convened hearings on the then-rising crime problem in America. McClellan had two principal targets: the landmark Warren Court decisions in *Mallory v. United States* (1957) and *Miranda v. Arizona* (1966).[2] *Mallory* held that if an arresting officer fails to bring a suspect before a magistrate for arraignment "without unnecessary delay" (as required by the Federal Rules of Criminal Procedure), a confession obtained during that delay is inadmissible. In *Mallory*, the Court suppressed a confession given seven hours after arrest where the police had questioned the suspect for several hours "within the vicinity of numerous committing magistrates." *Miranda*, of course, held that a person must be warned of his or her right to remain silent (and related rights) prior to custodial interrogation and that a confession obtained from an unwarned suspect is inadmissible. McClellan's view of the two cases was simple: "[t]he reason the police cannot stop crime is the Court's decision."[3]

The McClellan hearings led to the passage of the Omnibus Crime Control and Safe Streets Act of 1968. Title II of the Act sought to overrule *Miranda* and *Mallory* legislatively and return confession law to the "totality of the circumstances" voluntariness test.[4] In the ensuing debates, Senator McClellan urged his colleagues "to stand up and be counted on the questions: Do you favor turning the guilty loose, or are you going to stand for law and order and protect womanhood and…truly make our streets safe?"

The Act was passed almost unanimously. In the House, only 17 members voted against it, and in the Senate only four. One writer at the time described it as "a piece of demagoguery devised out of malevolence and enacted in hysteria."[5]

B.

Remarkably, in the first 30 years after its enactment, § 3501(a), the provision of the 1968 Act that was meant to overrule *Miranda*, was largely ignored. In his statement accompanying the signing of the Act, President Johnson called the provision "vague and ambiguous," which it was not, and requested the Attorney General "to assure that [the giving of *Miranda* warnings] will continue." As a result, § 3501(a) became, in the words of one commentator, "the statute that time forgot."[6]

That changed in 1999, with the Fourth Circuit's decision in *Dickerson v. United States*.[7] There, the Fourth Circuit *sua sponte* raised the applicability of § 3501(a) to the defendant's *Miranda* claim. When Attorney General Reno directed the local United States Attorney not to defend the constitutionality of the provision, the Circuit invited Professor Paul Cassel, a *Miranda* critic, to do so.[8] The rest of the *Dickerson* story is familiar: the Fourth Circuit found Dickerson's confession admissible, relying on § 3501(a)'s voluntariness test; the Supreme Court granted *certiorari*; the Justice Department persisted in its refusal to defend the statute (indeed it joined Dickerson's *certiorari* petition); Professor Cassell again appeared as § 3501's champion; and in a 7-to-2 decision the Court declared *Miranda* a "constitutional decision" and invalidated § 3501(a).[9]

"In Dickerson*, Justice Rehnquist 'summarily and nonchantantly' (the adverbs are Professor Kamisar's) dismissed his own prior decisions and rescued* Miranda*, ensuring that it will remain a fixture on the criminal justice landscape for the foreseeable future."*

The author of the *Dickerson* majority opinion was Chief Justice Rehnquist, in what Professor Yale Kamisar has characterized as one of the most "remarkable display[s] of nimble backpedaling" in Supreme Court history.[10] In 1969, as the Assistant Attorney General in charge of the Office of Legal Counsel, Rehnquist had sent a 19-page memorandum to then-Associate Deputy Attorney General John Dean (later of Watergate fame) sharply attacking the Warren Court's criminal procedure decisions. The memorandum directed its heaviest fire at *Miranda*. And once on the Court, Justice Rehnquist had written several opinions—most notably *Michigan v. Tucker* (upholding the admissibility of the testimony of a witness whose identity was the fruit of a *Miranda* violation) and *New York v. Quarles* (recognizing a public safety exception to *Miranda*)—that limited *Miranda*'s scope and seemed to relegate the decision to subconstitutional status.[11] In *Dickerson*, Justice Rehnquist "summarily and nonchantantly" (the adverbs are Professor Kamisar's) dismissed his own prior decisions and rescued *Miranda*, ensuring that it will remain a fixture on the criminal justice landscape for the foreseeable future.

C.

Corley completes the story. On September 17, 2003, at 8:00 a.m., Johnnie Corley was arrested in Norristown, Pennsylvania, on a local charge and taken to the nearby police precinct. At 11:45 a.m., he was transported to a hospital for treatment of a cut, which he received during his arrest. At 3:30 p.m., he was removed to the Philadelphia FBI office and told that he was a suspect in a bank robbery. Two hours later, he began confessing to that crime. Asked to "put it all in writing," Corley complained that he was tired and was held overnight. The next morning, at 10:30 a.m., he signed a written confession. At 1:30 p.m., 29 1/2 hours after his arrest, he was presented to a federal magistrate on the bank robbery charge.

Corley was convicted at a trial in which his confessions (oral and written) were admitted. In affirming the conviction, the Third Circuit held that § 3501 had abrogated *Mallory* and replaced it with a voluntariness test. The Supreme Court granted *certiorari*, and this time the government defended the statute. It argued that *Mallory*, on which Corley relied, was dead. By a 5-to-4 margin, the Supreme Court disagreed. Writing for the majority, Justice Souter read § 3501(c) to narrow *Mallory* slightly but not to overrule it. A confession made within six hours of arrest is admissible if voluntarily made. A confession made outside the six-hour window, however, must still be suppressed if the delay was unreasonable or unnecessary. Having interpreted the statute in that manner, the Court remanded Corley's case for the Third Circuit to determine if either his oral or written confession should have been admitted.

Justice Alito dissented, joined by Chief Justice Roberts and Justices Scalia and Thomas. The dissenters argued that Congress in 1968 had sought to "wipe away all…rules barring the admission of voluntary confessions," including the *Mallory* rule. Those words would have pleased Senator McClellan, but they did not carry the day.

* * *

And so, some 40 years after the passage of the 1968 Act, *Miranda* and *Mallory* are alive and well. After *Dickerson* and *Corley*, we now know that in the war on crime, Senator McClellan and his colleagues fired blanks.

Endnotes

1. *Corley v. United States*, 129 S. Ct. 1558 (2009).
2. *Mallory v. United States*, 354 U.S. 449 (1957); *Miranda v. Arizona*, 384 U.S. 436 (1966). Mallory built on *McNabb v. United States*, 318 U.S. 332 (1943), and the rule is often referred to as the *McNabb-Mallory* rule.
3. The story of the passage of the 1968 Act is told eloquently in R. Harris, The Fear of Crime, Praeger Publishers 1969.
4. As enacted, 18 U.S.C. 3501(a) provides in relevant part, that "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession…shall be admissible in evidence if it is voluntarily given." The provision directed at *Mallory*, 18 U.S.C. §3501(c) reads thusly:

   > In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention.

5. Harris, *supra* at 14.
6. P. Cassell, *The Statute That Time Forgot, 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 Iowa L. Rev. 175 (1999).
7. 166 F.3d 667 (1999).
8. Cassell became a federal judge in May 2002 and retired from the bench in November 2007.
9. *Dickerson v. United States*, 530 U.S. 428 (2000).
10. *Michigan v. Tucker*, 417 U.S. 433 (1974); *New York v. Quarles*, 467 U.S. 649 (1984).
11. *See* Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda's Critics—And Then Its Supporters*, in The Rehnquist Legacy, Cambridge University Press 2006.

Paul Shechtman is a partner in the firm of Stillman, Friedman & Shechtman, P.C. He is a leading criminal law practitioner who has lectured widely and has written numerous articles in the field of criminal law and procedure. He also serves as a professor at Columbia Law School, and has been a frequent contributor to our *Newsletter*.

The United States Supreme Court Extends *Crawford* Principles: *Melendez-Diaz v. Massachusetts*[1] and Its Impact on New York Law

By Andrew C. Fine

Introduction

Erasing more than two decades of Confrontation Clause precedent, the Supreme Court held in *Crawford v. Washington*[2] that the Confrontation Clause prohibits the introduction of "testimonial" hearsay statements against a criminal defendant unless the defendant is afforded an opportunity to cross-examine the declarant. What was dispositive under prior doctrine—whether the statement is admissible under a "firmly rooted" hearsay exception, or is otherwise deemed to possess "particularized guarantees of trustworthiness," *Ohio v. Roberts*[3]—no longer mattered. Justice Scalia authored the majority opinion; only two justices (Rehnquist and O'Connor) would have refused to overrule *Roberts*. *Crawford* dealt with statements made by the declarant to police, as did the Court's follow-up decision in *Davis v. Washington*,[4] in which the Court set more specific ground rules for determining when a statement made in response to police questioning is testimonial.

The implications of *Crawford*'s revolutionary new approach to the Confrontation Clause, of course, go far beyond the police-interrogation scenario. In the aftermath of *Crawford* and *Davis*, state and federal courts were sharply divided regarding under what circumstances, if any, forensic laboratory reports generated by or at the behest of the police or prosecution may be introduced under the Confrontation Clause, even when the expert responsible for overseeing the testing and preparing the report does not testify. In New York, the Court of Appeals addressed these issues in two decisions issued last year, *People v. Rawlins and Meekins*[5] (police fingerprint comparison report concluding that crime-scene fingerprint was defendant's held testimonial [*Rawlins*]; DNA lab report, which did not include a determination that crime-scene DNA matched defendant's, held to be non-testimonial [*Meekins*]), and *People v. Freycinet*[6] (autopsy report, redacted to eliminate opinions as to manner and cause of death, held non-testimonial).

On June 25, 2009, however, the United States Supreme Court held that three laboratory reports, affirming that the substance recovered from a car in which the defendant had been riding was cocaine, were testimonial hearsay, and hence that their admission against the defendant in a drug-sale case absent the testimony of the lab analysts violated the Confrontation Clause.[7] The Supreme Court's analytical approach differs markedly from, and is largely incompatible with, that employed by the Court of Appeals in *Rawlins* and *Freycinet*, and it has the potential to significantly affect trial practice, not only regarding forensic lab reports, but also involving the manner of presentation and the admissibility of many other kinds of documentary hearsay and expert testimony. The ensuing discussion will explore the likely impact of *Melendez-Diaz* on New York law.

"The Supreme Court's analytical approach differs markedly from, and is largely incompatible with, that employed by the Court of Appeals in Rawlins *and* Freycinet*, and it has the potential to significantly affect trial practice, not only regarding forensic lab reports, but also involving the manner of presentation and the admissibility of many other kinds of documentary hearsay and expert testimony."*

Crawford and *Davis*

The *Crawford* Court restored the Confrontation Clause to its historical roots. As background, the Court undertook a lengthy review of English common law, early state-court rulings, and debates prior to the adoption of the Sixth Amendment, in order to interpret the purpose underlying the Framers' enactment of the Clause. It concluded that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."[8] The use of such examinations outside the defendant's presence was widely criticized in the Colonies, as well as by English common law postdating the practice and early state-court decisions following the adoption of the Constitution, and the unfairness of permitting such evidence to be gathered by the authorities and presented in court without cross-examination was sharply criticized in early debates regarding the Constitution.[9]

Ultimately, the Court concluded that the Clause was not intended to prohibit the introduction of unreliable hearsay statements, but to guarantee that such statements, if made by those who knowingly "bear testimony,"[10] may not be admitted in the absence of cross-examination. Regarding "testimonial" hearsay statements, "the only

indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[11] Thus, the Court considerably broadened the Clause's reach regarding testimonial statements. On the other hand, the Court strongly intimated that the Clause should be narrowed regarding non-testimonial statements, suggesting, in dicta, that the introduction of non-testimonial hearsay statements would never violate the Clause.[12]

The *Crawford* Court found that the statement at issue there, made by defendant's wife to interrogating police, was testimonial "under any definition,"[13] and hence was inadmissible under the Clause because the wife did not testify and there was no opportunity to cross-examine her. Accordingly, the Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[14] The Court did declare that statements elicited by police interrogation,[15] guilty-plea allocutions, depositions, and, of course, any form of prior testimony qualify as testimonial. [16] It further recited, without passing judgment on their merits, three potential definitions of the term, which, the Court said, "all share a common nucleus and then define the Clause's coverage around it: 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably be expected to use prosecutorially;' 'extrajudicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;' 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[17]

Two years later in *Davis*, the Court provided clarification of the meaning of "testimonial hearsay," but only in the context of police interrogation. *Davis* involved accusatory statements made in a 911 call, a context in which appellate courts had nearly universally rejected arguments characterizing such accusations as testimonial. In a companion case, *Hammon v. Indiana*, however, the prosecution was allowed to introduce a wife's statements to police, who had responded to the scene of a reported domestic disturbance, that accused her husband of assaulting her, and lower courts were closely divided regarding the testimonial character of such crime-scene statements absent an opportunity to confront the declarant. Justice Scalia authored the Court's opinion.

The Court determined unanimously that the statements made during the early portion of the 911 call that were at issue in *Davis* were not testimonial,[18] but held by a vote of 8-1, with only Justice Thomas dissenting, that the statements to responding police by defendant's wife in *Hammon* were testimonial and hence inadmissible, since Ms. Hammon could not be cross-examined.[19] The Court also explicitly held that the introduction of non-testimonial hearsay does not violate the Confrontation Clause.[20]

Once again, the *Davis* Court declined to provide a comprehensive standard for determining whether hearsay is "testimonial," but did articulate such a standard for police "interrogation," focusing on whether the "primary purpose" of the police, considered objectively, is to "meet an ongoing emergency" (resulting in non-testimonial statements) or to "establish past events potentially relevant to later…prosecution" (resulting in testimonial statements).[21]

People v. Rawlins and Meekins, and *People v. Freycinet*

In *Rawlins*, latent fingerprints that had been lifted from two burglary sites were examined by a police detective who did not testify. The detective's report, introduced at trial in the detective's absence over defendant's Confrontation Clause objection, determined that those prints matched the defendant's right thumb print. By a vote of 6-1, the Court held in *Rawlins* that the fingerprint comparison report constituted testimonial hearsay under *Crawford*, and thus that its admission at trial in the absence of the specialist's testimony violated Rawlins' Confrontation Clause rights.[22] In the companion case, *Meekins*, the Court upheld the introduction of a DNA testing report conducted by a private laboratory at the behest of police, containing the results of tests conducted on samples taken from a rape kit, although the experts who conducted the tests were not called to the stand. The report did not include a comparison of that DNA with the defendant's.[23] The opinion was written by Judge Jones. Judge Read, concurring in result only, would have held the fingerprint comparison report in *Rawlins* to be non-testimonial.

The lengthy opinion discussed the circumstances under which business records prepared by or at the behest of law enforcement should be deemed to constitute testimonial hearsay under *Crawford*. It also contained criteria intended to apply more broadly to the analysis of whether a hearsay statement is testimonial, outside the context of police interrogation (which is governed by *Davis v. Washington*). Ultimately, the Court concluded that the most critical issue is whether a law enforcement "business record" directly accuses the defendant of a crime. Thus, the court states, "our test in each case must be to evaluate whether a statement is properly viewed as a surrogate for accusatory in-court testimony."[24] Such reports, the Court suggested, will likely be viewed as testimonial, but even more clearly, few others would be.

The majority rejected the prosecution's argument that all business records are non-testimonial.[25] The Court had arguably accomplished this already in *People v. Pacer*,[26] but its pronouncement here was unequivocal. In so doing, the Court explicitly rejected the Second Circuit's contrary holding in *United States v. Feliz*,[27] as well as decisions

from the Second Department and several New York trial courts. It relied on a difference between New York's business-record hearsay exception and that contained in the Federal Rules: in New York, unlike in the Federal system, the records of law enforcement agencies are eligible for admissibility.[28] The Court noted that the business-record exception to the hearsay rule is based primarily on the trustworthiness of such records, but recognized the "convenient danger of relying on a hearsay exception—particularly business records, and the breadth of that exception in New York—as a proxy for the statement's reliability when the real inquiry concerns whether the statement is 'testimonial' as that term is now understood after *Crawford and Davis*."[29]

However, taking a much narrower view of *Crawford*, the Court rejected as "too broad" the test dependent on the declarant's reasonable expectation that a statement will be used prosecutorially.[30] It determined that the result in *Davis*, allowing the introduction of a non-testifying domestic-violence complainant's accusations of her former boyfriend in a 911 call, would have been different had this standard been determinative, since she could well have expected her statements to be used against defendant at trial.

Concerning lab reports memorializing the results of scientific tests, the Court found the "insights" and "reasoning" underlying three pro-prosecution state high-court decisions to be "instructive,"[31] and relied heavily on them analytically.[32] *Crager* approved the admission of a report of DNA testing conducted by a government lab at the prosecution's request, in the absence of the lab technicians; *Geier*, like *Meekins*, upheld the introduction of a DNA report conducted by a private lab at police request, in the technicians' absence; and *Verde* affirmed the admission of a sworn certificate of chemical analysis by university lab specialists at the request of police, identifying a substance seized by police from the defendant as cocaine, in the tester's absence.

Regarding *Verde*, the Court of Appeals approved the Massachusetts high court's reasoning that the drug-test certificates at issue did not "concern the exercise of fallible human judgment," but "'merely [recorded, contemporaneously, the procedures taken and] state[d] the results of a well-recognized scientific test determining the composition and quantity of a substance.'"[33] Such "contemporaneous recordation of scientific protocol," the Court reasoned, "must be undertaken independent of any possible use at trial, for the independent purpose of ensuring that the test was properly administered."[34]

In *Crager*, the Court of Appeals noted, the technicians "could have reasonably expected that the…reports would be used in a later prosecution," but determined that any concern that the reports could be "prejudicial" "is allayed…because such notes 'represented the contemporaneous recordation' of the…results 'as [they were] actually performing those tasks' pursuant to industry-accrediting protocols."[35] Accordingly, "police or prosecutorial involvement in a case like *Crager* becomes a non-issue, and the focus shifts to declarant."[36] Adapting the "primary purpose" test used by *Davis* to evaluate whether statements made in response to police interrogation are testimonial, the Court of Appeals concluded that a technician's motivation and purpose are to "simply record[], contemporaneously, the administration of scientific protocol to reveal what is hidden from the naked eye"; the technician "ordinarily has no subjective interest in the test's outcome."[37] The Court also cited, with approval, the Ohio court's reasoning that the lab, though its mission was to "aid law enforcement," was "not itself an 'arm' of law enforcement in the sense that…[its] purpose [was] to obtain incriminating results."[38]

Judge Jones' opinion for the Court approvingly noted that in *Geier*, the California Supreme Court had similarly relied upon the "contemporaneous recordation" rationale; the DNA analysis, the Court of Appeals reasoned, was based on observations similar to those of a *Davis*-style declarant reporting an emergency.[39] "[T]he…raw data were not 'accusatory' (…in a Sixth Amendment sense) and the analyst did not 'bear witness' against defendant."[40] Rather, she generated the report "for the purpose of adhering to 'standardized scientific protocol.'"[41]

The Court of Appeals viewed as critical that in these three cases, though the courts emphasized the "objectivity of the scientific procedures at issue," none of the reports whose admission was approved was "directly accusatory, in the sense that they explicitly linked the defendants to the crimes."[42] It was "particularly noticeable in *Geier*" that although the laboratory analysis was conducted by nontestifying technicians, "the comparison to defendant's DNA was made by a testifying witness."[43] Though this distinction "is not an infallible touchstone," the Court wrote, "[i]n close cases,…the directness with which a particular statement points to the defendant as the offender is a factor to be considered."[44] However, the Court also said that "statements can often be testimonial where their tendency to inculpate the defendant is only indirect."[45]

Summarizing its overall approach, the Court stated that "[t]he question of testimoniality requires consideration of multiple factors, not all of equal import in every case."[46] Two of these, however, "play an especially important role in this determination: first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses the defendant of criminal wrongdoing."[47] These "interrelated touchstones" are informed by "the purpose of making or generating the statement, and the declarant's motive for doing so."[48]

Applying these principles to *Rawlins*, the Court concluded that the fingerprint reports at issue were testimonial because their maker, "a police officer, prepared his reports solely for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish defendant's identity."[49] Comparing latent prints recovered from a crime scene with fingerprints from a known individual "fit the classic definition of 'a weaker substitute for live testimony' at trial."[50] The technician was "'testifying' through his reports that, in his opinion, defendant is the same person who committed the burglaries," and his only purpose was "to ultimately apprehend a perpetrator."[51] Rebutting Judge Read's view that the report was business-related, rather than an effort "to nail down the truth about past criminal events," the Court noted that "it was the business of [the police technician] to establish (if possible) who committed the crime."[52] Though his conclusions could have exculpated Rawlins, the direct involvement of this law enforcement officer "'presents unique *potential*' for abuse."[53]

The Court ruled in *Meekins*, however, that the DNA reports at issue were non-testimonial.[54] That the testers "did not determine whether the data it collected matched [defendant] or any other suspect" was "critical[]" to this outcome.[55] The DNA test results, "standing alone," without any "'comparisons of the results' to any known DNA profiles," "shed no light on the guilt of the accused in the absence of an expert's opinion that the results genetically match a known sample."[56] Only the Medical Examiner's office determined a match with defendant, and defendant did not challenge the "Medical Examiner's role."[57] The testing procedures were "neither discretionary nor based on opinion," and the testers "only contemporaneously recorded the procedures employed and stated the results of a well-recognized scientific test."[58] Thus, the report "is not the kind of ex parte testimony the Confrontation Clause was designed to protect against."[59] Though the technicians "knew or had every reason to know ... that their findings could generate results that could later be used at trial," law enforcement's involvement was nevertheless "inconsequential" because it could not have influenced the outcome of the tests.[60] "Finally, the documents…were not directly accusatory; none of them compared the DNA profile they generated to defendant's."[61] In this regard, the Court noted that the document prepared by the Division of Criminal Justice Services notifying the ME's office that there was a DNA match was not a business record, and, because it "comes close to a direct accusation that defendant committed the crime,…is less clearly nontestimonial hearsay than the other documents at issue."[62] But "any error" in admitting that document was harmless.[63]

Significantly, the Court's discussion acknowledged the value of cross-examination regarding the testing methodology. The Court noted that errors could have been made "in the testing *procedure* itself."[64] However, any such errors were not the product of "testimony," the Court concluded.[65] Moreover, the witness through whom the reports were introduced could herself be effectively cross-examined regarding whether the proper testing protocols were followed.[66]

In *People v. Freycinet*,[67] the Court applied the rationale of *Rawlins* to unanimously reject the defendant's Confrontation Clause challenge to the introduction of an autopsy report, in the absence of the deputy medical examiner who performed the autopsy and wrote the report. The report was redacted to "eliminate [the doctor's] opinions as to the cause and manner of the victim's death."[68] Another doctor in the medical examiner's office testified to her opinions based on the facts in the absent pathologist's report.

First, the Court noted its prior holding in *People v. Washington*,[69] a *Rosario* case, that the medical examiner's office is "not a law enforcement agency" and the duties of the office are "independent of and not subject to the control of the office of the prosecutor."[70] The report was "very largely a contemporaneous, objective account of observable facts."[71] Though the doctor's finding characterizing the victim's injury as a "stab wound" was the product of an exercise of professional judgment, its significance to the case "derives almost entirely from [the absent doctor's] precise recording of his observations and measurements as they occurred."[72] Thus, it is "hard to imagine" that the report, as redacted, "could have been significantly affected by a pro-law-enforcement bias."[73] The opinion ends by relying on the report not "directly link[ing] the defendant to the crime," since it was concerned with "what happened to the victim, not with who killed her."[74] Thus, "[the absent doctor] was not defendant's 'accuser' in any but the most attenuated sense."[75]

Melendez-Diaz v. Massachusetts

Police searched a car in which Luis Melendez-Diaz was riding. They found a plastic bag containing 19 smaller bags hidden in the partition between the front and back seats, and ultimately charged Melendez-Diaz with selling cocaine.[76] The only proof that the bags recovered by police contained cocaine consisted of three "certificates of analysis" showing the results of forensic testing performed on the seized substances.[77] Without detailing the nature of the testing, the certificates merely reported the weight of the bags and asserted that they contained cocaine.[78] The certificates were sworn to by analysts at the State Laboratory Institute of Public Health,[79] which is not a law-enforcement agency.[80] The analysts were not called to testify. Melendez-Diaz's Confrontation Clause objection was overruled.

Under Massachusetts law, the state was permitted in drug cases to introduce a "certificate of analysis," prepared by a lab examiner, showing the results of forensic

analysis of seized substances.[81] The certificates are required by law to be sworn to.[82] Their purpose, as set forth by statute, was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance.[83]

On appeal, the Appeals Court of Massachusetts rejected the defendant's Confrontation Clause claim, on the authority of the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*,[84] which held such certificates are not testimonial, and that the authors of such certificates are accordingly not subject to confrontation.[85]

The Supreme Court granted *certiorari*, and on June 25, 2009, the Court reversed, holding, by a vote of 5-4, that the certificates were testimonial and inadmissible under the Confrontation Clause, since defendant had no opportunity to cross-examine the non-testifying analysts. Justice Scalia wrote the Court's opinion, joined by Justices Stevens, Souter, Ginsburg, and Thomas.[86]

Justice Thomas joined in the opinion but also filed a concurrence, adhering to his previously announced view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[87]

Justice Scalia's opinion begins by quoting the three potential formulations of "testimonial statements" set forth in *Crawford*. He notes that these categories "mention[] affidavits twice,"[88] and then continues, "The documents at issue here, while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'[89] They are incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[90] The majority concluded that the certificates were testimonial because (1) they qualified as affidavits, (2) they contained "the precise testimony the analysts would be expected to provide if called at trial," and (3) they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" [quoting from the third, broadest, *Crawford* formulation of "testimonial"].[91]

The remainder of Justice Scalia's opinion is saturated with analysis strongly suggesting that most such reports are testimonial if made by, or at the behest of, law enforcement, and that many other forms of documentary hearsay are testimonial, if they are prepared with the reasonable expectation of prosecutorial use. The decision has the potential to significantly alter criminal procedure by requiring the prosecutor, at least upon demand, to produce not only drug analysts, but also, *inter alia*, medical examiners, rape-kit analysts, DNA analysts, and even some clerks, in court or forfeit the admission of their reports. And it unequivocally rejects the shibboleth that "business records" and "public records" are necessarily non-testimonial, a viewpoint that had become widespread based on language wrenched out of context from *Crawford*, although one not shared by the New York Court of Appeals.[92]

Perhaps most significantly regarding New York practice, the Supreme Court explicitly rejected the premise that whether a statement is "accusatory" in that it directly implicates the defendant in wrongdoing is important to a resolution of its testimonial status. Instead, the relevant issue is whether the statement relates to facts necessary for a conviction:

> Respondent first argues that the analysts are not subject to confrontation because they are not "accusatory" witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband.…This finds no support in the text of the Sixth Amendment or in our case law.
>
> The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses *against him*." (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses "against him," the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor." U.S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.[93]

Regarding "business records" and "public records," the Court makes it clear that when such records are prepared for litigation purposes, they do not qualify under the "business records" exception under the common law.[94] The opinion specifically notes that "the results of a coroner's inquest"—i.e., autopsy reports—were not exempt from confrontation under early American common

law.[95] Of course, this suggests strongly that autopsy reports are testimonial and hence inadmissible without the testimony of the examining pathologist[96]—a view that had been almost uniformly rejected by lower courts after *Crawford* (except regarding the pathologist's ultimate opinion as to cause of death). Since *Melendez-Diaz*, two appellate courts have already so held.[97]

More broadly, it is now pellucid that whether a document qualifies under the current "business record" or "public record" hearsay exceptions is irrelevant to its testimonial character. When *Crawford* stated that business records were generally exempt from confrontation, that had nothing to do with their admissibility under hearsay exceptions:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.[98]

The Supreme Court noted that a clerk's statement "attesting to the fact that the clerk had searched for a particular relevant record and failed to find it," though obviously an "official record," was subject to confrontation at common law, and hence, by necessary implication, remains so.[99] This overrules, *de facto*, a number of circuit decisions that had held that a "certification of nonexistence of record," offered to prove that a deportee had never been given permission to return to the United States, is non-testimonial and may be introduced in prosecutions for illegal re-entry without the testimony of the official who issued it.[100]

These aspects of *Melendez-Diaz* demonstrate that its ramifications go far beyond the subject of lab reports, and affect all forms of documentary hearsay. Under its reasoning, if a "business record," "official record," or "public record" is prepared in the expectation that it will be used prosecutorially, the document is testimonial in nature and the defendant is entitled to cross-examine its maker.

The Court held that a declarant may be a "witness" for Confrontation Clause purposes regardless of whether he or she recalls events related to the commission of the crime, as in the paradigmatic case of Sir Walter Raleigh, or is making "near-contemporaneous observations," as lab analysts do.[101] The opinion notes that in *Davis (Hammon)*, the Court had held the declarant's statements to be testimonial even though they were "near-contemporaneous."[102] Relatedly, *Melendez-Diaz* roundly rejects the notion that reporting the results of a forensic test is somehow less testimonial because such testing is "neutral" and "scientific," in contrast with "testimony recounting historical events, which is 'prone to distortion or manipulation.'"[103] The Court explained that "this argument is little more than an invitation to return to our overruled decision in *Roberts*,"[104] which focused on a statement's reliability rather than its testimonial character.

The Court further suggested that the Confrontation Clause requires that chain-of-custody evidence be introduced through witnesses rather than documents.[105] Though the footnote acknowledged that since gaps in the chain of custody generally go to the weight of the evidence only, prosecutors need not call "anyone whose testimony may be relevant in establishing the chain of custody," it went on to say that "what testimony *is* introduced must (if the defendant objects) be introduced live."[106]

The Supreme Court majority peremptorily rejected the dissent's view that its opinion "sweeps away an accepted rule governing the admission of scientific evidence" that has been "established for at least 90 years,"[107] pointing out that nearly all of those decisions either relied on, or were decided under, the same standard as *Ohio v. Roberts*,[108] which was overruled in *Crawford*.[109] Further, Justice Scalia notes, though some early 20th-century state-court opinions denied confrontation regarding certificates of a substance's alcohol content, other state courts concluded otherwise—which suggests that reports of breath-test and blood-test results are testimonial.[110] Since the decision, two state appeals courts have already agreed.[111] The opinion, however, does suggest that "documents prepared in the regular course of equipment maintenance"—e.g., breathalyzer-operability reports—"may well qualify as nontestimonial records."[112]

On an even broader scale, Justice Scalia eviscerated the dissenters' radical notion that the Confrontation Clause only covers the "conventional 'witness'—meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant's guilt."[113] The majority pointed out, *inter alia*, that "a police officer's investigative report describing the crime scene" would not be subject to confrontation under this standard, a proposition that it found ludicrous.[114] And it further noted that the dissenters would exempt from confrontation "all expert witnesses—a hardly 'unconventional' class of witnesses."[115]

Importantly, the Court reaffirmed, more directly than it had in *Davis v. Washington*, that it is irrelevant that the report was "not provided in response to interrogation."[116] This affects all aspects of *Crawford* analysis, not merely that involving documentary hearsay. "Respondent and the dissent cite no authority, and we are aware of none,

holding that a person who volunteers his testimony is any less a 'witness against' the defendant…than one who is responding to interrogation."[117]

It is also apparent now that a forensic lab report prepared for prosecution need not be generated by a law-enforcement official or agency in order to qualify as testimonial. The reports at issue were prepared by analysts working for the State Laboratory Institute, a division of the Massachusetts Department of Health—not a law enforcement agency.[118] What was relevant to the Court in this regard was that the report was prepared "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,"[119] not the identity of the analyst's employer. The dissenters, in contrast, would not require confrontation of declarants who would not qualify as "adversarial government officials responsible for investigating and prosecuting crime."[120]

A defendant's ability to subpoena the analyst is irrelevant under the Clause, the Court held. "Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[121] However, "notice and demand" statutes, requiring the prosecution to notify defense counsel of its intention to use an analyst's report as evidence, and then obliging counsel to object, within a specified period of time, to the admission of the report absent the analyst's appearance, in order to avoid forfeiting the confrontation right, are not barred by the Confrontation Clause.[122]

Notwithstanding the irrelevance of "reliability" under *Crawford*, the Court, in dicta, continued by taking issue with the notion that "neutral scientific testing is as neutral or as reliable as respondent suggests."[123] The opinion cites studies critical of police laboratory techniques, refers to "documented cases of fraud and error involving the use of forensic evidence," and points out that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well."[124] It notes reliability problems that have been uncovered regarding "common forensic tests such as latent fingerprint analysis, pattern / impression analysis, and toolmark and firearms analysis."[125] And it further declares that there may be no viable alternative to cross-examination as a means of challenging autopsies and breathalyzer test results.[126] This, of course, strongly suggests that such reports are testimonial. (Regarding autopsy reports, *see also* p. 14, *infra*) In *Melendez-Diaz*, moreover, the certificates merely contained the test result (cocaine was found), but not what tests were performed or "whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed."[127]

Finally, the Court declined to "relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process'":

> It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.[128]

The Court also disputed the premise that this requirement will be onerous, concluding that most defendants who go to trial will not insist on producing the analyst, particularly in drug cases, and that "there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial."[129]

How Is *Melendez-Diaz* Likely to Affect New York Practice?

Melendez-Diaz rejected virtually all of the arguments that were relied on by the Court of Appeals in *Meekins* and *Freycinet* to justify its viewpoint that many types of forensic lab reports and other scientific reports, including ones generated in anticipation of prosecution, are non-testimonial. Indeed, all three of the out-of-state decisions relied on so heavily by the Court of Appeals have now been overruled by the Supreme Court, either directly or indirectly. *Commonwealth v. Verde* provided the basis for the Massachusetts intermediate appellate court's now-reversed disposition of the *Melendez-Diaz* case itself.[130] In *Barba v. California*,[131] the Supreme Court vacated an unpublished intermediate appellate California decision directly applying *People v. Geier* to an identical DNA fact pattern, and remanded for reconsideration in light of *Melendez-Diaz*.[132] The Supreme Court similarly vacated the Ohio Supreme Court's decision in *State v. Crager*.[133]

The Supreme Court denied *certiorari* in *Meekins* itself. 129 S. Ct. 2856 (June 29, 2009). However, the challenged report in *Meekins* did not contain the conclusion that the data matched the defendant's DNA, and the Court of Appeals itself acknowledged that a DCJS report informing the medical examiner's office of a DNA match may have been testimonial.[134] Moreover, the Court of Appeals concluded that even if the introduction of the DCJS report was improper, it would have been harmless, because the prosecution relied on a testifying expert "to prove the match."[135]

The centerpiece of the Court of Appeals' analysis in *Meekins* and *Freycinet* is its premise that perhaps the most

critical determinant of a statement's "testimoniality" is whether it is "accusatory," in that it directly implicates the defendant in wrongdoing. The Supreme Court has now held the Court of Appeals' reasoning to be antithetical to the very language of the Confrontation Clause, which guarantees the accused's right to be confronted with the witnesses "against" him.[136] Any witness who provides facts helpful to the prosecution in proving an element of the crime, the Court ruled, is a witness "against" him for the purpose of the Clause.

Moreover, in flatly rejecting the viewpoint that an analyst is somehow immunized from confrontation because she is making "near-contemporaneous observations," the Supreme Court directly repudiated another major underpinning of the analytical foundation of *Meekins* and *Freycinet*. Time and again, the *Meekins* Court relied on the virtually contemporaneous observations of the technicians, both in its discussion of the out-of-state authority it deemed persuasive (e.g., regarding *Crager*, DNA report "represented the 'contemporaneous recordation' of the…results 'as [they were] actually performing those tasks' pursuant to industry-accrediting protocols,"[137] and in its analysis of the facts of *Meekins* (e.g., the technicians "only contemporaneously recorded the procedures employed").[138]

Are the ultimate determinations in *Rawlins, Meekins,* and / or *Freycinet* still valid after *Melendez-Diaz*? Certainly, *Rawlins* is still correct. The fingerprint comparison report was a formal police report that was prepared for litigation. Indeed, in *Melendez-Diaz*, the Supreme Court specifically called attention to the value of confrontation regarding "latent fingerprint analysis."[139]

But *Meekins* is likely doomed, as is *Freycinet*. Although the DNA test results in *Meekins* did not report a match, the document's "non-accusatory" status is utterly irrelevant under *Melendez-Diaz*. The *Meekins* Court's rejection of the significance of the declarant's reasonable expectation of prosecutorial use is no longer valid; that standard was relied on heavily by the Court in *Melendez-Diaz*. The Court of Appeals further relied on the report's "near-contemporaneous" nature, its scientific validity, and its generation by a non-law enforcement agency in holding the report to be non-testimonial. The Supreme Court has now rejected each of these *ratio decidendi*. Under the Supreme Court's reasoning, such a document would be testimonial since it was generated at the behest of law enforcement, was prepared in anticipation of a criminal prosecution, and was offered to assist in proving an essential element of the charged crime.[140]

Freycinet surely has a short shelf-life as well. As in *Meekins*, the Court found it critical that the report in question (here, an autopsy report) did not directly link the defendant to the crime, and hence that the pathologist "was not defendant's 'accuser' in any but the most attenuated sense."[141] As noted, whether a document is "accusatory" in nature is no longer relevant, as long as the document is offered to prove facts helpful to the prosecution, which the report in *Freycinet* did. Similarly, the Court's reliance on the report being "very largely a contemporaneous, objective account of observable facts," and its having been prepared by a declarant who was employed by a non-law enforcement agency, is incompatible with *Melendez-Diaz*. Moreover, as previously noted,[142] the Supreme Court referred specifically to autopsy reports in its opinion, in a manner strongly suggesting that it views them as testimonial. Under the now-applicable standard, since the report in *Freycinet* fulfilled an obvious testimonial purpose and was prepared with the reasonable expectation of prosecutorial use, it was testimonial.

What about "formality?" While it is still an important part of the Supreme Court's analysis, it seems clear that a document need not be sworn to qualify as testimonial. Even Justice Thomas, who believes that a statement must be "formalized" to be testimonial, also recognizes that a statement need not be an "affidavit" to qualify, giving confessions as an example.[143] Moreover, in *Davis v. Washington* (*Hammon v. Indiana*),[144] the Court's eight-justice majority rejected Justice Thomas' view that a domestic-violence complainant's statement to responding police was insufficiently "formalized" to be testimonial: "Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." An "affidavit" or otherwise stringent formality prerequisite would create a bizarre incentive to devise documents that are less rigorous and scientific in nature, and could lead to the outlandish outcome that if the lab analyst scribbled down her findings in a note pad instead of subscribing to them in an affidavit or other equally "formalized" document, the writing would be non-testimonial.[145]

Since *Melendez-Diaz* was decided, an appellate court has already held that a DNA report was "testimonial" even though it was not in "affidavit" form, noting that the *Melendez-Diaz* Court went beyond the lab report's "affidavit" status to address whether the report was "functionally identical to live, in-court testimony" and whether it was "made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial."[146]

The degree of a document's formality should be even less decisive in New York, since the Court of Appeals previously recognized, in *People v. Goldstein*,[147] the danger of overemphasizing this factor in evaluating "testimoniality." In *Goldstein*, a prosecution psychiatrist, called to rebut an insanity defense, recounted the contents of her interviews with non-testifying declarants who had previously encountered the defendant. In furtherance of its holding that the interviews were testimonial, the Court noted that in *Crawford*, the statement held inadmissible "was unsworn and used colloquial phrasing," and stated,

"[r]esponses to questions asked in interviews that were part of the prosecution's trial preparation are 'formal' in much the same sense as 'depositions' and other materials that the Supreme Court identified [in *Crawford*] as testimonial."[148] The same can certainly be said of forensic reports that detail the declarant's evaluation of the results of scientific tests, undertaken with knowledge of their potential prosecutorial value.

Can the prosecution do an end run around *Melendez-Diaz* by not introducing the report itself, but instead calling an expert other than the analyst to disclose the contents of the report? *Melendez-Diaz* does not address this issue directly, but its rationale seems incompatible with this sort of circumvention. The Supreme Court repeatedly stressed the necessity of cross-examining the analysts responsible for conducting the testing and preparing the report, in order to "test[] analysts' honesty, proficiency, and methodology."[149] Of course, allowing a testifying expert to provide a conduit for the non-testifying analyst's hearsay statements achieves the same purpose as introducing the report alone, and is no substitute for cross-examination of the analyst.[150]

Does it matter if the testifying expert offers his or her own opinion, but relies on the unintroduced report prepared by the non-testifying analyst, and reveals the contents of the report to the jury? Logically, the answer certainly should be no; the cross-examiner will be unable to ask questions that test either the professional background or the techniques and procedures utilized by the non-testifying analyst, and hence cannot possibly conduct meaningful cross-examination of the testifying expert.

Since *Melendez-Diaz*, a California appeals court accepted this principle in *People v. Dungo*.[151] In this murder case, the autopsy was performed by a pathologist who was later fired due to his questionable competence. For the expressed purpose of circumventing an opportunity to cross-examine him, the prosecution, without attempting to introduce the report, instead offered the testimony of another pathologist from the same office, who had not been present at the autopsy. That pathologist testified to his opinions, based entirely on the absent expert's report. The appellate court concluded that the unintroduced report was testimonial, and that allowance of the testimony of the substitute analyst violated the defendant's Confrontation Clause rights. Borrowing from *Melendez-Diaz*, the court declared that "[t]he prosecution's failure to call [the analyst who conducted the autopsy and prepared the report] as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment or from testing his honesty, proficiency, and methodology."[152]

Prior to *Crawford*, the view was widely held that an expert's testimony disclosing a non-testifying expert's findings was not hearsay, because it was offered merely as a foundation for the testifying witness' opinion.[153] *Crawford* on its face does not contradict these holdings, since it only applies to statements offered for their truth. However, post-*Melendez-Diaz*, the *Dungo* court rejected the prosecution's argument that the substitute pathologist's testimony disclosing the contents of the report was non-testimonial "because the information in [the] report was not offered for its truth, but only as a basis for [the substitute pathologist's] opinion."[154] The court concluded quite simply that the jury could not evaluate the substitute's opinion without accepting "the accuracy and substantive content of [the] report." It approvingly quoted a commentator's view that "to pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand."[155]

"Based on logic and precedent, New York courts should continue to recognize that the Confrontation Clause cannot be circumvented by the expedient of offering the out-of-court statements of non-testifying experts as the basis for the testifying expert's opinion."

Before *Melendez-Diaz*, the New York Court of Appeals squarely rejected a similar "non-hearsay" contention in *Goldstein*. The prosecution argued that their psychiatrist's recitation of the contents of her interviews with non-testifying declarants was not hearsay, because it was admitted merely to provide the basis of the psychiatrist's opinion. In dismissing this claim, the Court declared, "[w]e do not see how the jury could use the statements of the [non-testifying] interviewees to evaluate [the prosecution psychiatrist's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true."[156] Accordingly, the statements "were offered for their truth, and are hearsay."[157]

Based on logic and precedent, New York courts should continue to recognize that the Confrontation Clause cannot be circumvented by the expedient of offering the out-of-court statements of non-testifying experts as the basis for the testifying expert's opinion. Moreover, since, in this scenario, effective cross-examination of the basis of the expert's opinion is impossible,[158] the Confrontation Clause should forbid not merely the introduction of the "basis" testimony, but the expert's opinion as well.

Can the prosecutor escape the Confrontation Clause problem by having the expert merely recite the sources

she relied on, without relating the information they provided? The courts may be reluctant to reject such an argument, since otherwise an expert could no longer rely on out-of-court statements by non-testifying declarants if they are testimonial in nature. However, it is settled in New York that "an expert who relies on necessary facts within personal knowledge which are not [otherwise] contained on the record is required to testify to those facts prior to rendering the opinion."[159] Moreover, if an opinion is based on an unconstitutional foundation, it is difficult to justify its admissibility. Camouflaging the sources of the opinion serves only to make the cross-examiner's job more difficult, and deprives the jury of the opportunity to meaningfully evaluate its reliability:

> If the prosecution expert offers an opinion that is based upon testimonial hearsay, the jury will be denied the opportunity to properly assess the expert's opinion and the defendant will be faced with a choice between two options, either of which raises serious constitutional concerns. The defendant can elect to explore the basis of the expert's opinion on cross-examination, in which case the testimonial hearsay will be revealed to the jury, or the defendant can leave the opinion's basis unchallenged, in which case the jury has no means of assessing its proper weight.[160]

Conclusion

Melendez-Diaz should expand the reach of the Confrontation Clause dramatically regarding forensic lab reports and many other forms of documentary hearsay. Regarding New York precedent, the opinion fatally undermines the rationale for the Court of Appeals' holdings last year in *Meekins* and *Freycinet*, and likely will render most forensic lab reports inadmissible unless the analyst takes the stand. Together with the Court of Appeals' 2005 opinion in *People v. Goldstein*, it will also make it considerably more difficult for prosecutors to justify introducing expert testimony that conveys, or is based on, the opinions of non-testifying declarants that are testimonial in nature. More broadly, the Supreme Court's strong emphasis on the importance of the declarant's reasonable expectation of prosecutorial use, and its recognition that a statement need not be "accusatorial" or the product of "interrogation" to be testimonial, could broaden the Clause's reach regarding other forms of hearsay as well.

Endnotes

1. 129 S. Ct. 2527 (decided June, 25, 2009).
2. 541 U.S. 36 (2004).
3. 448 U.S. 56, 65-66 (1980).
4. 547 U.S. 813 (2006).
5. 10 N.Y.3d 136 (2008).
6. 11 N.Y.3d 38 (2008).
7. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527.
8. 541 U.S. at 50.
9. *Id.* at 44-50.
10. 541 U.S. at 51.
11. *Id.* at 68-69.
12. 541 U.S. at 51, 60, 68.
13. *Id.* at 60.
14. *Id.* at 68.
15. The Court made it clear that for this purpose "interrogation" should be interpreted "in its colloquial, rather than any technical legal, sense," 541 U.S. at 53 n. 4, and explicitly directed courts not to apply the standard governing "custodial interrogations" for *Miranda* purposes ("any words or actions on the part of police… that the police should know are reasonably likely to elicit an incriminating response" [*Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980)]).
16. *Id.*
17. *Id.* at 51-52.
18. 547 U.S. at 826-28.
19. *Id.* at 829-832.
20. *Id.* at 823-825.
21. *Id.* at 822.
22. *People v. Rawlins*, 10 N.Y.3d 136, 157 (2008). A second detective through whom this report was offered testified to his independent assessment of the sets of fingerprints, concluding that they matched the defendant's prints. A third detective testified to the match as well, as a defense witness. Relying on their testimony, the Court of Appeals held that the erroneous introduction of the report by the non-testifying detective, in violation of the Confrontation Clause, constituted harmless error.
23. *People v. Rawlins (Meekins)*, 10 N.Y.3d at 158-160.
24. 10 N.Y.3d at 151.
25. 10 N.Y.3d at 149-151.
26. 6 N.Y.3d 504 (2006).
27. 467 F.3d 227 (2006), see 10 N.Y.3d at 149-150 and n.8.
28. 10 N.Y.3d at 149-150.
29. *Id.* at 150.
30. 10 N.Y.3d at 151.
31. 10 N.Y.3d at 153.
32. *State v. Crager*, 879 N.E.2d 745 (Ohio 2007), *People v. Geier*, 161 P.3d 104 (Cal. 2007), and *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005). 10 N.Y.3d at 153-156.
33. 10 N.Y.3d at 154.
34. *Id.*
35. 10 N.Y.3d at 153-154.
36. 10 N.Y.3d at 153.
37. 10 N.Y.3d at 154.
38. *Id.* at 153.
39. 10 N.Y.3d at 155-156.
40. *Id.* at 155-156.
41. *Id.* at 156 (citation omitted).
42. 10 N.Y.3d at 156.
43. *Id.*

44. *Id.* (emphasis supplied).
45. *Id.*
46. *Id.* at 156.
47. *Id.*
48. *Id.*
49. *Id.* at 157.
50. *Id.*, quoting from *Davis*, 547 U.S. at 828.
51. 10 N.Y.3d at 157.
52. *Id.* at 157 n. 14.
53. *Id.* (quoting from *Crawford*; emphasis in original).
54. 10 N.Y.3d at 158-160.
55. *Id.* at 159.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 159-160.
61. *Id.* at 160 (emphasis supplied).
62. *Id.* at 160.
63. *Id.*
64. *Id.* at 159 (emphasis in original).
65. *Id.*
66. *Id.*
67. 11 N.Y.3d 38 (2008).
68. *Id.* at 40.
69. 86 N.Y.2d 189 (1995).
70. 11 N.Y.3d at 42. The Court's focus in *Freycinet* on whether the medical examiner's office is an arm of the prosecution, and its approving reference in *Rawlins* to the *Crager* court's focus on the DNA lab not being an "arm of law enforcement," is difficult to reconcile with its treatment of a similar *Crawford*–related issue in *People v. Goldstein*, 6 N.Y.3d 119 (2005), *cert. denied*, 547 U.S. 1159 (2006). In *Goldstein*, the prosecution hired a private psychiatrist to rebut defendant's insanity defense. The Court held that the psychiatrist's recitation of out-of-court statements by non-testifying declarants, which she relied on in support of her opinion, violated Goldstein's Confrontation Clause rights. In rejecting the prosecution's reliance on the psychiatrist not being a "government officer," the Court reasoned that "[t]he Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee." 6 N.Y.3d at 129.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. 129 S. Ct. at 2530.
77. *Id.* at 2531.
78. *Id.*
79. *Id.* at 2531.
80. *Id.* at 2552 (Kennedy, J., dissenting).
81. 129 S. Ct. at 2531-32.
82. *Id.* at 2531.
83. *Id.*
84. 827 N.E.2d 701 (Mass. 2005).
85. *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (unpublished), 2007 WL 2189152, *4, n.3 (2007).
86. Though unusual, this is the same coalition responsible for *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Like *Melendez-Diaz*, *Apprendi* relied on an originalist pro-defense analysis of a right guaranteed by the Sixth Amendment (in *Apprendi*, the right to a jury trial).
87. 129 S. Ct. at 2543.
88. *Id.* at 2532.
89. Black's Law Dictionary 62 (8th ed. 2004).
90. *Quoting from Crawford*, 541 U.S. 36, at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828))." 129 S. Ct. at 2532.
91. *Id.* at 2531-32.
92. *See People v. Pacer*, 6 N.Y.3d 504 (2006); *People v. Rawlins*, 10 N.Y.3d at 149-151.
93. 129 S. Ct. at 2533-34 (emphasis as written).
94. 129 S. Ct. at 2538-2540.
95. *Id.* at 2538.
96. *Accord*, Harry Sandick and Justin Mendelsohn, *Divided Supreme Court Extends Reach of Confrontation Clause*, July 20, 2009 N.Y.L.J., p. 4, col. 1.
97. *State v. Lockyear*, ___ S.E.2d ___, 2009 WL 2753029, at *8-*10 (N.C., decided Aug. 28, 2009) (autopsy report not admitted, but contents recited into record by testifying pathologist; pathologist's testimony held inadmissible); *People v. Dungo*, ___ Cal.Rptr.3d ___, 2009 WL 2596892 (Cal. App., 3d Dist., decided Aug. 24, 2009) (autopsy report not admitted, but formed the basis of testifying pathologist's opinion; testimony held inadmissible).
98. 129 S. Ct. 2539-2540.
99. 129 S. Ct. at 2539.
100. *See United States v. Burgos*, 539 F.3d 641 (7th Cir. 2008); *United States v. Cervantes-Flores*, 421 F.3d 825, 830-34 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005). *See also Tabaka v. District of Columbia*, 976 A.2d 173 (D.C. App. 2009) (holds testimonial, based on *Melendez-Diaz*, DMV document certifying that its records revealed no evidence that defendant had been issued a learner's permit). Before *Melendez-Diaz*, the New York Court of Appeals held that an affidavit prepared for litigation by a DMV official, averring that the agency's license revocation and mailing procedures regarding defendant had been satisfied, which was offered to prove that defendant knew that his license had been revoked, was testimonial. *People v. Pacer*, 6 N.Y.3d 504 (2006). Though Pacer's focus on the document's accusatorial status is questionable in light of *Melendez-Diaz*, its outcome obviously remains valid.
101. *Id.* at 2535.
102. *Id.*
103. 129 S. Ct. at 2536.
104. *Id.*
105. 129 S. Ct. at 2532 n.1. *Accord*, Jessica Smith, *Melendez-Diaz and the Admissibility of Forensic Laboratory Reports and Chemical Analyst Affidavits in North Carolina Post-Crawford*, published July 2, 2009, online in [University of] North Carolina Criminal Law Blog, available at http://docs.google.com/gview?a=v&q=cache:Q-15TlytgYJ:www.sog.unc.edu/programs/crimlaw/menlendez_diaz.pdf+%22jessica+smith%22+melendez-diaz&hl=en&gl=us ("The majority opinion indicates that chain of custody information is testimonial," citing fn.1). *But see* Bennett L. Gershman, *Confronting Scientific Reports Under Crawford V. Washington*, 29 Pace L. Rev. 479, 497-98 (2009) (interpreting fn.1 to allow prosecution to present chain of custody other than through live witnesses).

106. *Id.* (emphasis as written).

107. (Kennedy, J., dissenting, 129 S. Ct. at 2543).

108. 448 U.S. 56.

109. 129 S. Ct. at 2533.

110. *Id.*

111. *Grant v. Commonwealth*, ___ S.E.2d ___, 2009 WL 2742377 (Va. App., decided Sept. 1, 2009) ("certificate of blood alcohol analysis," memorializing results of a breath test, are testimonial and inadmissible in the absence of the machine's operator); *People v. Lopez*, ___ Cal.Rptr.3d ___, 2009 WL 2712530 (Cal. App., 4th Dist., decided Aug. 31, 2009) (blood test report, memorializing results of examination of blood drawn from defendant, are testimonial and thus inadmissible in the analyst's absence). Earlier trial-level decisions from New York courts regarding this issue are mixed. *Compare People v. Kanhai*, 8 Misc.3d 447 (Crim. Ct., Queens Co. 2005) (document containing breath-test results non-testimonial), *with People v. Fisher*, 9 Misc.2d 1121(A), 2005 WL 2780686 (City Court, Rochester 2005) (testimonial). Before *Melendez-Diaz*, the Appellate Division, Third Department, agreed with this result. *People v. Rogers*, 8 A.D.3d 888 (2004).

112. 129 S. Ct. at 2532 n.1. Breathalyzer-operability reports have been viewed by New York trial-level courts as non-testimonial. *E.g., Green v. DeMarco*, 11 Misc.3d 451 (Sup. Ct., Monroe Co. 2005).

113. Kennedy, J., dissenting, 129 S. Ct. at 2551.

114. *Id.* at 2535.

115. *Id.* I doubt that many people speculated that the very applicability of the Confrontation Clause to non-percipient declarants was at stake in *Melendez-Diaz*. It was universally believed that post-*Crawford*, all testimonial statements were subject to confrontation, and that the issue here was whether the lab report was testimonial. It seems preposterous, but it could be asked whether the dissenters believe that cross-examination is constitutionally required when "non-conventional witnesses" testify in court.

116. *Id.* at 2535.

117. *Id.*

118. *See id.* at 2531; Kennedy, J., dissenting, *id.* at 2552. Justice Kennedy noted that "[t]here is no indication that the analysts here—who work for the State Laboratory Institute, a division of the Massachusetts Department of Public Health—were adversarial to petitioner. Nor is there any evidence that adversarial officials played a role in formulating the analysts' certificates." 129 S. Ct. at 2552.

119. *Id.* at 2532.

120. Kennedy, J., dissenting, 129 S. Ct. at 2552, quoting from *Comment, Toward A Definition of 'Testimonial': How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093, 1118 (2008).

121. *Id.* at 2540. On June 29, 2009, the Court granted a criminal defendant's *cert.* petition and ordered briefing and argument regarding this very question. *Briscoe v. Virginia*, 129 S. Ct. 2858. Briscoe is represented by the godfather of *Crawford*, Prof. Richard D. Friedman of Michigan Law School. In the decision below, the Virginia Supreme Court held that a statute permitting the prosecution to introduce a forensic lab report without calling the analyst, but giving the defendant the right to call the analyst and treat him as hostile, provided an adequate substitute for confrontation. *See Magruder v. Commonwealth*, 657 S.E.2d 113 (Va. 2008). Given the United States Supreme Court's ringing condemnation of the proposed alternative of requiring the defendant to present the analyst that is quoted above, it is puzzling that the Court granted plenary review rather than merely vacating and remanding for reconsideration in light of *Melendez-Diaz*. One commentator for Scotusblog has speculated that the Melendez-Diaz dissenters may have voted to grant review (four votes is sufficient) in the hope that newly appointed Justice Sotomayor, who replaced Justice Souter, will vote to overrule *Melendez-Diaz*. Lyle Denniston, *Analysis: Is Melendez-Diaz Already Endangered*?, *available at* http://www.scotusblog.com/wp/new-lab-report-case-granted/. To me, it is exceedingly unlikely that the new Justice would vote to overturn such newly minted precedent. Moreover, in *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004), then-Circuit Judge Sotomayor's opinion for the court suggested her acceptance of the broadest of *Crawford*'s three proposed definitions of "testimonial hearsay": "declarant's awareness or expectation that his or her testimony may later be used at trial." *Id.* at 228. *Briscoe* will be argued during the Court's upcoming term.

122. *Id.* at 2541.

123. 129 S. Ct. at 2536.

124. *Id.* at 2537.

125. *Id.* at 2538. Though these types of police and scientific reports were discussed in dicta, they likely reflect the Court's viewpoint that all of these documents, as long as they contain evidence relevant to proving an element of a crime and are made in anticipation of prosecutorial use, are also testimonial.

126. *Id.* at 2536 and n. 5.

127. *Id.* at 2537.

128. 129 S. Ct. at 2540.

129. *Id.* at 2540-42.

130. *See Commonwealth v. Melendez-Diaz*, 2007 WL 2189152 at *4 n. 3, 870 N.E.2d 676 (Mass. App. 2007) (unpublished), *rev'd*, 129 S. Ct. 2527 (2009).

131. 129 S. Ct. 2857 (June 29, 2009).

132. *See People v. Barba*, 2007 WL 4125230 (Cal. App., 2d Dist., decided Nov. 21, 2007) (unpublished). The Supreme Court denied *cert.* in *Geier* itself. 129 S. Ct. 2856 (June 29, 2009). In *Geier*, however, the California Supreme Court decided alternatively that even if the introduction of the DNA report violated the Confrontation Clause, any error was harmless beyond a reasonable doubt. 161 P.3d at 140-141. That made a Supreme Court remand pointless, and likely explains the denial.

133. *Crager v. Ohio*, 129 S. Ct. 2856 (June 29, 2009).

134. 10 N.Y.3d at 160.

135. *Id.*

136. *Accord*, Paul Shechtman, *Not Many Fireworks During a Workmanlike Term*, Aug. 31, 2009 N.Y.L.J., pp. S12-S13. "The analysis in *Melendez-Diaz* calls into question the thoughtful opinions of the Court of Appeals in *Freycinet* and *Rawlins*.…*Freycinet*…and *Rawlins*…relied principally on the fact that the analysts whose forensic reports were received into evidence were not 'accusatory' witnesses. But in *Melendez-Diaz*, Justice Antonin Scalia rejected the notion that the Confrontation Clause distinguishes between accusatory and non-accusatory witnesses."

137. 10 N.Y.3d at 153-54.

138. 10 N.Y.3d at 159; *see also Freycinet*, 11 N.Y.3d at 42 (autopsy report was "very largely a contemporaneous, objective account of observable facts").

139. 129 S. Ct. at 2538.

140. One commentator has concluded that notwithstanding *Melendez-Diaz*, *Meekins* is probably still viable. *See* Gershman, *supra* at 18 n. 8, 29 Pace L. Rev. at 497. However, he based this view solely on his agreement with *Meekins'* underlying analysis, without assessing its compatibility with *Melendez-Diaz'* reasoning.

141. 11 N.Y.3d at 42.

142. *See ante* at 15, 21.

143. *Id.* at 2543 (Thomas, J., concurring).

144. 547 U.S. at 830 n.5.

145. The hearsay rule would not provide an adequate substitute. If the "note pad" method became routine lab practice, it could obtain acceptance as a business record; even if it did not, its introduction would be mere evidentiary error.

146. *Cuadro-Fernandez v. State*, ___ S.W.3d ___, 2009 WL 2647890 (Tex. App., Dallas, decided Aug. 28, 2009).

147. 6 N.Y.3d 119 (2005), *cert. denied*, 547 U.S. 1159 (2006).

148. 6 N.Y.3d at 129.

149. 129 S. Ct. at 2538.

150. *See State v. Lockyear*, 2009 WL 2753029 at *8-*10; *People v. Goldstein*, 6 N.Y.3d at 126-127.

151. ___ Cal.Rptr.3d ___, 2009 WL 2596892 (Ct. App., 3rd Dist., decided Aug. 24, 2009).

152. 2009 WL 2596892, at *9.

153. *E.g., United States v. Farley*, 92 F.3d 1122, 1125 (10th Cir. 1993); *Boone v. Moore*, 980 F.2d 539, 543 (8th Cir. 1992); *People v. Nieves*, 738 N.E.2d 1277, 1284 (Ill. 2000).

154. *Id.* at *8.

155. *Id.* at *9, quoting from Jennifer Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & Pol'y 791, 822 (2007). *Accord*, Julie A. Seaman, *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Geo. L.J. 827, 847-848 (2008), *quoted in Dungo*, 2009 WL 2596892, at *9. "[I]f the [expert's] opinion is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to 'demonstrate the underlying information [is] incorrect or unreliable'" (citation omitted).

156. 6 N.Y.3d at 128.

157. *Id.*

158. "The expert witness is not meaningfully subject to cross-examination, because the basis of his opinion cannot be tested according to the constitutionally prescribed procedure for assessing testimonial hearsay: cross-examination of the hearsay declarant." Seaman, *supra*, 96 Geo. L.J. at 880.

159. *People v. Jones*, 73 N.Y.2d 427, 430 (1989).

160. Seaman, *supra*, 96 Geo. L.J. at 879; *Accord*, Shechtman, *People v. Goldstein and Rule 703*, January 13, 2006 N.Y.L. J., at 4, col. 4 ("Nor is the problem solved if the expert is allowed to give her opinion without stating its basis in inadmissible information. That 'solution' disadvantages the jury, which must somehow evaluate the expert's testimony without knowing the information on which she relied. A bare opinion offers a jury little help. Moreover, it often puts defense counsel in an untenable position: expose the inadmissible hearsay or forgo effective cross-examination.").

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Recent Developments in the United States Supreme Court

By Spiros A. Tsimbinos

With the recent appointment of Justice Sonia Sotomayor and the opening of the Court's new term, it appears appropriate at this time to review some of the recent trends which have emerged from the United States Supreme Court and to attempt to predict some of the developments which may occur in the near future.

The Appointment of Justice Sotomayor and Her Possible Impact on the Court

It is widely expected that in most matters, Justice Sotomayor will join the liberal grouping of Judges, and that, therefore, the 5-4 balance which has existed in many closely divided matters will not be dramatically altered. Justice Sotomayor, however, may prove to be more conservative than many people have expected, especially in the area of criminal law. While on the Second Circuit Court of Appeals, she voted in favor of the prosecution 92% of the time, and she also served for several years as a prosecutor in the New York County District Attorney's Office. She clearly is not expected in the criminal law area to be as pro-defense as Justice Souter, whom she replaced. Justice Souter, for the last two years, had the highest pro-defense voting record of all of the Justices, and voted on behalf of the defense almost 75% of the time.

"Because of his critical vote, Justice Kennedy has been described as the most important Judge in the nation, and his influential position continues unabated in the coming years."

The Continuation of a Divided Court and Many 5-4 Decisions

It is still widely expected that the Court will continue to be sharply divided on many important matters, and that the presence of many 5-4 or 6-3 decisions will continue. In the most recent past term, the Court divided 5-4 or 6-3 in almost half of the 79 decisions rendered. This was an increase from one-third, which existed in the previous three years. The Court's volume of approximately 75 to 80 decisions per year will continue without any major change. Although it was initially expected that during the past term the Court's volume would reach 100 decisions, this development did not occur, and the number of significant decisions issued this year is almost the same as last year.

The Continuation of Justice Anthony Kennedy as the Key Swing Vote

As in the past several years, Justice Kennedy continues to be the critical swing vote. In the past term, he voted in the majority 92% of the time, going with the conservative block on eleven occasions, and voting with the liberal group five times. Because of his critical vote, Justice Kennedy has been described as the most important Judge in the nation, and his influential position continues unabated in the coming years.

The Significant Average Age Decline in the Personnel of the Court

With the appointment of Justice Sotomayor, who is 55 years of age, and the recent appointments of Chief Justice Roberts and Justice Alito, who are both in their 50s, the average age of the Court's personnel has dropped dramatically. The oldest Justice on the Court is currently Justice Stevens, who is 89 years of age. Justices Ginsburg, Breyer, Kennedy and Scalia are in their 70s. The current trend for new appointments appears to be to select Justices in their 40s or 50s, who will serve for long periods of time. With the expected retirement of either Justices Stevens or Ginsburg in the next few years, the appointment of new Justices will continue to reduce the average age of the Court, and it will slowly begin to reflect the views of a younger generation.

A Trend Toward Deciding on Narrow Grounds and a Bid for Greater Consensus

Chief Judge Roberts has made a great effort to achieve greater consensus among the Court. He has attempted to do this by having cases decided on the narrowest ground, and to begin to make changes with respect to prior decisions in incremental steps. Thus, in the recent Voting Rights Act case, *Northwest Austin Municipal Utility District #1 v. Holder*, 129 S. Ct. 2504 (2009), the Court determined the issue on a narrow procedural ground rather than on broad constitutional principles which were expected. The goal of Chief Justice Roberts to reach a total consensus among the members of the Court, however, still appears almost impossible to reach, with the number of unanimous decisions issued last year still just under 33%.

Criminal Law

Although the Court ruled in favor of the prosecution in more cases than it did for the defense, defense lawyers

actually had a pretty good year, since the Court rendered some major decisions favorable to the defense. The most significant decision for the defense bar was the case of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), where by a 5-4 decision, the Court extended its *Crawford* ruling and held that crime laboratory reports may not be used against criminal defendants at trial unless the analysts responsible for creating them provide live testimony. It appears that Justice Scalia, who has become an advocate for the right of confrontation, was largely responsible for the initiation of the *Crawford* principles, as well as the *Apprendi* rulings, regarding sentencing. Thus, interestingly, Justice Scalia, who is viewed as a member of the conservative bloc, has been quite liberal on these types of criminal law issues, and he can no longer be categorized as one of the most pro-prosecution Justices on the Court. It appears that this slot has now passed to Justice Alito, who in the last term appears to have the highest pro-prosecution rating in criminal cases. It also appears that in recent years, the Supreme Court is giving renewed attention to criminal cases, since in the last term approximately 36% of its decisions involved criminal law issues.

Environmental Cases

During the last term, environmentalists suffered their worst term ever, losing all five cases which involved environmental issues, and which were decided by the Court.

Affirmative Action

The Court continues to wrestle with the issue of affirmative action, and remains sharply divided in these types of cases. The most important case this term in this area was *Ricci v. Destefano*, 129 S. Ct. 2658 (2009) involving a lawsuit by Connecticut firefighters. The Court held that the City could not disregard promotion tests based upon its belief that results could have disparate impact on minorities. The decision was a 5-4 result, and the Court appears to be moving toward the principle that the effort to insure diversity should not lead to discrimination, and that equal should mean equal.

"The recent appointment of Justice Sotomayor refocused the attention of the nation on the importance of the United States Supreme Court."

Increasing Diversity

With the addition of a second female member of the Court, as well as the Court's first Hispanic, the Court has achieved a greater measure of diversity. The Court currently is composed of seven males and two females. The seven males include six whites and one black, and the two females include a Hispanic woman. In terms of religious backgrounds, it appears, however, that the Court may be becoming less diverse. It currently has six members of the Catholic religion, one Protestant and two Jewish members. Since Justice Stevens, who is 89, is the only Protestant member of the Court, it will be interesting to note whether his impending retirement will lead to a call for a "Protestant" appointment in order to maintain the diversity of the Court. This could actually become a strong argument, since more than a majority of the country is still of the Protestant religion.

Conclusion

The recent appointment of Justice Sotomayor refocused the attention of the nation on the importance of the United States Supreme Court. With the prospects of new decisions on controversial issues coming from a still largely divided Court, and the distinct possibility of additional personnel changes in the Court in the near future, it is important for legal scholars to continue to keep a sharp eye on developments within the United States Supreme Court.

Official Citations to Criminal Law Decisions from the New York Court of Appeals for the 2008-2009 Term

(Covering Decisions from September 4, 2008 to September 4, 2009)

Case	Citation	Issue Involved
People v. Shemesh	11 N.Y.3d 774 (2008)	Right to Testify Before Grand Jury
Defillippo v. Rooney	11 N.Y.3d 775 (2008)	Prosecutorial Misconduct
People v. Kozlowski *People v. Swartz*	11 N.Y.3d 223 (2008)	Fair Trial
Elmira v. Doe	11 N.Y.3d 799 (2008)	CPL 160.50 Sealing Requirement
People v. Jamie Smith	11 N.Y.3d 797 (2008)	Sex Offender Registration Act
People v. Lucas	11 N.Y.3d 218 (2008)	Murder in the First Degree
People v. Jenkins	11 N.Y.3d 282 (2008)	Specific Performance of a Plea Agreement
People v. Jones	11 N.Y.3d 822 (2008)	Batson Challenges
People v. Ennis	11 N.Y.3d 403 (2008)	Ineffective Assistance of Counsel
People v. Naradzay	11 N.Y.3d 460 (2008)	Sufficiency of Evidence
People v. Macshane	11 N.Y.3d 841 (2008)	Batson Issue
People v. Johnson	11 N.Y.3d 416 (2008)	Sex Offender Classification
People v. Hawkins *People v. Eduardo*	11 N.Y.3d 484 (2008)	Sufficiency of Evidence
People v. Jean-Baptiste	11 N.Y.3d 539 (2008)	Sufficiency of Evidence
People v. George	11 N.Y.3d 848 (2008)	Sufficiency of Evidence
People v. Castellano	11 N.Y.3d 850 (2008)	Sufficiency of Evidence
Rivera v. Firetog	11 N.Y.3d 501 (2008)	Double Jeopardy
People v. Giles	11 N.Y.3d 495 (2008)	Evidence of Prior Uncharged Crimes
People v. Diggins	11 N.Y.3d 518 (2008)	Predicate Felony Statement
People v. Buss	11 N.Y.3d 553 (2008)	Sex Offender Registration
People v. James	11 N.Y.3d 886 (2008)	Submission of Lesser Included Offense
People v. Collado	11 N.Y.3d 888 (2008)	Post-Release Supervision
People v. Mills	11 N.Y.3d 527 (2008)	Resentencing-For Certain Drug Offenders
People v. Ford	11 N.Y.3d 875 (2008)	Robbery in the First Degree
People v. Silvestry	11 N.Y.3d 902 (2009)	Search and Seizure
People v. Romeo	12 N.Y.3d 51 (2009)	Speedy Trial
People v. Taveras	12 N.Y.3d 21 (2009)	Imposition of Consecutive Sentences
People v. Rouse	12 N.Y.3d 728 (2009)	Speedy Trial Pursuant to CPL 30.30
People v. Williams	12 N.Y.3d 726 (2009)	Impeachment of Defendant's Testimony

People v. Ryan	12 N.Y.3d 28 (2009)	Search and Seizure
People ex rel. Gill v. Greene	12 N.Y.3d 1 (2009)	Consecutive Sentences
People v. Dorm	12 N.Y.3d 16 (2009)	Admission of Defendant's Prior Conduct
People v. Small	12 N.Y.3d 732 (2009)	Molineux Evidence
People v. Maye	12 N.Y.3d 731 (2009)	Search of Body Cavity
People v. Guerrero	12 N.Y.3d 45 (2009)	Mandatory Surcharge
People v. Moye	12 N.Y.3d 743 (2009)	Unsworn Witness
People v. Knox et al.	12 N.Y.3d 60 (2009)	Registration of Sex Offenders
People v. Elysee	12 N.Y.3d 100 (2009)	Admissibility of Blood Samples
People v. Quinones	12 N.Y.3d 116 (2009)	Constitutionality of Persistent Felony Law
People v. Coreno	12 N.Y.3d (2009)	Preservation of Issue
People v. Bauman	12 N.Y.3d 152 (2009)	Duplicitous Indictment
People v. Kalin	12 N.Y.3d 225 (2009)	Waiver of Misdemeanor Information
People v. Fuentes	12 N.Y.3d 259 (2009)	Brady Violation
People v. France	12 N.Y.3d 730 (2009)	Probable Cause for Arrest
People v. Contreras	12 N.Y.3d 268 (2009)	Brady Issue
People v. Weaver	12 N.Y.3d 433 (2009)	Use of GPS Device Needs Warrant
In re Elvin G.	12 N.Y.3d 834(2009)	Suppression Hearing Required
People v. Mattocks	12 N.Y.3d 326 (2009)	Altered Metro Card
People v. Goldstein	12 N.Y.3d 295 (2009)	Failure to Heed Parker Warnings
People v. Leeson	12 N.Y.3d 823 (2009)	Use of Prior Uncharged Crimes
People v. Borrell	12 N.Y.3d 365 (2009)	Ineffective Assistance of Counsel
People v. Alaeman	12 N.Y.3d 806 (2009)	Allen Charge
People v. Boyd	12 N.Y.3d 390 (2009)	Post-Release Supervision
People v. Sevencan	12 N.Y.3d 388 (2009)	Dismissal of Leave to Appeal
People v. Davis	13 N.Y.3d 17 (2009)	Misdemeanor Hearing
People v. Marte	12 N.Y.3d 583 (2009)	Identification Procedures
People v. Bailey	13 N.Y.3d 67 (2009)	Forgery Charges
People v. Cano	12 N.Y.3d 876 (2009)	Attempt to Commit a Crime
People v. Mingo & *People v. Balic*	12 N.Y.3d 563 (2009)	Sex Offender Registry Act
People v. Decker	13 N.Y.3d 12 (2009)	Speedy Trial
People v. McGrantham	12 N.Y.3d 892 (2009)	Criminally Negligent Homicide
People v. Almetor	12 N.Y.3d 591 (2009)	Joint Bench and Jury Trial
People v. Buchanan	13 N.Y.3d 1 (2009)	Use of Stun Belt During Trial
People v. Gomez	12 N.Y.3d 854 (2009)	Search of Vehicle

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 July 2, 2009 to October 15, 2009.

Conduct of Defense Attorney

***People v. McDaniel*, decided September 1, 2009 (N.Y.L.J., September 2, 2009, p. 32)**

In a unanimous decision, the Court of Appeals held that a review of the entire record revealed that the Attorney provided meaningful representation to the Defendant when viewed in the totality of the circumstances, and that therefore the Defendant was not denied a fair trial. The Court found that defense counsel's decision not to seek a dismissal of robbery in the first degree for insufficient evidence was justified, in view of the fact that a dismissal of that charge would in all likelihood not have been granted. The Court further found that defense counsel's conduct was not egregious, and that no prejudicial error which would have affected the fairness or result of the trial had occurred. Under these circumstances, the Order of the Appellate Division which upheld the Defendant's conviction was affirmed.

Court Not Required to Offer Lesser Sentence

***People v. Maliszewski*, decided September 3, 2009 (N.Y.L.J., September 4, 2009, p. 36)**

In a unanimous decision, the Court of Appeals held that a sentencing court was not required to offer the Defendant the option of a lesser sentence where plea withdrawal can put the Defendant in the position he was in prior to admitting guilt. In the case at bar, the Defendant had pleaded guilty to burglary and was sentenced pursuant to a plea agreement that the Appellate Division eventually found was illegal. Back in the trial court, he was offered the chance to withdraw his plea. He chose not to do so and instead argued that the sentencing court should have offered him the option of a lesser sentence. The Court of Appeals, in rendering its decision, relied upon its leading cases of *People v. Selikoff*, 35 N.Y. 2d 227 (1974), and *People v. McConnell*, 49 N.Y. 2d 340 (1980).

Constructive Possession of Contraband

***People v. Mayo*, decided September 15, 2009 (N.Y.L.J., September 16, 2009, p. 43)**

In a unanimous decision, the New York Court of Appeals held that the evidence which was presented to the grand jury was legally sufficient to establish that the Defendant constructively possessed 96 glassine bags containing crack cocaine recovered from underneath clothing which was on his apartment's bedroom floor. In the case at bar, the police had unexpectedly arrived at the apartment while the Defendant was getting dressed in the bedroom. Forty-seven small glassine bags containing crack cocaine were in plain view on the bedroom dresser. The Defendant was in close proximity to both the drugs which were found on the dresser and subsequently on the floor. The Court of Appeals held that the grand jury could have reasonably inferred, and that a *prima facie* case was established, and that the Defendant exercised dominion and control over all the contraband in question. The Order of the Appellate Division which upheld the Defendant's conviction was therefore affirmed.

Lack of Preservation

***People v. Kolupa*, decided September 22, 2009 (N.Y.L.J., September 23, 2009, p. 40)**

In a unanimous decision, the New York Court of Appeals affirmed a determination of the Appellate Division, finding that the Defendant failed to preserve his argument that the People introduced insufficient evidence to corroborate the child victim's testimony. The Court found that defense counsel had not renewed a motion to dismiss for insufficiency at the close of his proof, nor did he specifically argue that there was insufficient corroboration of the victim's statements. As a result, the issue was not reviewable by the New York Court of Appeals.

Recent United States Supreme Court Decisions Dealing With Criminal Law and Recent Supreme Court News

The United States Supreme Court opened its new term on Monday, October 5, with newly appointed Justice Sonia Sotomayor sitting on her first set of major cases. Since the opening of the term, the Court has rendered a few decisions in the area of criminal law. These cases are summarized below, as well as some decisions which were rendered in late June, and which we were unable to be included in our Fall issue.

Yeager v. United States, 129 U.S. 2360 (June 18, 2009)

In a 6-3 decision, the United States Supreme Court held that double jeopardy principles prevented the retrial of a Defendant who had been indicted for securities and wire fraud, and several counts of insider trading. The jury had acquitted the Defendant on various fraud counts, but was unable to reach a verdict on the insider trading counts. The Court of Appeals held that in the case at bar, based upon the evidence which was presented, there was an apparent inconsistency between the acquittals and the failure to return a verdict on the insider trading counts. Under these circumstances, the prosecution's efforts to retry the Defendant on the counts upon which the jury was unable to reach a verdict constituted double jeopardy. The Court specifically noted that the double jeopardy clause precludes the government from re-litigating any issue that was necessarily decided by the jury's acquittal in a prior trial. The majority opinion concluded that if the possession of insider information is a critical issue of ultimate fact of all of the charges against the Defendant, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element. The majority opinion was delivered by Justice Stevens and was joined in by Chief Justice Roberts and Justices Souter, Ginsburg, Breyer and Kennedy. Justice Scalia filed the dissenting opinion in which Justices Thomas and Alito joined.

Davis v. Georgia, 129 U.S. __ (August 17, 2009)

In a death penalty case which was handled by the Supreme Court during its summer recess on an emergency basis, the Court, in a 6-2 ruling, ordered a federal judge to consider the innocence claims of a condemned Georgia prisoner. The Court ruled that a hearing should be held to determine whether evidence that could not have been obtained at the time of trial clearly establishes the innocence of the defendant. The Defendant had argued that since his trial, which convicted him of murder, 7 of the 9 key witnesses recanted, and new evidence has indicated that the main witness against him was the actual shooter. The lower federal courts had ruled that because the Defendant could point to no constitutional defects, he could not present his new evidence. Writing for the majority, Justice Stevens stated that the substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Justices Scalia and Thomas dissented. The dissent argued that the Court's decision was an extraordinary step which had not been taken in nearly 50 years. The majority's action was also characterized as a "fool's errand" and a confusing exercise that served no purpose except to delay the State's execution of a lawful criminal judgment.

Getsy v. Ohio, 129 U.S. __ (August 19, 2009)

In a 5-4 decision, which was the first one participated in by newly appointed Justice Sotomayor, the United States Supreme Court rejected a last-minute appeal to stop the pending execution of the Defendant in Ohio. The Defendant had been convicted in 1995 of a murder-for-hire killing. The other participants in the crime had not received death sentences, and attorneys for the Defendant had argued that he should be spared the death penalty. In a two-line order, the Court's majority rejected the Defendant's plea for a stay of execution, and the execution proceeded the very next day. The majority decision consisted of Chief Justice Roberts and Justices Alito, Kennedy, Thomas and Scalia. The four dissenting Justices who had supported the granting of the stay of execution consisted of Justices Stevens, Ginsburg, Breyer and Sotomayor.

United States Supreme Court Hears Oral Argument in Animal Cruelty Case

During October 2009, the United States Supreme Court heard oral argument in a case which involved the issue of whether a federal statute that makes it a crime to depict animal cruelty violates the First Amendment. The case in question is *United States v. Stevens*, and the questioning during the oral argument indicated that the Court was inclined to either strike down or narrowly construe the federal statute in question. It is expected that a decision from the Court will be forthcoming shortly, and we will report the ultimate decision for the benefit of our readers.

United States Supreme Court to Determine Whether Second Amendment Also Applies to States

In one of its first actions during the new term, the Supreme Court announced that it had agreed to hear an appeal from firearm owners in Chicago on the issue of whether the Second Amendment's guarantee of an indi-

vidual's right to guns, as announced in the *Heller* case, applies to state and local regulations as well as to federal law. The case known as *McDonald v. City of Chicago* is expected to be heard sometime in January or February, and a decision could be forthcoming by May or June. The Court's determination in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) was a 5-4 vote, and Court observers are viewing with interest the position that will be taken by Justice Sotomayor, who recently joined the Court and who had previously, as a Circuit Court of Appeals Judge, determined that the Second Amendment does not cover state regulation. This case will be one of the important criminal law decisions in the 2009-2010 term.

Constitutionality of Life in Prison Without Parole for Juvenile Offenders Who Have Committed Non–Homicide Crimes Argued Before Court in November

The cases of *Graham v. Florida* and *Sullivan v. Florida*, which involve the issue of whether imprisonment for life without parole for non-homicide crimes imposed upon juvenile offenders violates the prohibition against cruel and unusual punishment was argued before the United States Supreme Court on November 9. These cases were the subject of a feature article in our Fall 2009 issue, and we will publish a follow-up article once the Supreme Court determines the matter. It is expected that a decision will be forthcoming by the end of the year 2009, and hopefully we will be able to discuss the new developments in our Spring 2010 issue.

Court to Determine Possible Modification of *Miranda* Ruling

Also scheduled on the Supreme Court's docket for the new term is a gun-possession case emanating from Florida which involved a situation where a police form used to advise defendants of their Miranda rights had a defect in its wording, since it did not specifically advise defendants that they had a right to have a lawyer present during questioning. The ultimate outcome of the case could affect law enforcement agencies around the country, and could also jeopardize hundreds of other prosecutions. The case known as *Florida v. Powell* is expected to be argued sometime in January or February, with a decision forthcoming before the Court's summer recess. We will keep our readers advised of developments.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from July 2, 2009 to October 15, 2009.

People v. Lettley (N.Y.L.J., July 14, 2009, pp. 4 and 37)

In a unanimous decision, the Appellate Division, Third Department, dismissed a count of placing a false bomb or hazardous substance in the first degree, and substituted a lesser included count of placing a false bomb or hazardous substance in the second degree. In the case at bar, the Defendant had originally been convicted of mailing envelopes containing powder to several individuals and organizations. The Court found that the destination of his letters were not public buildings or public places within the meaning of the first degree charge, and that as a result, the conviction had to be reduced to the second degree category, where no requirement of a public place or building was listed as an essential element. As a result, the matter was remitted to the sentencing court for a redetermination as to the Defendant's sentence based upon the reduced charge, which carries a maximum term of four years.

People v. Hall (N.Y.L.J., July 20, 2009, pp. 1, 3 and 25)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial, on the grounds that a prosecutor had improperly removed a black juror from the panel in violation of *Batson* principles. The Court held that a new trial was necessary because the prosecutor exercised her peremptory challenges in a discriminatory manner, and that the non-racial reasons expressed by the prosecutor for the removal were pretextual. The prosecutor gave as her reasons that the black potential juror was in a "helping profession," which was similar to the Defendant's, and that she was about the same age as the Defendant's mother, who was an alibi witness. The Court noted that other jurors, who were also in helping professions or were of similar age and who were not black, were not challenged by the prosecution. Under these circumstances, the Appellate Panel unanimously concluded that the equal protection clause of the Constitution was violated and that a new trial was required.

People v. Oxley (N.Y.L.J., August 4, 2009, pp. 1, 2 and 39)

In a unanimous decision, the Appellate Division, Third Department, reversed a murder conviction and ordered a new trial on the grounds that the Defendant had been deprived of a fair trial when the trial judge prevented testimony on behalf of the Defendant which implicated a third party in the killing which was the subject of the indictment. The Defendant had attempted to introduce evidence that someone else killed the victim in the case at bar. The trial judge held a hearing outside of the presence of the jurors, but ruled that the proposed evidence was of a hearsay nature and would not be allowed to be heard by the jury. The Appellate Division, however, found that the evidence involving a third individual was compelling enough that the Defendant should have been allowed to present it to the jury to establish a viable alternative to the Defendant as the actual perpetrator of the killing. The Court noted that a witness had stated that she saw the third individual threatening the victim at the scene of the crime only a few hours before the murder. The Appellate Panel thus concluded that the trial judge had abused his discretion in denying the Defendant the opportunity to present his evidence which was not merely speculative but specific, and adequately connected the third individual to the victim, to the point that the jury could have considered that someone else besides the Defendant was the guilty party. Under these circumstances a new trial was required.

People v. Simmons (N.Y.L.J., August 5, 2009, pp. 1, 2 and 39)

In a 3-2 decision, the Appellate Division, First Department, upheld a Defendant's conviction, even though it found that the trial judge, in an answer to a jury inquiry, may have indicated that he himself had reached a definitive conclusion on the critical issue of intent. The three-judge majority found that the Judge's instructions must be viewed as a whole, and in doing so, the overall jury charge was sufficient to apprise the jury of the proper legal principles to be applied. The majority determined that trial judges must be afforded a degree of latitude in answering jury inquiries, and that a degree of imperfection in the framing of spur-of-the-moment, off-the-cuff answers, is not sufficient to vitiate the overall effect of a proper charge. The majority opinion was joined in by Justices Saxe, Catterson and McGuire. Issuing a vigorous dissent were Justices Moskowitz and Acosta. The dissent argued that the cumulative effect of the trial court's inept remarks mirrored the prosecution's version of what transpired, and clearly could have influenced the jury in rendering its own conclusion regarding the Defendant's intent. The dissent also pointed out that the trial court failed to give a curative instruction immediately after the defense objected to his improper remark. Given the sharp division in the instant matter, it appears likely that the case will eventually be decided by the New York Court of Appeals.

People v. Calderon (N.Y.L.J., August 17, 2009, pp. 17 and 18)

In a unanimous decision, the Appellate Division, First Department, affirmed a Defendant's conviction for manslaughter in the second degree. In doing so, the Court rejected the Defendant's claim that his defense counsel was ineffective because of his failure to request that the Court charge the jury on criminally negligent homicide as a lesser included offense.

The Court concluded that defense counsel's decision could have been based upon trial strategy, and that the overall review of the record indicated that there was no basis to conclude that counsel provided ineffective assistance.

People v. Clark (N.Y.L.J., August 18, 2009, pp. 1, 6 and 37)

In a unanimous decision, the Appellate Division, Third Department, upheld a Defendant's conviction for criminal contempt based upon a violation of an order of protection. The Defendant had made several phone calls to his ex-girlfriend, which the prosecution claimed were inherently menacing, even though the Defendant did not make any explicit threats during the calls. The Appellate Panel held that while the Defendant did not expressly threaten the victim in any of the telephone calls, the inherent menace in the calls became apparent when viewed in the broader context of the proof which was presented in the case. The Court's majority ruling was written by Justice Mercure.

In re Leroy M. (N.Y.L.J., August 27, 2009, pp. 1, 2 and 35)

In a 4-1 decision, the Appellate Division, First Department, reversed a finding of juvenile delinquency against a 15-year-old teenager because the police had improperly entered and searched his home without a warrant. The prosecution claimed that the juvenile's 23-year-old sister had provided consent to the search. The Appellate Court found, however, that the police had made the initial entry into the premises without a warrant, and that the subsequent alleged consent by the sister was insufficient to cure the original taint. The matter involved the theft of a laptop from a school, and the police had discovered the laptop in question in the juvenile's home following the search. The officers in question had initially entered the juvenile's home without ringing the doorbell or otherwise announcing their presence, and the Appellate Panel concluded that this constituted flagrant police misconduct. Thus the sister's belated consent could not be used to support the illegal search in question. The majority ruling consisted of Justices Tom, Catterson, Renwick and Richter. Justice Nardelli dissented, arguing that since the sister had told police "thank God you're here," she had indicated her consent to the search without any hesitation.

People v. Deveore (N.Y.L.J., August 28, 2009, p. 1, and August 31, 2009, p. 26)

In a 3-1 decision, the Appellate Division, Second Department, reversed a Defendant's conviction for gang assault and attempted murder because the police had not made a sufficient effort to locate him, and thus the provisions of the speedy trial rules had been violated. In the case at bar, a felony complaint and warrant for the Defendant's arrest was issued on April 20, 2005. The Defendant was not arrested until July 21, 2006, more than a year later. Although the police had visited the Defendant's last known address and the possible address of a girlfriend, they had made no effort to find him at his grandmother's address, where the record indicated he had lived for the last six years. Under these circumstances, the majority concluded that the Defendant's speedy trial rights had been violated. The majority opinion was joined in by Justices Spolzino, Skelos and Covello. Justice Dillon dissented.

People v. Black (N.Y.L.J., August 28, 2009, pp. 1, 2 and 37)

In a unanimous decision, the Appellate Division, Third Department, dismissed several counts of rape, for which the Defendant had been convicted, resulting in a reduction in his sentence by roughly half. The charges in question were dismissed because they were drafted in a manner that made it impossible to discern the specific acts to which they related. Under these circumstances, the Court found that the counts were duplicitous, and had to be dismissed. In a decision written by Justice Malone, the Court concluded that there was no way to correlate the events related in the victim's trial testimony to each of the four second degree rape counts. They thus were duplicitous, and a dismissal was required.

People v. Edwards (N.Y.L.J., September 14, 2009, pp. 17 and 18)

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction, and held that the Defendant's motion to suppress certain evidence should have been granted. The Defendant had been stopped at a roadside traffic stop by Sheriff's Deputies, and was kept there for an extended period of time. Although the initial stop was valid, the Appellate Division found that the police did not have reasonable suspicion to extend the traffic stop after its initial justification was exhausted. As a result, the drugs which were eventually found on the Defendant should have been suppressed. The Court concluded that although a traffic ticket could have been issued, the officers observed no

indicia of criminality, and that the Defendant's further detention for additional investigation was unauthorized. The Defendant's plea was therefore vacated and the matter remitted to the County Court for further proceedings.

People v. Alford (N.Y.L.J., September 11, 2009, pp. 25 and 27)

In a unanimous decision, the Appellate Division, Third Department, held that convictions for criminal sexual acts and sexual conduct against a child had to be dismissed as lesser included offenses of other counts in the indictment for which the Defendant was convicted. The Court found that under the facts in the case, it would have been impossible for the Defendant to have committed the higher charge without concomitantly committing by the very same conduct, the lesser included counts. In reaching its determination, the Court cited *People v. Beauharnois*, 64 A.D.3d 996 (2009).

People v. Swift (N.Y.L.J., October 6, 2009, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Fourth Department, reinstated a Defendant's murder conviction even though new D.N.A. evidence disproved one of the prosecution's central contentions. A key piece of physical evidence against the Defendant was blood recovered from the crime scene, which a government expert testified was a mixture of type A, which belonged to the victim, and type O, which belonged to the Defendant. Years after the Defendant's conviction, a DNA test established that all of the blood belonged to the victim. Based upon this information, the Defendant had moved for a CPL 440.10 motion, which was granted by the trial court. The Appellate Division, however, concluded that although the People relied upon the evidence in question, other evidence in the case still tended to connect the Defendant to the robbery, and was sufficient to support the conviction. The Appellate Panel found that the DNA results were not of such character as to create a possibility that had such evidence been received at trial, the verdict would have been more favorable to the Defendant. It is possible that this case may eventually reach the New York Court of Appeals, and we will keep our readers advised of developments.

People v. Moore (N.Y.L.J., October 13, 2009, pp. 1 and 3, and October 14, 2009, p. 26)

In a 3-1 decision, the Appellate Division, Second Department, upheld a Defendant's conviction and rejected the Defendant's claim that his attorney's failure to assert a justification defense constituted ineffective assistance of counsel. The Appellate Court found that a justification defense was not supported by a reasonable view of the evidence, and that trial counsel could not be faulted for failing to request a justification instruction. The majority opinion was joined in by Justices Mastro, Covello and Floro. Justice Belen dissented.

For Your Information

Chief Judge Lippman Finalizes Wrongful Conviction Commission

In early May, Chief Judge Lippman had announced that he was forming a Justice Task Force to examine the issue of wrongful convictions which may have occurred in the State. He announced at that time that he had selected Associate Judge of the New York Court of Appeals, Theodore T. Jones, Jr., and Westchester County District Attorney Janet DiFiore to act as co-chairs. In late July, the names of the additional members of the Commission were announced, and Judge Jones issued a public statement on the matter indicating that the goal of the Commission would be to determine why innocent people were convicted in the first place and to recommend ways to prevent future mistakes. The Commission will focus on individual cases only after the courts and/or prosecutors have determined that a miscarriage of justice has actually occurred. The Commission will not investigate pending appeals in which defendants are challenging their convictions. The appointment of the Commission by Judge Lippman follows a detailed Task Force report which was issued by the New York State Bar Association based upon the work of a special committee headed by Judge Barry Kamins. Judge Kamins is in fact now serving as a member of the Lippman Commission. The full Commission is listed as follows:

Co-chairs

Theodore T. Jones, Jr., Court of Appeals Judge
Janet DiFiore, Westchester County District Attorney

Members

Kathleen Corrado, Director of Laboratories, Onondaga Center for Forensic Sciences

Judith Harris-Kluger, head, Office of Policy and Planning, Unified Court System

William E. Hellerstein, professor, Brooklyn Law School

Seymour W. James, attorney-in-charge, criminal defense, Legal Aid Society

Barry Kamins, acting Supreme Court Justice, New York City Criminal Court

Raymond Kelly, New York City Police Commissioner

Joseph Lentol, D-Brooklyn, Chairman of Assembly Codes Committee

Richard B. Lowe III, Manhattan Supreme Court Justice

Denise O'Donnell, State Criminal Justice Services Coordinator

Karen K. Peters, Appellate Division, Third Department, Justice

Eric Schneiderman, D-Manhattan, Chairman of Senate Codes Committee

Susan Xenarios, Director, Crime Victims Treatment Center, St. Luke's Hospital

Judge Jones also stated in announcing the final formulation of the Commission that he viewed his group as a permanent asset to the Legislature, Governor and legal and law enforcement communities in making improvements on procedures to avoid future false convictions.

Judge Smith Appointed to Respond to Criminal Leave Application Inquiries

Soon after assuming his position as Chief Judge, Judge Lippman indicated that he was somewhat concerned about the small number of criminal leave applications which were granted by the New York Court of Appeals, and he declared his intention to review the process in question. In July, Judge Lippman designated Associate Judge Robert S. Smith to serve as a liaison to the public and the bar on the question of criminal leave applications. Judge Smith will address questions about the process including the criteria considered by Judges in reviewing leave application and limitations on the Court's jurisdiction. He will not review determinations made in any particular case. In court notices which appear for several days in the *New York Law Journal*, it was stated that any written questions and comments regarding the criminal leave application process should be directed to Judge Robert S. Smith at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207-1095. The granting of criminal leave applications has for several years remained at 2% or less, and although it appears unlikely that any significant increase in the acceptance rate will occur, it is refreshing that the process is being reviewed and that the public and the legal community can receive some additional insight as to how the decision-making in the process is arrived at.

Appellate Division Dismisses Lawsuit Regarding Indigent Defense Representation

In the case of *Hurrell-Harring v. State of New York*, the Appellate Division, Third Department, in a 3-2 decision, dismissed a lawsuit commenced by the New York Civil Liberties Union, which charged that the State of New York had abdicated its constitutional duty to provide effective legal representation to indigent criminal defendants. The three-Judge majority, in an opinion written by Justice Kavanagh, stated that the Plaintiffs were seeking

a massive overhaul of the State's public defense system, and that the judiciary, based upon the principle of separation of powers, should not intrude in an area which required legislative action. The majority concluded that it was a fundamental misunderstanding of constitutional guarantees of a defendant's right to counsel in a criminal case to argue that the funding and administration of indigent defense programs violate Sixth and Fourteenth Amendment guarantees. Justices Lahtinen and McCarthy joined Justice Kavanagh in the majority ruling. Justices Peters and Stein dissented.

Due to the sharp split in the Appellate Division, and the importance of the issue involved, it appears likely that the matter will eventually have to be determined by the New York Court of Appeals. Attorneys for the New York Civil Liberties Union in fact announced that they would appeal to the Court of Appeals. We will keep our readers advised of any further developments in this important matter.

Obesity Rates Continue to Rise

A new recent study by the Robert Wood Johnson Foundation continues to provide bad news with respect to the problem of obesity in the United States. The most recent study reported that more than 1 in 4 adults in 31 states in the United States are obese. The average American is 23 pounds overweight, and the percentage of Americans who are considered obese is steadily rising. The obesity rate in adults has risen over the last several years in 23 states. The State of Mississippi has the highest obesity rate at 32.5%. Alabama and Tennessee also have obesity rates of over 30%. The State of Colorado has the lowest obesity rate at 18.9%. The obesity rate also appears to be highest among individuals from 55 to 64 years of age. Of major concern is the fact that the obesity rate among children has also risen, with Mississippi again having the highest rate of overweight children at 44.4%. The States of Arkansas and Georgia follow, with rates of over 37%. The increasing obesity rate has dramatic health and economic consequences for the nation. A recent study conducted by the Centers for Disease Control and Prevention estimated that obese Americans spend about 42%, or $1,429 a year, more on health care than Americans who are not obese. The study was based upon 2006 figures. The report concluded that Americans who were 30 or more pounds over a healthy weight cost the country an estimated $147 billion in weight-related medical bills. This is double the amount from a decade ago. Government scientists and health economists from RTI International, a non-profit research group, have commented that today obesity is the single biggest reason for the increase in health care costs. The commentators concluded, "If you really want to rein in health care dollars you have to get people dieting, exercising, and living a healthier lifestyle." Obesity was specifically identified as increasing the risk of heart disease, diabetes and several other diseases. It has been estimated that extremely obese people, those who are 80 or more pounds overweight, live 3 to 12 fewer years than their normal weight peers.

Numerous health groups have advocated the simple warning of eating less and exercising more. The Centers for Disease Control and Prevention, in issuing its report, specifically outlined several steps which communities should take to prevent obesity. These steps were outlined as follows:

- Put schools within easy walking distance of residential areas.
- Improve access to outdoor recreational facilities.
- Require physical education in schools.
- Enhance traffic safety in areas where people could be physically active.
- Enhance infrastructure supporting walking and biking.
- Discourage consumption of sugar-sweetened drinks.

You May Live to Be 100

A recent report by the United States Census Bureau indicated that the number of people reaching 100 and over is growing at a rapid rate. It is expected that by the year 2050, there may be nearly 6 million people in the world's population who are 100 or over. The United States is expected to have more than 600,000 people in this category by mid-century. Today it is estimated that there are currently 340,000 persons 100 or over throughout the world, and this has jumped from an estimated few thousand in 1950. In the age bracket of 80 and older, the report also indicated that a projected rise in the number of people in that category is expected to more than double by the year 2040. Increased medical advances and improved diets are key factors attributed to increased longevity. The nation with the highest number of people 100 or over is Japan, which is well known for its low-fat staple of fish and rice, and its special care of the elderly.

As part of the study, people were asked whether they wanted to live to 100 or above.

The majority of Americans who were asked this question responded that they wanted to live to approximately 89, with only 8% indicating that they wanted to pass 100. The average life span for people in the United States is currently 78.

Litigation Over Appointment of Lieutenant Governor Finally Reaches a Conclusion

Governor Paterson's action in attempting to appoint Richard Ravitch as his Lieutenant Governor became the subject of extended litigation. Justice Lamarca, from the Nassau County Supreme Court, had recently ruled that

the Governor lacked the authority to, on his own, appoint a Lieutenant Governor, and that his efforts violated provisions of the State Constitution. Justice Lamarca concluded that Public Officers Law § 43, which the Governor relied upon in making the appointment, was incompatible with provisions of the New York State Constitution, which provide that a Lieutenant Governor must be elected by voters of the State at the same time that they choose a Governor. The Justice's ruling had been appealed to the Appellate Division, Second Department. The Governor, following the initial issuance of a preliminary injunction, had pledged not to attempt to install Mr. Ravitch until the Courts had determined if he had the legal authority to appoint him. The Appellate Division, with respect to the issuance of a stay pending the litigation, reached a compromise position following a hearing on July 30, 2009. The Court, in a brief order, continued a stay only to the extent of enjoining the Appellant, Richard Ravitch, from presiding over the New York State Senate or exercising or casting a vote therein. The litigation in question is known as *Skelos v. Paterson*.

The Appellate Division, Second Department, in an expedited ruling, held on August 19, 2009 that the Governor lacked authority to make the appointment in question, and that his actions were unlawful. The Appellate Panel, which was comprised of Justices Fisher, Dickerson, Eng and Angiolillo, held that the only way to fill the seat of a vacant Lieutenant Governor is by election. Although ruling that the Governor's action was unlawful, the Appellate Division did grant leave to appeal to the New York Court of Appeals, finding that there was a need for the case to be resolved finally and expeditiously by the Court of Appeals, since important constitutional issues were involved.

The New York Court of Appeals shortly thereafter in late August set the date of September 11 for oral argument, and announced that it would decide the case by means of an expedited procedure. On September 22, 2009, the Court of Appeals, in a 4-3 decision, upheld the Governor's authority and reversed the Appellate Division Order. In an opinion by Chief Judge Lippman, which was joined in by Judges Ciparick, Read and Jones, the Court ruled that the Public Officers Law granted sufficient authorization to the Governor to make the appointment in question. The majority reasoned that the State Legislature and drafters of the State Constitution would never have envisioned leaving the post of Lieutenant Governor vacant for a substantial period of time. Judge Pigott dissented, stating that the majority's opinion in effect allowed an unelected Governor to also appoint an unelected Lieutenant Governor, thereby violating fundamental principles of democratic rule. Judge Piggott was joined in dissent by Judges Graffeo and Smith. The litigation in question arose from a political dispute over control of the New York State Senate, and some commentators noted that the ultimate division in the Court of Appeals, with the exception of one Judge, was among party lines. Chief Judge Lippman and Judges Ciparick and Jones, who are Democrats, voted in favor of the Governor. Judges Piggott, Graffeo, and Smith, who are Republican, voted in favor of Senator Skelos. However, Judge Read, who is a Pataki appointee, joined the majority opinion and cast the critical deciding vote. The Governor's decision to attempt to appoint a Lieutenant Governor was made in response to the legislative deadlock which developed in the State Senate, and the decision by the New York Court of Appeals apparently puts an end to an unfortunate situation which had effectively paralyzed governmental operations in the State of New York.

Life Without Parole

A recent report issued by the Sentencing Project indicated that a record 140,610 inmates in state and federal prisons are serving life sentences, and nearly one-third of these have no possibility of parole. The number of inmates sentenced to life without parole is placed at 41,095, triple the number which existed in 1992. The Sentencing Project is a criminal justice research group that supports alternatives to incarceration, and its report basically urges that life without parole be abolished. The report specifically highlights life sentences without parole imposed on juveniles, arguing that such sentences represent a fundamental and unwise shift from the long-standing traditions that juveniles are less culpable than adults, and are capable of change. The report indicated that several states throughout the nation still provide for life without parole for juvenile offenders, and that Pennsylvania leads the nation in this area, with 345 juveniles serving life without parole sentences in that state.

In fact, the issue of whether life without parole for juvenile offenders convicted of non-homicide crimes is unconstitutional is currently before the United States Supreme Court in two Florida cases, *Graham v. Florida* and *Sullivan v. Florida*, with a decision expected shortly. Law enforcement groups have continued to oppose any changes in a state's ability to impose life imprisonment without parole. These groups basically have argued that such sentences remove violent criminal offenders from the general public and act as a necessary deterrent to repeated violent criminal activity, thereby insuring the public's safety.

New York Court of Appeals, Despite Appearance of Impropriety, Appears Ready to Rule on Judicial Pay Increases

The New York Court of Appeals has before it two cases involving the issue of judicial pay increases. In *Marion v. Silva*, 58 A.D.3d 102 (2008) the Appellate Division, Third Department, dismissed the Plaintiff's case, finding that the issue of judicial pay was within the legislative prerogative and could not be reviewed by the Court. However, in *Larabee v. Governor*, 880 N.Y.S. 256 (2009) the Appellate Division, First Department, ruled that the legislature and Governor had violated fundamental con-

stitutional principles by failing to adequately provide for judicial pay increases, and ordered immediate action by the legislative and executive branches. It made a similar ruling in *Chief Judge v. Governor*, which was issued in late September 2009.

The Court of Appeals is basically facing a quandary in this matter, since normally judges are expected to recuse themselves in cases where the outcome would affect them personally. Chief Judge Lippman has already recused himself, since he is a Plaintiff in one of the cases which was filed involving the issue. The other six Associate Justices are now in effect being asked to decide on their own pay increases. This situation has clearly raised the issue of the appearance of impropriety and a possible conflict of interest.

In order to actually decide the issue, it is expected that the six Justices of the New York Court of Appeals will have to invoke the principle of the "Rule of Necessity." While not codified in state law, the Rule of Necessity has developed within the judiciary in New York and elsewhere, as a last resort to having cases adjudicated when there are no other courts to turn to. A 1929 treatise on jurisprudence characterized the situation regarding a Rule of Necessity as follows: "Although a judge had better not, if it can be avoided, take part in a decision of a case in which he has any personal interest, yet he not only may, but must, do so if the case cannot be heard otherwise." The issues in the judicial pay cases appear to concern only questions of state law, and would not be able to be heard by federal courts. The Rule of Necessity has been invoked in some cases in the past, most notably in *Morgenthau v. Cook*, 56 N.Y.2d 24 (1982), in which Chief Judge Cook's program of temporarily reassigning judges to State Supreme Court benches in New York City was challenged by District Attorney Morgenthau. In that case, the six Judges ruling on the matter actually voted against their Chief Judge, finding that he had acted without constitutional or statutory authority. How the six Associate Justices will handle the pay raise cases is difficult to predict, since the Court, no matter what it does, is being placed in a difficult position. Oral argument on these matters has been set for January 12, and a decision is expected by February or March, 2010. Chief Judge Lippman has continued to express the hope that the legislature will act on judicial pay increases before it is necessary for the Court to issue its ultimate ruling. We will keep our readers advised of the latest developments.

Some American Workers Putting in Long Hours Despite Recession

Despite the current economic recession and the higher than normal unemployment rate, many Americans are still working long hours. A recent survey by the Statistical Abstract of the United States revealed that in 2007, 70% of Americans 16 and older worked 40 hours or more during the average work-week. Seven percent worked between 35 and 39 hours, and 23% worked 34 hours or less. Recent Labor Department statistics place the overall average workweek for American workers at 33.1 hours as of July 2009. The Labor Department also reported that as of July 2009, the average hourly wage for an American worker was $18.56. The current unemployment rate remains at 10.2%, with the unemployment rate for teenagers at 23.8%

U.S. Birth Rate Drops

According to a new report from the National Center for Health Statistics, the number of U.S. births fell in 2008, marking the first annual decline in births since the beginning of the decade. The nation recorded 4,247,000 births in 2008, down 68,000 from 2007. The largest decline in births occurred in California, down by 15,000, and Florida, down by 8,000.

Generation Gap Continues to Widen

A recent survey from the Pew Research Center reveals that two-thirds of Americans 16 and older believe that a generational divide exists in every one of eight areas which were listed. The widest divergence was found in the field of technology, with younger individuals finding the new technology such as computers easy and a part of everyday activities. Members of the older generation continue to have difficulty adjusting to such modern technical advances as e-mails, I-pods, and other new advances. According to the survey, 69% also reported that musical tastes were very different between the generations, and 80% stated that moral values and considerations of the work ethic were also quite different between the older and younger generations. The Pew Study concluded that the different generations disagree to some extent about almost everything.

Home Ownership Declines as Mortgage Delinquencies Increase

Due to the recent housing crisis and the economic recession, a new report issued by the Census Bureau concludes that for the first time in many years, the rate of home ownership in the United States has dropped significantly. Between 2004 and 2005, the percentage of households that owned their own home was just under 70%. By the second quarter of 2009, the percentage had fallen to 67.4%. It is also forecast that the percentage may continue to drop, and may reach 63.5% by 2020. The survey also concluded that as the rate of home ownership is declining, the percentage of people renting is increasing. Some experts are predicting that the nation may be returning to the situation in the 1960s when more people rented, and people did not buy homes as investments but as places to raise families.

The decline in home ownership is largely attributable to the current economic recession, and the increase

in mortgage delinquencies. As of the end of August, a new report by the Mortgage Bankers Association revealed that more than 13% of American homeowners with a mortgage are either behind on their payments or in foreclosure. It was estimated that approximately 4% of all mortgage holders were in foreclosure, and about 9% were behind in at least one monthly payment. The report also revealed that the foreclosure rate had now expanded beyond subprime mortgages, and was affecting fixed rate loans. Nearly one-third of the new foreclosure listings in the last few months involved prime fixed rate loans, up from 20% in 2008.

New York State's Position as the Third Most Populous State Appears Secure as Florida's Population Drops

A recent report by the U.S. Census Bureau indicates that for the first time since 1946, the State of Florida has experienced a population loss. It is estimated that the State lost 50,000 residents between April 2008 and April 2009. This population loss will bring the State's overall population to just under 18.3 million. For many years, Florida was growing at an extremely rapid rate, adding some 400,000 residents per year in 2006 and 2007. This rapid growth enabled the State's population to come very close to that of New York State. During the last few years, New York State has continued to gain in population, and currently has a population of just over 19.4 million, while Florida has leveled off and has now actually lost residents. Under these circumstances, it appears clear that New York State will continue to hold its No. 3 position in the United States in terms of overall population. California continues to be the most popular State, with a population of just over 36 million, followed by Texas, which has 23.5 million.

Proposed Rule Changes for Judicial Nomination Commission

Former Chief Judge Judith S. Kaye, who recently assumed the position of Chair of the Commission on Judicial Nominations, recently announced some proposed changes in the operation of the Commission's selection process. The Commission is charged with submitting to the Governor a list of seven candidates for selection to the New York Court of Appeals. The Governor is then obligated to choose from the list of candidates presented by the Commission. The Commission recently received some criticism with respect to the appointment of a new Chief Judge to the Court of Appeals when it presented to Governor Paterson a list of seven males and failed to include Judge Carmen Ciparick, who was already the senior Associate Judge on the Court. Although selecting Jonathan Lippman as the new Chief Judge from the list which was presented to him, Governor Paterson called for a review of the Commission's procedures and a greater sensitivity for the need to provide a more diverse list of potential candidates. He also recently appointed former Chief Judge Kaye to the Commission, who was thereafter selected as the Commission's new Chair. The Commission thus issued its proposals for changes, and these proposed changes are listed below. The Commission is providing for a 45-day comment period, and any finalized revisions are expected to be in effect by the beginning of the year.

Proposed Rule Changes

Current	Proposed
No explicit declaration against discrimination or for diversity.	Explicit statement barring discrimination and a commitment to considering nominees "who reflect the diversity of New York's communities including, but not limited to, diversity in race, ethnicity, gender, religion, sexual orientation and geography."
No provision for formation of a search Committee.	Commission chair may appoint a search committee of commission members to solicit recommendations.
No specified means of giving notice of impending openings except for a "broadly disseminated public notice."	Notifications of openings to be disseminated to the media, bar groups and law schools, as well as posted on the Internet.
No provision for informational meetings.	The commission will convene public informational meetings in each of the Appellate Division's four departments to discuss screening procedures and to hear comment about the nominating process.
All applicants must complete a detailed full questionnaire.	Use of a two-step application process where candidates initially would submit a resume and answer a short-form questionnaire. If deemed worthy, the candidates would then submit a full questionnaire.

Allowing Third Year Law Students to Handle Felony Cases

Largely due to the severe budget cutbacks experienced by many public defender systems throughout the United States, many states are beginning to consider allowing third year law students to handle not only certain misdemeanor matters, but also felony cases. Only recently, Ohio became the 42nd State to allow third year law students to handle felony cases, in addition to misdemeanors. The law students in question are usually part of a clinical training program, and are supervised by law school professors or attorneys working for indigent defense services.

The use of third year law students to handle felony matters is still a controversial one, and has not as yet received much support in New York State. Currently under practice orders from the State's appellate divisions, third year law students work on appeals, and handle misdemeanor matters in criminal courts. They always work under the direct supervision of an attorney. Since both defenders and prosecutors are facing the effects of the deep recession and the imposed budget cuts, it appears likely that the possible use of third year law students in an expanded capacity within the criminal justice system will receive greater attention. Only recently, Professor Ian Weinstein, in a letter to the editor which appeared in the *New York Law Journal* on August 12, 2009, at page 6, supported the concept and perhaps advanced the position of most law schools in the State, arguing that not only would law students gain valuable clinical experience, but with the proper supervision could provide quality representation. Professor Weinstein is the Director of Clinical Legal Education at Fordham Law School. In his letter, Professor Weinstein advanced the following argument:

> The very significant growth of clinical education programs at most law schools is one of the signal changes in legal education over the past 25 years. Having supervised students at the trial and appellate levels in both the state and federal courts in New York for more than 20 years, I have seen hundreds of second and third year law students provide exemplary representation to a wide range of clients. With all the calls for law schools to do a better job preparing students for the profession, New York's relatively restrictive rules are out of step with trends in professional education and the rules in most other states.

In another follow-up letter to the *New York Law Journal* which appeared in the August 18, 2009 edition, Michelle J. Anderson, the Dean of CUNY School of Law, also supported the concept of greater law student involvement in the actual handling of cases as a means of responding to the need for critical legal services during this time of economic hardship. Dean Anderson remarked:

> Extraordinary economic times call for the legal academy and the entire legal community to enhance our collective commitment to service. Through legal internships and clinics, law schools in particular can have an impact. As law students across the Country start school this month, they have an opportunity to make a difference.

Governor Paterson Makes Additional Appointments to Appellate Divisions

In early August, 2009, Justice Robert A. Spolzino, who had been sitting in the Appellate Division, Second Department, since 2004, announced that he was resigning his position to rejoin a law firm he had been affiliated with some ten years earlier. In announcing his resignation, Justice Spolzino cited the fact that judges had not received a raise in more than a decade, and that he could no longer accept the financial sacrifice which he and his family were making. Judge Spolzino will become a partner at the 750-lawyer firm of Wilson, Eiser, Moskowitz, Edelman and Dicker. Justice Spolzino was earning $144,000 as an Appellate Division Justice, and is expected to earn a lot more in his new position with the law firm. The instant resignation required Governor Paterson to make another appointment to the Appellate Division, Second Department. Thus, in late October he announced that he had selected Sandra L. Sgroi to fill the Second Department seat. Justice Sgroi had been sitting in the Supreme Court, Suffolk County. She is a Hofstra Law School graduate and is 56 years old.

In late September, Governor Paterson also moved to fill two existing vacancies in the Appellate Division, First Department. He announced the appointment of Justices Nelson S. Roman and Sallie Manzanet-Daniels to that Court. Justice Roman had been sitting in the Supreme Court, Bronx County since 2003, and had also previously served as a Civil Court and Housing Judge. He is a former New York City Police Officer and City Prosecutor, and is a graduate of Brooklyn Law School. Justice Manzanet-Daniels had been serving in the Bronx Supreme Court since 2002. She previously served as an Attorney with the New York City Legal Aid Society and is a graduate of Hofstra University School of Law.

Due to Economic Recession, States Begin Closing Prisons

Since correction budgets in many states have risen dramatically over the last few years, the current economic crisis has forced many states to examine the budgets of correctional institutions as a means of cutting expenditures. This has led in several states to the closing of pris-

ons in the last two years. The states of New Hampshire, Tennessee and Kansas have already closed several prison facilities, and other states are planning similar moves. Michigan recently announced that it plans to close three prisons and five prison camps, and Vermont recently announced the closing of a prison within that state. Within our own State of New York, three prison camps and seven prison annexes are slated to close within the next year in an effort to save approximately $52 million over the next two years. These prison facilities are located in the northern part of New York, and it is expected that approximately 550 jobs will be lost in the region as a result of the expected prison closings.

Sex Offense Courts to Also Handle Misdemeanor Crimes

It was announced in late August that the Office of Court Administration had amended its rules regarding sex offense courts so as to allow them to also begin hearing misdemeanor cases in addition to the felony matters which they now handle. The new rules also provide Chief Administrative Judge Pfau with the authority to establish sex offense courts anywhere in the State. Under the revised rules, the presiding justice in the sex offense court would determine whether transfer of misdemeanors to the specialized court would promote the administration of justice. If not, the case file would be returned to the criminal court and the misdemeanor case would proceed as usual. Currently, sex offense courts exist in several parts of the State as follows:

5th Judicial District
Orange County, Oswego

6th Judicial District
Tompkins County, Ithaca

8th Judicial District
Erie County, Buffalo

9th Judicial District
Westchester County, White Plains

10th Judicial District
Nassau County, Mineola

10th Judicial District
Suffolk County, Central Islip

11th Judicial District
Queens County, Kew Gardens

E-Filing Expands in New York State

A recent bill which received final legislative approval would allow electronic filing in most civil cases in Supreme Court, Surrogates Court, the Court of Claims and the New York City Civil Court. The practice would still have to receive the approval of the State's Chief Administrative Judge and the consent of the parties. The new legislation is designed to build on the limited pilot programs involving e-filing, which had existed for the last several years. The legislation also allows Chief Administrative Judge Phau to set up rules for mandatory electronic filing for certain types of cases, and in certain areas of the State. The use of e-filing has gradually increased within the State as new technology is being increasingly utilized by attorneys and the legal system. By April of 2009, 10,000 attorneys had already registered to utilize e-filing, up from only 300 who were registered in 2002.

New U.S. Attorney Appointed for Southern District

In early August, Preetinder S. Bharara was confirmed by the United Sates Senate to serve as the next United States Attorney for the Southern District of New York. Mr. Bharara has worked as Chief Counsel to United States Senator Charles Schumer. He also served as a prosecutor in the Southern District from 2000 to 2005. He is 40 years of age, and is a graduate of Columbia Law School. Mr. Bharara's name was submitted to the United States Senate by President Obama based upon the recommendation of Senator Schumer. Mr. Bharara was sworn in on August 13, 2009, and he immediately began serving in his new position by announcing several appointments to his executive staff. An opening for United State Attorney in the Eastern District still exists, and President Obama's nomination of Loretta Lynch to fill that position is still awaiting confirmation by the United States Senate.

Kathleen B. Hogan Takes Over as President of State D.A.'s Association

In August it was announced that Warren County District Attorney Kathleen B. Hogan has been selected to succeed Staten Island District Attorney Daniel M. Donovan, Jr., as President of the District Attorneys Association of the State of New York. Ms. Hogan has been serving as Warren County District Attorney since 2001. She is the first woman District Attorney from Warren County, and is the second to be President of the District Attorneys Association. Prior to serving in Warren County, Ms. Hogan was a former Brooklyn Assistant District Attorney and a senior attorney at the New York Prosecutor's Training Institute in Albany. Ms. Hogan will serve as President of the District Attorneys Association until August of 2010.

Poverty Rate Expected to Increase in United States

A recent report from the United States Congress Bureau indicates that due to the current economic recession, the poverty rate in the United States is expected to significantly increase during the coming years. The report indicated that the year 2008 was economically a much worse year than 2007, and that the poverty rate is expected to increase to 12.7% of the U.S. population. This would account for more than 38.8 million people, representing an increase of 1.5 million over a year ago. The number of

uninsured persons is also expected to increase because of rising unemployment and the erosion of private health insurance paid by employers and individuals. Hopefully, the recent news that we may be beginning an economic upturn will assist in lowering the projections which have been issued.

Women Now a Majority of U.S. Workforce

A recent pronouncement from the Bureau of Labor Statistics indicated that for the first time in history, women will outnumber men in the workforce by the beginning of this year. Women held 49.83% of the nation's 132 million jobs in June. Since as a result of the current recession, men have lost jobs in greater numbers than women, it is forecast that by January 2010, the number of women in the workforce will surpass that of men.

Part-Time Workers Increasing in Record Numbers

As a result of the economic recession, more workers are being forced into part time positions rather than full-time employment. The Bureau of Labor Statistics recently indicated that the number of people working part time as a result of losing full-time work has nearly doubled in the last few years, rising from 4.6 million to 9 million. Overall, the percentage of the workforce as of August 2009 that consisted of part-time workers was 16.8%, up from 8.8% in December 2007.

Recession Causes Potential Retirees to Continue to Work

A recent report from the Pew Research Center states that older adults are working longer and are not retiring at the traditional retirement ages. Thirty-eight percent of workers 62 and older reported that they have delayed their retirement due to the recession, and will continue to work where possible. In addition, 63% of workers who are now between the ages of 50 and 61 have indicated that they intend to delay their retirement and to continue to work past the age of 65. Many older workers have also reported that in addition to the necessity of obtaining additional income, they find that either part-time or full-time work after they reach retirement age has beneficial effects by keeping them active, and approximately 50% reported that they enjoyed their work.

Unions May Be Making Comeback

Since labor unions played an important part in the recent presidential and congressional elections, and the current White House and Congress are favorable to the interests of the unions, it appears possible that the demise of union membership over the last 25 years could be reversed, and that the number of union members may once again begin to increase. A recent report by the Bureau of Labor Statistics reported that the highest number of union membership is still in the Northeast and Midwest, while the lowest is in the South and West. Currently the State of New York has the highest percentage of workers who are members of a union, with a percentage of 24.9. New York is followed by Hawaii, Illinois, Michigan, Minnesota and New Jersey, which all have percentage rates of over 16%. The states with the lowest percentage of union membership are Arkansas, Louisiana, Mississippi, South Carolina, North Carolina, Texas and Virginia, all of which have a rate of under 6%.

Cyrus Vance, Jr., New District Attorney of New York County

Following a hotly contested primary election, Cyrus Vance, Jr., was selected as the Democratic Party nominee for District Attorney of New York County. Mr. Vance received 44% of the vote, while his two chief rivals, former Judge Leslie Crocker Snyder and Attorney Richard Aborn, received 30% and 26% respectively. Since no Republican candidate was entered, Mr. Vance became the new District Attorney for Manhattan on January 1, 2010. The new District Attorney will replace Robert Morgenthau, who served in the office for 35 years. Mr. Morgenthau had announced his retirement upon reaching the age of 90 and had supported Mr. Vance as his replacement.

Mr. Vance is 55 years of age and is a graduate of Georgetown University Law School. For the last several years he has been a partner at a Manhattan Law Firm, and previously worked as an Assistant District Attorney in the Manhattan Office. He is married with two children. Mr. Vance has announced that he intends to continue many of the procedures currently in operation in the Manhattan office, as well as holding on to many members of the current staff. He, however, has also indicated that he will implement certain new innovations, such as assigning community-based prosecutors to specific neighborhoods and precincts, forming more specialized units, and working aggressively to reduce the backlog in the Criminal Court. We congratulate Mr. Vance on his selection, and wish him well in his new position.

Judge Lynch Appointed to Second Circuit Court of Appeals

In late September, Judge Girard E. Lynch, who had been sitting in the Southern District of New York since 2000, was confirmed by the U.S. Senate for appointment to the United States Court of Appeals for the Second Circuit. Judge Lynch was nominated by President Obama to fill the existing vacancy on the Court. Judge Lynch is 58 years of age, and had previously served as a federal prosecutor. He had also served for a period of time as counsel to a leading law firm, and had also served as an adjunct professor of law. He is a graduate of Columbia Law School. The Second Circuit for the last year has been operating with a reduced staff, and three vacancies still exist for that Court. It is expected that additional appointments to that Court will be announced shortly.

Economic Recession Causing Drastic Changes in American Life

A recent report by the Census Bureau indicates that the recent economic recession is profoundly disturbing American life in several areas. More people, for example, are delaying marriage and home buying, and are staying in their present location rather than moving. The report indicated that at the present time, there are 31% of Americans 15 and older who have never been married. This is the highest level in a decade. The never married include three-fourths of men in their 20s, and two-thirds of women in that age range. The home ownership rate has now fallen to 67%, the lowest level in six years. In addition, only 15% in the country reported changing residence, a decline from 2006.

More Americans 65 and older are still working or seeking work. The recession has also greatly impacted younger Americans, with the income for younger age groups falling dramatically in the last few years. Since 2000, the incomes of young and middle-aged people, especially men, has declined, leaving that age group poorer than in the 1970s. People in their 20s and 30s, as well as people between the ages of 45 and 54, have seen their household income in the last eight years drop by nearly $7,500. Due to Social Security, Medicare and private pension plans, older Americans appear to be faring better than the younger generations, and there appears to be a widening financial gap between the young and old.

Additional studies have also confirmed the fact that the recession has hit middle income and poor families the hardest, widening the economic gap between the richest and poorest Americans. It is now estimated that approximately 13% of the nation is living below the poverty line, an 11-year high. The use of food stamps also jumped in 2008, with nearly 9.8 million households utilizing the program. The State of Louisiana, for example, has more than one-third of its residents on food stamps. It was also revealed that the cities with the most inequality in economic status were Atlanta, Washington, New York, San Francisco, Miami and Chicago.

New Legislation Increases Penalty for the Killing of a Child

In September, the New York State Legislature passed a bill which made those who have killed a child in an especially cruel and wanton manner eligible for life sentences without parole. The bill is awaiting the Governor's approval, which is expected shortly, and the new legislation is to be in effect with the start of 2010.

Westchester County D.A. Receives State Bar Grant to Conduct Pilot Program Involving Electronic Recording of Interrogations

The New York State Bar Association recently awarded a $50,000 grant to the Westchester County District Attorney's Office in order to conduct a pilot project involving the electronic recording of police interrogations of suspects. The Bar Association had previously awarded similar grants to the District Attorney's offices in Broome, Greene and Schenectady. The most recent award, however, is the largest one granted, and involves a much larger office and a County with a substantial population. Our Criminal Justice Section has long been active on the issue of videotaping of custodial interrogations, and Vincent E. Doyle, III, of Buffalo, a Past President of our Section, was involved in overseeing the distribution of the grant and the collection of data.

In announcing the grant, State Bar President Michael E. Getnick stated, "By providing local district attorneys and their law enforcement partners with resources to videotape interviews of suspects in police custody, the State Bar is taking important steps to ensure the integrity of the fact-finding process in criminal cases." Although legislation has not yet been enacted, there appears to be a growing trend in New York State to voluntarily record police interrogations. Some form of recording is utilized in 26 of New York's 62 counties. It is hoped that the implementation of the pilot projects throughout the State will provide sufficient data to make a final decision regarding the extent of recording in the State.

At the conclusion of the pilot program, each district attorney will file a report with the State Bar regarding the number of cases or investigations that were subject to custodial recording; the outcomes of the cases or investigations; the outcome of any suppression hearing; the number of guilty pleas; the number of trial convictions or acquittals; the number of complaints of police brutality or coercion; the number of claims of involuntary confession; the number of defendants who refused custodial recording; and other relevant information.

Quality of Life Ratings

A recent report issued by an agency of the United Nations listed Norway as the nation with the world's highest quality of life. The African Nation of Niger was rated as the country with the lowest quality of life. The ratings were based upon life expectancy, literacy, school enrollment and per capita gross domestic product in 182 countries. The report stated that a child born in Niger, which was at the bottom of the list, can expect to live to just over 50 years, while a child born in Norway, which was at the top of the list, is expected to reach the age of 80. In terms of income, the average earnings of a person in Norway is 85 times that of an individual in Niger. Following Norway on the top ten list were Australia, Iceland and Canada. Surprisingly, the United States did not make the top ten, but was ranked as number 13.

About Our Section and Members

Upcoming Activities

The Section's Annual Meeting, luncheon and CLE Program will be held on Thursday, January 28, 2009 at the Hilton New York at 1335 Avenue of the Americas (6th Avenue at 55th Street) in New York City. The CLE program at the Annual Meeting will involve a discussion of the future of forensics in the courtroom. Detailed information regarding these events will be forwarded under separate cover. We urge all of our members to participate in the annual meeting programs.

Fall CLE Program

The Section's full Executive Committee meeting and CLE program was held on Saturday, October 31, 2009 at the Seneca Niagara Casino and Hotel in Niagara Falls, New York. Paul Cambria moderated the CLE program, which involved a discussion of recent cases in the Criminal Law area from the United States Supreme Court, the Second Circuit Court of Appeals, and the New York Court of Appeals.

New Treasurer

Section Chair James Subjack recently announced that Sherry Levin Wallach has been appointed as the new Treasurer of our Criminal Justice Section. Jim also expressed his appreciation and gratitude to Malvina Nathanson, who had served as Treasurer for the last two years. We thank Malvina for her services, and welcome Sherry to her new position.

The Criminal Justice Section Welcomes New Members

We are happy to report that during the last several months we have continued to have many new members join the Criminal Justice Section. We welcome these members and hope that they will fully participate in and enjoy our many activities. The names of the new members are listed below:

Peter A. Adebanjo
Lindsey Albinski
Rebecca Joy Aledort
Henry W. Asbill
Justin T. Ashenfelter
Michael Paul Beltran
Konstantin Burshteyn
Betty Calvo-Torres
Clifton C. Carden
Alan Robert Carena
Barry Clarke
Linda Claude-Oben
Ilona Beth Coleman
JoAnna R. Corso
Giovanni Diluca
Valerie Ann Dunkle
Marta M. Dybowski
Yusuf A. El Ashmawy
Angela M. Elacqua
Elizabeth Noelle Ensell
Sarah Fauer
Sara Beth Fedele
Robert J. Fisher
Ericka Jane Alice Fowler
Monroe H. Freedman
Mark Raphael Fridman
Marc Gann
Louis M. Gelormino
Lawrence Gerschwer
Emily Elizabeth Gold
Anna Goldman
John K. Grant
Henry D. Guevara
Andrew James Gustus
William Hair
Leon P. Hart
Chai Hoang
Angelina Ibragimov
John Ingrassia
Raymond John Jacoub
Zachary Haviland Johnson
Carmel Kappus
Robert Norman Knuts
Robert A. Ladanyi
Tara Michelle Ladd
Deenita Marie Lake
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Joshua Joseph Lax
Mark H. Levine
Sigal Pearl Mandelker
Patrick Joseph Manning
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Michele Lee Matrachia
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Sharon A. Moritz
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Michael Orozco
Mark S. Portin
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Peter Preiser
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Jeffrey B. Rednick
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