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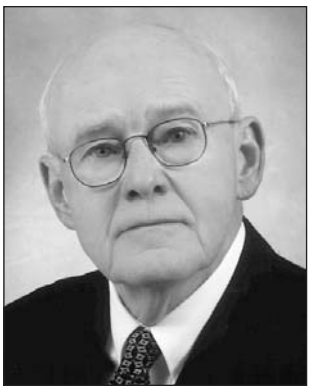
New York Criminal Law Newsletter

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

Inside

NYSBA

Message from the Chair



As my term of Chairman comes to an end I have so many people to thank for making my two-year tenure such a rewarding and pleasurable experience. In particular I extend my sincere thanks to our incoming Chair, Roger Adler, and our new Vice-Chair, Jean Walsh, for all the advice they have given and the incredible amount of work they have done.

As many of you know when I took over as Chair our Section was very much indebted to the Bar Association for spending over our budget for a period of twenty years or so. Over the past two years I have addressed that situation and retired much of our debt. I owe a thank you to Spiros Tsimbinos and Barry Kamins for taking over our newsletter and operating it in a fashion that was fiscally responsible.

To further the goal of fiscal responsibility our section has changed the by-laws to create the position of Treasurer. Serving in that position will be Richard Collins who will keep a close eye on the section budget.

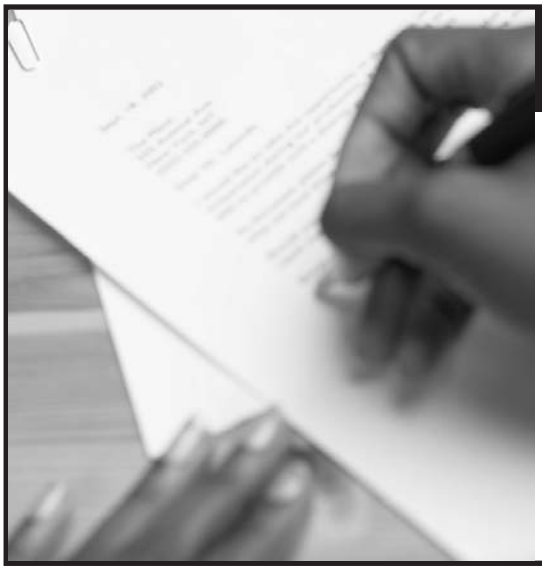
Congratulations to Jim Subjack who is our new Secretary. Jim has been very active in our section and also has been very active in the New York State District Attorneys Association. Jim will bring his prosecutorial experience with him to our meetings and should be able to express some fresh points of view. Jim has experience on the defense side of the Bar too and will be a great asset to us.

We have made great strides over the past couple of years with the raise in the 18b rates, the changes in the Rockefeller Drug Laws, promoting the videotaping of questioning of defendants in police custody and many other issues and I feel that with Roger Adler taking over the reins, things will only get better.

In closing I would just like to remind all our members that the Criminal Justice Section is composed of the Judiciary, Defense Counsel and Prosecution and that it is our objective to work together to improve the Criminal Justice system in a way that benefits all of us.

I intend to stay active in the section and hope to see all of you at the Fall Meeting in October, which Roger is presently planning.

Michael T. Kelly



Request for Articles

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

Spiros A. Tsimbinos
120-12 85th Avenue
Kew Gardens, NY 11415
(718) 849-3599

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

Message from the Editor

The big news within this issue is the passage after many years of controversy of modifications to the Rockefeller drug laws. Effective January 13, 2005, new sentences take effect for felony drug offenses. Details regarding the new 28-page law are discussed in our first feature article. To readily assist criminal law practitioners we have also provided a chart highlighting the new changes.

Within the last few months our New York Court of Appeals and the United States Supreme Court have also decided several very important cases which should be of special interest to our readers. The Supreme Court's modification of the federal sentencing guidelines is of particular significance. These cases are discussed in detail within this issue. We are also pleased to present two interesting and informative articles, one dealing with the People's appeals from orders of suppression and the other outlining the different practices and procedures in our local criminal courts throughout the state.

Recent studies have also revealed interesting statistics with respect to the current composition of our prison population as well as the current trends with respect to the status of violent crimes and efforts to reduce the crime rate within our state and nation. The results of these various studies are included in our "For Your Information" section.

Lastly January was a busy month for our criminal justice section with the holding of our annual luncheon, election of new officers and the presentation of special awards to deserving members of the bench and bar. The names of the newly elected officers and the award recipients are discussed in our regular feature column dealing with our section and members.

Our newsletter continues to grow both in volume and the variety of its content and we are pleased that so many of our members have indicated positive comments about our publication. We continue to request that you supply us with articles for publication and look forward to your continued support and comments.

Spiros A. Tsimbinos

A Summary of Newly Enacted Drug Sentences

By Spiros A. Tsimbinos

After years of controversy and stalemate, the Legislature in early December finally passed modifications to the Rockefeller Drug Laws. The Governor signed the legislation shortly thereafter and the new sentencing structure is already in effect. The new legislation, included within a 28-page legislative bill, contains several key features. First and most important the life term for drug offenses is eliminated and will no longer be imposed. Second, the concept of determinate sentencing first initiated by the Sentencing Reform Act of 1995 is extended to drug felony crimes in place of the prior indeterminate terms. The range of determinate sentences is specified for each category of felony with specified differences for first time offenders, nonviolent second felony offenders and prior violent offenders. In addition and as part of the sentence, periods of post-release supervision are also imposed following the precedent established by Jenna's Law in 1998. The new sentences are effective for crimes committed on or after January 13, 2005.

Greater access is also provided to inmates for enrollment in New York State's Comprehensive Alcohol and Substance Abuse Treatment Program, and additional in-prison counseling sessions are established. Further, major changes have been made in the weight thresholds for A-I and A-II heroin and cocaine possession by doubling the prior amounts of two and four ounces to four and eight ounces.

As a holiday bonus to persons already sentenced under the Rockefeller Laws, the new legislation also permits retroactive sentences for defendants currently serving 15 to 25 years to life for drug crimes. Several defendants have already been resentenced pursuant to the new statute and it is anticipated that some 400 inmates are eligible for resentencing. The defendants who are denied resentencing in their original application would be able to then appeal to the Appellate Divisions.

Printed below is a chart that was prepared with the assistance of Barry Kamins, which depicts the new determinate sentences for drug crimes. Additional information and details on the new drug law will be published in future issues of our newsletter. Criminal law practitioners are strongly urged to immediately familiarize themselves with the new changes which have already become effective.

JAIL SENTENCES AND POST-RELEASE SUPERVISION PERIODS FOR FELONY DRUG OFFENCES

(New Penal Law Sections 70.70, and 70.71 effective January 13, 2005).

The following are the determinative sentences available for the various felony categories.

Class A-I Felony

First Offender:	8 - 20 years
Prior Non-Violent Felony:	12 - 24 years
Prior Violent Felony:	15 - 30 years

Class A-II Felony

First Offender:	3 - 10 years
Prior Non-Violent Felony:	6 - 14 years
Prior Violent Felony:	8 - 17 years

Class B Felony

First Offender:	1 - 9 years (2 - 9 years if near a school)
Prior Non-Violent Felony:	$3^{1/2}$ - 12 years
Prior Violent Felony:	6 - 15 years

Class C Felony

First Offender:	1 - $5^{1/2}$ years
Prior Non-Violent Felony:	2 - 8 years
Prior Violent Felony:	$3^{1/2}$ - 9 years

Class D Felony

First Offender:	1 - $2^{1/2}$ years
Prior Non-Violent Felony:	$1^{1/2}$ - 4 years
Prior Violent Felony:	$2^{1/2}$ - $4^{1/2}$ years

Class E Felony

First Offender:	1 - $1^{1/2}$ years
Prior Non-Violent Felony:	$1^{1/2}$ - 2 years
Prior Violent Felony:	2 - $2^{1/2}$ years

Post Release Supervision Periods

Class A-I and Class A-II Offender:	5 years
Class B or C First Offender:	1 - 2 years
Class D or E First Offender:	1 year
Class B or C Second Offender:	$1^{1/2}$ - 3 years
Class D or E Second Offender:	1 - 2 years
Class B or C Violent Felony Offender:	$2^{1/2}$ - 5 years
Class D or E Violent Felony Offender:	$1^{1/2}$ - 3 years

Local Court Criminal Practice

By Steven C. Davidson

The practice of criminal defense in the local courts, village or justice courts scattered around New York State can be challenging and interesting. This article will seek to discuss the nuts and bolts of criminal defense in these courts of limited jurisdiction.

***Getting the Case*:** Unless you're a member of the "18-b" panel, which is the group of lawyers who agree to represent indigent defendants at a reduced hourly rate funded by county and/or state funds, your criminal representation may start with a phone call from a law school classmate asking for a favor, or from a client you did a closing for, or some other indirect source. So what do you do to get started? Firstly, remember the ethical considerations about Written Letters of Engagement (sec. 12.15.1). The key amount seems to be $3,000 for a signed retainer. If you are charging more than that, be sure to get a signed retainer. If you will be charging less than $3,000, you don't necessarily need one, but it is advisable.

***Your First Appearance*:** Some courts accept, and in fact request from you, a business card as a notice of appearance. Other courts require a more formal notice of appearance to be filed with the clerk. Unless the court staff and/or the judge know you already, it is a good idea to carry business cards especially when making your initial appearance.

Arraignment: During the first appearance, what typically happens is that your client will be "arraigned." The arraignment is simply the formal lodging of the charges against your client in open court. Generally, in local court, the judge will be joined on the bench by the court's clerk and perhaps a court reporter. The prosecutor, who represents the People of the State of New York through the local county's district attorney's office, is the other lawyer in the proceeding. Your client will be required to stand next to you for the formal arraignment to take place. The judge will likely ask you whether you "waive a formal reading." It is easy to spot a rookie because he or she does not waive a formal reading, which generally prompts a rolling of the eyes and making of strange faces from the bench and the DA. The typical response is "so waived," or "Your Honor, I'll waive a formal reading of the charges against my client, waive a formal reading of my client's right, but not the rights themselves, and enter a plea of not guilty on all charges currently pending before this court." Later, we will discuss some of the distinctions between misdemeanor "complaints" and misdemeanor "informations." After waiving a reading and entering a plea, the prosecutor may hand you, or serve on you, a Criminal Procedure Law § 710.30 notice (CPL), or a supporting deposition, an owner's deposition or a lab report, if it is a drug case. After service of these notices, the DA will probably declare "readiness for trial," which is relevant for speedy trial purposes. Refer to CPL §§ 30.30 and 170.70.

At this point, the judge may look at you and ask for a bail application. Bail is covered by CPL articles 510, 520 and 530. Generally speaking, it is important that you stress to the court whether your client is a local person, specifically, whether your client is from where the case is pending: statutorily referred to as "ties to the community," and/or a "flight risk." If you can show that your client has no prior criminal record, has ties to the community such as family, friends, real property, employment, you can make a meaningful application for a reasonable bail or ROR (release on recognizance). Reasonable, of course, is defined by the jurisdiction and the charges.

However, before making a meaningful bail application, it may be necessary for your client to be "processed." That is typically being fingerprinted and photographed. You will have a much better chance for reasonable bail if your client's rap sheet comes back clean, in other words, no prior convictions. Conversely, even if there are convictions, look to see how long ago they happened, or if your client shows any warrants for failure to appear in court. The rap sheet will be important later when we begin addressing plea bargain offers from the DA.

Adjournments: After your client is arraigned and bail is set, the court may ask you whether you would like an adjournment. An adjournment is a magic word that means you have to come back to court another day. But adjournments are important for several other reasons also: First, time calculations. In some parts of the state, time periods, speedy trial factors, CPL §§ 30.30, 170.70, 180.80, etc., are looked at carefully. In other parts of the state, time periods aren't scrutinized quite so closely. However, the court may still ask, "time charged to the defendant," or "time charged to the People." The DA will not often accept the time being charged to the People. So just make sure to keep an eye on the adjournments so that you are not giving away your client's rights.

Once the case is adjourned, you can really dig into the facts of the case, if you have not already done so.

For example, how old is your client? Is he or she "Y.O." eligible? Age may be an important issue. CPL art. 720.

***People's Offer*:** After the arraignment, and usually not until the rap sheet comes back, the DA may make an offer to your client. Now, during the initial meeting with the client or the client's family, you may be asked by the accused "what am I looking at?" Or, "what kind of time am I looking at?" Obviously, you need to look at the charges. Penal Law §§ 55.05 and 55.10 (PL). Basically, in New York State, an A misdemeanor carries a maximum incarceration of 12 months, a B misdemeanor carries a maximum of 3 months and a violation, which is considered a "non-criminal" event, carries a maximum incarceration of no more than 15 days. PL § 70.15.

Once you know what the worst case scenario is for your client, you can then look into the plea offer. Obviously, from the defense perspective, you want to limit your client's exposure to jail. In other words, you would like to begin any plea discussion by taking jail off the table. So, once again, you need to examine your client's rap sheet and present it in the light most favorable. Secondly, you need to spin the facts of the case and advocate on behalf of your client to the DA. Tell the DA why your client deserves a small fine, a conditional discharge or probation. Fines are usually, if not always, controlled by statute. The court enjoys a certain amount of discretion within statutory parameters. Therefore, explain to the court why it should not fine your client more than the minimum. Again, you must advocate your client's position. Emphasize the minor nature of the charges, your client's clean rap sheet, if that argument is available to you, and discuss your client's limited financial resources while asking for the minimum fine. There is something called a surcharge, which is an additional amount payable to the state.

Conditional discharge, or "CD," in criminal court circles, means in essence that your client needs to stay out of trouble for the period of the CD, which is usually one year. There may be specific CD conditions. So, if your client violates a specific condition of the CD, a violation can come back before the court and the underlying criminal case is reopened and subject to further proceedings. Similar to a CD is the ACD—adjournment in contemplation of dismissal. CPL § 170.55 or 170.56 for marijuana. Again, an ACD is a great outcome for your client because after the adjournment period, 6 months in most cases, but one year in others like marijuana, if the client stays out of trouble, the dismissal is granted and the charges are dismissed by operation of law, almost as if they had never been filed in the first instance. ACDs can be magic.

Lastly, there is probation: 3 years for an A misdemeanor, 1 year for a B misdemeanor. Those time limits are not negotiable. They are set by statute. PL art. 65. Your client may say to you, "I'll take probation, but does it have to be three years?" The simple answer is "yes." On an A misdemeanor, it is three years. However, in some circumstances, the department of probation may terminate the probation period sooner. But the short answer is, 3 years for an A and 1 year for a B.

"You will face a world of trouble if you approach criminal representation thinking that to plead or not is your choice."

Attorney-Client Relationship: So now that you have an offer from the DA, what do you do? Obviously, no matter how bad or good you think the offer is, it must be conveyed to your client. Ethically, you are duty bound to convey all offers. Moreover, and this is very important to consider, the decision to accept or reject an offer is always the client's decision. It is never the attorney's decision. You can counsel, advise, or suggest. But in the final analysis, when the dust settles, it is the client's decision whether to plead or go to trial. You will face a world of trouble if you approach criminal representation thinking that to plead or not is your choice. Now, on the other hand, you may have other important choices if the client does not accept your advice, or if a conflict develops between you and your client. If you are unable to effectively represent the client because he or she is not cooperating with you, or does not trust you, or for some other concrete reason, you may seek to be relieved, or the client may ask the court to relieve you from the case. But bear in mind that it is the client's right to proceed to trial if he or she chooses.

Open file discovery: At some point, you may need to complete what is called "open file" discovery, or "consent" discovery in some jurisdictions. Once you have seen "everything," or virtually everything that the DA has seen, then perhaps you can better explain to your client why the plea offer may be the route to take. Open file discovery is simply making an appointment with the DA and sitting in his or her office and looking at the file, and taking notes as best you can. You are not usually allowed to make copies, but taking careful, copious notes from the file is advisable.

Now, open file, or consent discovery, may lead to motion practice if you find something in the file that causes a red flag in your mind. CPL art. 255, §§ 170.30, 170.35, 170.40 and CPL art. 240 or 710. You may not know what kind of suppression, identification or other pre-trial issues need to be addressed before going through the DA's file during open file discovery. Also, you must be aware of time limits for making motions.

Plea: Let us assume that you have gone through the process so far: you have gotten paid, you have completed the arraignment, made a compelling bail argument, adjourned the case once or twice, gotten the rap sheet back, gotten a good offer from the DA, and gotten your client's authority to accept the plea. Now what?

Make sure that there are no immigration ramifications for your client if you are pleading to a misdemeanor. This article is not going address that issue in much detail here. But, it is important to realize that immigration status can be adversely impacted by a guilty plea. So make sure your client has been properly cautioned about INS and/or immigration issues.

"Criminal defense work in the local, village or district courts can be fun and challenging. But like any other legal matter, it must be handled carefully."

OK, with that out of the way, now you are in front of the judge. Typically, the DA will go on the record and reduce the misdemeanor charges for plea purposes. Then it is your chance to enter a plea. Typically one says: "Your honor, my client has authorized me to withdraw any previously entered pleas of not guilty and enter in its place a plea of guilty to the reduced charge," *or whatever the reduced plea is.* You may also want to reiterate what the agreed upon fines are. For a misdemeanor plea, the DA and the judge will most likely run through a series of questions called an *allocution*, checking to see the mental state of your client.

Sentencing

Sentencing for a violation is pretty straightforward. One nice aspect of the violation plea is that a violation is a non-criminal disposition. By operation of law, the file is sealed and the rap sheet will not show a conviction. CPL §§ 160.50 and 160.55.

A misdemeanor conviction may require a presentence report (PSR). See CPL art. 390. Essentially, the PSR is an investigation done by the Department of Probation. It looks at a great many issues like family structure, education, alcohol or drug use, prior criminal history, employment history, military service, and the like. Finally, the report makes a recommendation, either probation, incarceration, or some other sentence. Some courts place great emphasis on these reports. In fact, some dispositions require the preparation of a PSR. They can take several months to prepare in some jurisdictions.

On the sentencing date, unless your client has done something unthinkable like getting re-arrested pending sentencing, the sentencing should go rather smoothly. There should not be any surprises at that point. Everything has already been sorted out and negotiated. Ask the court to exonerate bail, that, is allow your client to use the bail posted to pay the fine and surcharge. And that should wrap up your criminal case.

There are some housecleaning matters that you will start doing after you have handled a few criminal matters. For example, if you handle DWIs, it is good and safe practice to advise your clients in writing not to drive until DMV tells them in writing that they can drive again, usually after the suspension/revocation period ends and the restoration fee is paid to the state *even if they have been so advised on the record*. There are a few other standard closing matters that you will pick up along the way.

Conclusion

Criminal defense work in the local, village or district courts can be fun and challenging. But like any other legal matter, it must be handled carefully.

Steven C. Davidson is a criminal defense attorney admitted in New York, The United States Supreme Court, Massachusetts and Washington, D.C. He is also a frequent speaker at CLE lectures about criminal practice, litigation skills and ethics. He was assisted in the preparation of this article by Soulafreda Valassis, Esq., a recent graduate of Cardozo Law School and member of the Connecticut Bar.

Section 450.50: Appeal by the People from an Order of Suppression: An Overview

By Andrew J. Schatkin

Introduction

Section 450.50 of the Criminal Procedure Law (CPL), defines and sets forth the circumstances and process by which the People are allowed to appeal from an Order Suppressing Evidence in a criminal case in the state of New York. Subsection 1 states that, in taking an appeal from an order granting suppression pursuant to subsection 8 of CPL 450.50, the People must file, in addition to a Notice of Appeal, an Affidavit of Errors, a statement asserting that the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the People with respect to the criminal charge which has been filed in court either (a) insufficient as a matter of law or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

The Necessity of the Statement

It has been said that the purpose of the section, allowing the People to appeal from the Suppression Order is the feeling that where the effect of the order is to leave the prosecution with insufficient evidence, the order is for the most practical purposes final, and an appeal should be permitted. The Appellate Term, in *People v. Midgett*,[1] so stated.

This statutory guarantee of finality, as enunciated in CPL 450.50, the Affidavit of Errors and the filing of statement in the appellate court is unnecessary where the indictment itself is also dismissed simultaneously with the Suppression Order.

Thus in *People v. Townsend*,[2] where the count of an indictment charging bribery in the first degree was dismissed, and the defendant's statements relating back thereto were suppressed by order of the Supreme Court of New York County, the Appellate Division, First Department, held that an appeal from the suppression of the defendant's statements was properly taken. The court held that CPL 450.50 was designed to limit interlocutory appeals by the People from suppression orders so that dismissal of the indictment, simultaneously with the suppression of statements guarantees finality and renders the filing of a statement pursuant to CPL 450.50(1) unnecessary.

Section 2 of the same statute specifically states that appeal from the suppression order constitutes a bar to the presentation of the accusatory instrument involving the evidence ordered suppressed unless and until such suppression order is reversed on appeal and vacated.

There is a caveat and limit to this restriction, however. Where the appeal is withdrawn with the permission of the court this relieves the People from the bar to further presentation of and prosecution under the accusatory instrument. Hence in *People v. McIntosh*[3] the Court of Appeals held that withdrawal with the permission of the appeals court makes the appeal a nullity. Under these particular and peculiar circumstances, the court held that there is no bar to further prosecution within the meaning of CPL 450.50(2). Of course, if the appeal under the statement is unsuccessful, any further prosecution of the defendant for the charges contained in the accusatory instrument is totally barred. If the appeal is successful it is obvious that the prosecution may proceed.[4]

The Statement

This statutory section specifically states that the statement filed with an appellate court must allege that the deprivation of the use of the evidence order suppressed has rendered the sum of the proof available to the People with respect to a criminal charge, which has been filed in court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

Again, there is a gloss here. Thus, in *People v. Casadei*,[5] the Appellate Division, Fourth Department held that the People were not precluded from introducing the contested blood test evidence at trial with respect to a Penal Law charge where the People had prevailed on a suppression appeal. They so held even though the People had not indicated the Penal Law charge against the defendant in their statement in support of their appeal from the suppression order and their statement only discussed the charge under the VTL count. The clear thrust of the *Casadei* holding is that success on appeal cures any deficiency in the statement that may have lacked a full explanation of the charges. Under *Casadei*, any error in the statement is mooted.

Another twist on some supposed deficiency in the statement under CPL 450.50 is set forth in *People v. Brooks*.[6]

In *Brooks*, the Appellate Division, Fourth Department held that the prosecution's failure to file the statement asserting the deprivation of evidence suppressed by the trial court, nullified any possibility of conviction and did not preclude the People's appeal from the trial court's order dismissing the indictment. The Court reasoned that since the appeal was from an order of full indictment dismissal, and not merely and solely from an order granting suppression, that statement was not required in the case in which, as in *Brooks*, the trial court had suppressed the evidence and had also dismissed the indictment.

In similar fashion in *People v. Midgett*,[7] the defendant appealed from an order granting the defendant's motion to suppress physical evidence and a subsequent order dismissing the information because the People were unable to proceed to trial without the suppressed evidence. The appellate court held that where there has already been a judicial determination that the People were unable to proceed without the suppressed evidence, a statement by the People to that effect is superfluous.

Specifically, the court held that the requirements of CPL 450.50 are satisfied where the court dismisses the information on the ground that the People are left with insufficient evidence to proceed with the prosecution, and so the filing of the statement under those circumstances is not required.[8]

A final point should be noted. The statute here, CPL 450.50, prohibits any further prosecution of the accusatory instrument under this limited type of appeal. Further, if the prosecution seeks to continue the matter by obtaining a superseding indictment which contains the same charges set forth in the original indictment, the newly indicted charges may also be dismissed. The Court held in *Forte v. Supreme Court*,[9] that where all the evidence which suppressed both the original and superseding indictment was known to the prosecutor, the prosecution cannot avoid the statutory bar by obtaining a superseding indictment alleging the same offense, unless there is a showing of newly discovered evidence.

Conclusion

This review of the import and meaning and ramifications of CPL 450.50 reveals a number of threads. First, the purpose of the statute and its requirements is to preclude appeal from a non-final order and to preserve finality.[10] Second, where the indictment has been dismissed, the rule and its necessity is rendered unnecessary.[11]

Third, where the appeal is successful, under the statutory section, any minor deficiency or deficiencies in the statement will be cured.[12] Fourth, where the appeal is withdrawn with the permission of the court, this allows or rather removes any bar to further prosecution within the meaning of CPL 450.50, which would be otherwise operative during the appellate process.[13]

In the same way, when the appeal is from dismissal of the full indictment, the failure to file the statement is rendered harmless. The statement is also not required where the trial court has dismissed the indictment.[14] Again, if the appeal is unsuccessful any further prosecution will be barred.[15]

Finally, and in conclusion, the People cannot evade the affirmation of the suppression order and continue the prosecution by filing a superseding indictment unless the indictment alleges newly discovered evidence.

Endnotes

1. *People v. Midgett*, 86 Misc. 2d 3, 383 N.Y.S.2d 784 (S. Ct. App. Term 1976).
2. *People v. Townsend*, 127 A.D.2d 505, 511 N.Y.S.2d 858 (1st Dep't 1987).
3. 80 N.Y.2d 87, 587 N.Y.S.2d 568 (1992).
4. *People v. Felton*, 171 A.D.2d 1034, 568 N.Y.S.2d 988 (4th Dep't 1991).
5. *People v. Casadei*, 106 A.D.2d 885, 483 N.Y.S.2d 875 (4th Dep't 1989).
6. 54 A.D.2d 333, 388 N.Y.S.2d 450 (4th Dep't 1976).
7. *Id.*
8. *Id.*
9. *Forte v. Supreme Court*, 62 A.D.2d 704, 406 N.Y.S.2d 854 (2nd Dep't 1978), *aff'd*, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979).
10. *People v. Midgett*, 86 Misc. 2d 3, 383 N.Y.S.2d 784 (S. Ct. App. Term 1976).
11. *Brooks*, 54 A.D.2d 333.
12. *People v. Casadei*, 106 A.D.2d 885, 483 N.Y.S.2d 875 (4th Dep't 1989).
13. *People v. McIntosh*, 80 N.Y.2d 87, 587 N.Y.S.2d 568 (1992).
14. *Brooks*, 54 A.D.2d 333.
15. *Forte v. Supreme Court*, 462 A.D.2d 704, 406 N.Y.S.2d 854 (2nd Dep't 1978), *aff'd*, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979).

Andrew J. Schatkin practices law in Jericho, New York and is the author of many legal articles and a contributor to several books. Andrew J. Schatkin is listed in *Who's Who in America; Who's Who in the World;* and *Who's Who in American Law.*

New York Court of Appeals Review

When the New York Court of Appeals resumed its session after returning from its summer recess, it issued several cases of interest and importance with respect to the area of criminal law. Summarized below are the decisions of the Court covering the period up to January 25, 2005.

RIGHT TO COUNSEL

***People v. Carranza*, Decided October 21, 2004 (N.Y.L.J., October 22, 2004, p. 19)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction and rejected his claim that statements he made to a police officer without a lawyer present should have been suppressed. The Court of Appeals rejected the defendant's argument because the requirements of the *Arthur* rule set forth in *People v. Arthur*, 22 N.Y.2d 325 (1968) were not met. Under the instant circumstances the police department questioning the defendant had not been informed that an attorney represented him or sought to communicate with police on his behalf. At the time of the commission of the murder involved in the instant case the defendant had another unrelated case pending in which he had been assigned a lawyer from the Legal Aid Society. The local police officers questioning the defendant were not aware of the defendant's representation on the other case and thus the Court of Appeals found that the *Arthur* rule did not apply. The Court of Appeals reiterated that a lawyer may not prevent the police from questioning a suspect by communicating only with law enforcement agencies not involved in the investigation.

LICENSED PROFESSIONALS LIABLE FOR AIDING UNAUTHORIZED PRACTICE

***People v. Santi*; *People v. Corines*, Decided October 21, 2004 (N.Y.L.J., October 22, 2004, pp. 1, 4 and 18)**

In two companion cases the New York Court of Appeals unanimously held that licensed professionals who aid and abet the unauthorized practice of their trade are subject to felony prosecutions under section 6512 of the Education Law. The Court stated that the only reasonable interpretation of the statute is that it does not exempt licensed professionals from criminal prosecution and that such an interpretation was required in order to promote the public safety. The Court observed that licensed professionals cannot evade responsibility simply by maintaining an arm's-length distance with individuals engaged in the unauthorized practice.

Under the instant facts of the case Dr. Corines had operated two medical offices in which the defendant Santi continued to work after having been suspended from the practice of medicine. The Court of Appeals held Dr. Corines responsible as an aider and abetter of Santi's actions in continuing to practice medicine after her suspension.

DEPRAVED INDIFFERENCE MURDER

***People v. Payne*, Decided October 19, 2004 (N.Y.L.J., October 20, 2004, pp. 1, 2 and 18)**

In a 5-2 decision the Court of Appeals dismissed a charge of depraved indifference murder against a defendant on the grounds that the prosecutor had overreached and had charged the defendant with both intentional murder and depraved indifference homicide. The Jury had acquitted the defendant of the intentional murder count, but in what appeared to have been a compromised verdict convicted him of depraved indifference murder. Relying upon its recent ruling in *People v. Gonzalez*, 1 N.Y.3d 464 (2004), the court found that the defendant had acted intentionally and not recklessly.

Judges Read and Graffeo dissented on the grounds that the defendant had failed to preserve the issue for Court of Appeals review. The dissenters observed that the defendant moved at the close of the prosecution's case for dismissal of the depraved indifference count, but had failed to renew the motion at the end of trial. The majority felt that the issue had been adequately preserved by the defendant's initial motion.

DEFENDANT'S RIGHT TO A FAIR TRIAL NOT VIOLATED

***People v. Henriquez*, Decided October 19, 2004 (N.Y.L.J., October 20, 2004, p. 20)**

In a 6-1 decision the Court of Appeals upheld defendant's conviction and ruled that a defendant who invoked his right to trial counsel but then refused to permit his attorney to do anything could not prevail on a subsequent claim of ineffective assistance of counsel. The Court ruled that the defendant's Sixth Amendment right had not been violated and the defendant had not been denied a right to a fair trial. During the trial the defendant had ordered his court-appointed attorney to do nothing and had also declined to proceed pro se. The defendant had been warned by the trial judge of the perils of proceeding in such a manner and the Court of Appeals determined that the defendant must now accept the consequences of the decision which he voluntarily and intentionally made.

Judge George Bundy Smith dissented, arguing that the Court and defense counsel had a constitutional and professional obligation to insure that the defendant was effectively represented.

TRACK STATUS OF INSANITY ACQUITTEE

***Norman D (Anonymous) v. Commissioner of the New York State Office of Mental Health*, Decided October 19, 2004 (N.Y.L.J., October 20, 2004, p. 18)**

In a unanimous decision relating to the tracking status of a defendant who has been committed following a finding of insanity, the Court of Appeals held that the tracking status as determined by the initial commitment order governs the acquittee's level of supervision in future proceedings and may be overturned only on appeal from that order, not by means of a rehearing and review. The Court of Appeals determined that under CPL 330.20(16) the initial trial court cannot change a defendant's tracking status under the guise of a rehearing and review and that only an Appellate Court as part of the appellate process can change the initial determination.

EVIDENCE OF UNCHARGED CRIMES

***People v. Resek*, Decided November 23, 2004 (N.Y.L.J., November 24, 2004, pp. 1 and 19)**

In a 4-3 decision the Court of Appeals reversed a defendant's drug conviction and ordered a new trial because the trial court had improperly allowed testimony that the defendant may have also stolen a vehicle at the time of his arrest. The grand jury had refused to indict the defendant for possession of a stolen car and the majority opinion in the Court of Appeals adhered to its prior strict and high standards regarding the wrongful admissibility of uncharged crimes.

Judge Rosenblatt writing for the majority acknowledged that a delicate balance had to be made between the danger of uncharged crime testimony and its usefulness in filling in gaps to explain interwoven events. In the case at bar the majority concluded however that the prejudicial effect outweighed any legitimate prosecutorial need for the testimony. The three dissenting judges expressed the view that the error which occurred was harmless and a reversal was not required. Within their dissent the minority relied upon the Court's prior decisions in *People v. Tosca*, 98 N.Y.2d 660 (2002), and *People v. Till*, 87 N.Y.2d 835 (1995). The 4-3 decision again illustrated the split within the court with Judges Kaye, G.B. Smith, Ciparick voting for reversal and Read, Graffeo and Robert S. Smith voting to uphold the conviction. Judge Rosenblatt who wrote the majority opinion again constituted the swing vote casting his vote with the Kaye group.

ANONYMOUS UNDERCOVER TESTIMONY

***People v. Waver*, Decided November 23, 2004 (N.Y.L.J., November 24, 2004, p. 21)**

In a unanimous decision the Court of Appeals reversed a drug conviction and ordered a new trial because the trial court had improperly allowed two undercover police officers to provide anonymous testimony. The officers had provided only their shield number and not their name. The defendant contended that his Sixth Amendment right to confrontation had been violated by the anonymous testimony and that he had been denied a fair trial. The Court of Appeals held that the People had failed to make a proper showing to establish the need for the anonymous testimony and under the circumstances a new trial was required. The Court of Appeals stated that the three-step sequential enquiry that was mandated by their decision in *People v. Standard*, 42 N.Y.2d 74 (1977), was not followed and therefore reversible error had occurred.

NOTICE OF ALIBI

***People v. Rodriguez*, Decided November 30, 2004 (N.Y.L.J., December 1, 2004, p. 19)**

In a unanimous decision the Court of Appeals affirmed a defendant's conviction but sharply split on the reasons for its result. A four-judge majority found that the trial court had committed error in allowing a defendant to be cross-examined regarding a prior withdrawal of an alibi notice. The majority concluded that the trial judge had wrongfully given the prosecutor a tactical advantage and that the court's actions were contrary to the Court of Appeals' prior decision in *People v. Burgos-Santos*, 98 N.Y.2d 226 (2002). The majority nonetheless upheld the conviction because it concluded that the trial judge's error was harmless in view of the overwhelming evidence of the defendant's guilt.

In a separate concurring opinion consisting of Judges Graffeo, Read and Robert S. Smith the minority expressed the view that the trial court had committed no error by allowing the testimony in question and that the trial court was within its discretion to make the ruling, which it did.

ORDERS OF PROTECTION

***People v. Inserra*, Decided November 30, 2004 (N.Y.L.J., December 1, 2004, p. 20)**

In a unanimous decision the Court of Appeals upheld a defendant's conviction for criminal contempt in the second degree for violating an order of protection. The information which charged the defendant stated only that the defendant's name appeared on the order of protection. The defendant attacked the information as being legally insufficient since it did not contain factual allegations that the defendant was aware of the contents of the order of protection. The Court of Appeals ruled, however, that the defendant's signature on the order of protection allows the court to infer that he was aware of its contents and could constitute sufficient evidence of his intent to be bound by its terms. The Court of Appeals therefore reversed the Appellate Term's dismissal of the action and remitted the matter back to that court for additional consideration.

FIRST DEGREE MURDER

***People v. Duggins*, Decided December 2, 2004 (N.Y.L.J., December 3, 2004, p. 18)**

In a 4-3 decision the Court of Appeals upheld a first degree murder conviction based upon the claim that a defendant committed two murders as part of the same criminal transaction even though the killings occurred almost two hours apart at two different locations. The statute which elevates second degree murder to first degree murder includes as one of the aggravating factors multiple killings which are part of the same criminal transaction. The first degree murder statute, however, does not define same criminal transaction and the Court of Appeals was confronted with the issue of whether under the circumstances of the case the two killings could be viewed as being part of the same transaction.

The four-judge majority adopted a definition from another statute, to wit CPL section 40 which deals with other crimes. That statute describes the same criminal transactions as those that are so connected in point of time and circumstance of commission as to constitute a single criminal incident. The majority then found that the defendant had acted in the context of a gang war where he methodically undertook to kill two of his rivals. The majority thus concluded that the defendant's two homicidal acts were part of a continuous course of conduct, which was sufficient to establish the contemporaneousness necessary to constitute the same transaction basis for first degree murder. The majority opinion consisted of Judge Read and Judges George Bundy Smith, Rosenblatt and Graffeo.

The dissenting opinion written by Judge Robert S. Smith argued that the first degree murder statute refers to crimes that are distinct but part of a common scheme. The wholesale adoption of CPL section 40 was therefore inappropriate to the application of the instant facts. Judge Robert Smith was joined in dissent by Chief Judge Judith S. Kaye and Judge Ciparick.

An interesting sideline to this case is the breakup of the traditional voting blocks on significant and controversial criminal matters. As can be noted, Judge George Bundy Smith, who usually votes with Judges Kaye and Ciparick, in this case joined the Read and Graffeo group. Judge Robert Smith, who usually votes with Judges Read and Graffeo, found himself joined by Judge Kaye and Ciparick. It appears at least for this interesting case that the two Smiths switched sides from their usual lineups.

RIGHT TO BE PRESENT

***People v. Fabricio*, Decided December 2, 2004 (N.Y.L.J., December 3, 2004, p. 19)**

In a unanimous decision the Court of Appeals upheld a murder conviction and rejected a defendant's claim that he was denied his right to be present at a critical stage of his trial proceedings. In the case a sidebar conference was held while the defendant was on the witness stand and the jury was seated in the jury box. During his cross-examination the prosecutor had asked for a sidebar conference to discuss an issue regarding a matter he wished to enquire about. The defendant argued on appeal that since he did not participate in the sidebar conference he was denied his right to be present.

The Court of Appeals concluded, however, that the sidebar conference concerned only a legal issue and did not involve a *Sandoval* or *Ventimiglia* hearing. The defendant's right to be present thus had not been violated. In rendering its determination the court emphasized that an essential fact of the right to be present is the potential for the defendant to meaningfully participate in the subject discussions. The Court found that in the instant situation the sidebar conference focused on a pure question of the law—whether the defendant's testimony opened the door to the use of his prior inconsistent statement and whether the People had a good faith basis to inquire about it. The defendant did not have a right to be present as the subject legal discussion did not implicate his peculiar factual knowledge or otherwise present the potential for his meaningful participation.

PEOPLE'S WITHDRAWAL OF CONSENT TO DEFENDANT'S GUILTY PLEA

***People v. Marrero*, Decided December 2, 2004 (N.Y.L.J., December 3, 2004, p. 30)**

In a unanimous decision the Court of Appeals affirmed an order of the Appellate Division and held that the Appellate Division had correctly ruled that in the event the defendant could not properly be adjudicated a second felony offender the People should not be permitted to withdraw their consent to the defendant's original guilty plea. The matter had been remitted by the Appellate Division for resentencing based upon a mutual mistake with respect to the defendant's alleged commission of a prior felony offense. Upon resentencing the people had sought to allege a different prior felony conviction as a basis for the adjudication. Although allowing the people to make such a substitution, the Appellate Division had also indicated that if the people could not sustain their substituted allegation, the defendant's guilty plea would still stand. The Court of Appeals in rendering its determination fully supported the Appellate Division ruling in all of its aspects.

JUSTIFICATION CHARGE

***People v. Jones*, Decided December 16, 2004 (N.Y.L.J., December 17, 2004, pp. 18 and 19)**

In a unanimous decision the Court of Appeals held that a trial judge had committed error when he refused to instruct the jury on the home exception with regard to the

duty to retreat. The Court held that under Penal Law section 35.15 an exception exists with respect to the duty to retreat in a justification claim where someone who would otherwise have to retreat does not have to do so if attacked at home. The Court concluded that the exception applies even when the assailant and the defendant share the same dwelling. The case involved a defendant who choked his live-in girlfriend to death after she picked up a knife during a heated argument. The trial court had charged on justification but had refused to instruct the jury that because the defendant was in his own home, he had no duty to retreat before using deadly force.

The Court of Appeals concluded that this refusal was error but thereafter upheld the defendant's conviction, finding that the error did not warrant reversal. The Court of Appeals found that the overwhelming evidence disproved the justification defense and there was no reasonable possibility that the verdict would have been different had the Court given the requested instruction. The error was thus deemed to be harmless and the defendant's conviction affirmed.

UNPRESERVED ISSUE

***People v. Prado*, Decided December 16, 2004 (N.Y.L.J., December 17, 2004, p. 22)**

In a divided opinion a five-judge majority of the Court of Appeals affirmed a defendant's conviction following a bench trial. The majority held that with respect to the alleged judicial bias the defendant's claim was unpreserved for appellate review. With respect to a second issue involving whether the defendant's counsel was ineffective for failing to object to the lack of evidence corroborating his confession as required by CPL section 60.50, the majority concluded that the claim was without merit.

In a vigorous dissent Judge George Bundy Smith voted to reverse the defendant's conviction and grant a new trial. Judge Smith based his conclusion on the grounds that the defendant's attorney was ineffective in failing to raise or argue that corroboration of the defendant's confession was lacking. Judge Smith viewed the provisions of CPL section 60.50 as being fundamental and that the failure of defense counsel to raise this issue seriously prejudiced the defendant. Judge Smith also expressed the view that the trial record indicated that the trial court had already made up its mind that the defendant was guilty prior to the holding of the bench trial and that thus the defendant was denied a fair trial. Judge Smith pointed to a colloquy and the trial court's remarks just prior to trial in support of his contentions. Also in an interesting decision Judge Robert S. Smith dissented in part, concurring with the majority that the defendant's judicial bias claim was not preserved.

LOSS OF MINUTES

***People v. Parris*; *People v. Hoffler*, Decided December 21, 2004 (N.Y.L.J., December 22, 2004, pp. 21 and 22)**

In two companion cases the New York Court of Appeals again considered the issue of what should occur when trial or hearing minutes have been irretrievably lost. Relying upon its prior decision in *People v. Glass*, 43 N.Y.2d 283 (1977), the Court reiterated that the loss of a reporter's minutes is not an automatic reason for reversing a conviction. Specifically the Court held that a reconstruction hearing should normally be available for a defendant appealing his conviction after trial if the defendant has acted with reasonable diligence to mitigate the harm done by the mishap. Further, a defendant who has pleaded guilty is entitled to a reconstruction hearing only when he can identify a ground for appeal that is based on something that occurred during the untranscribed proceeding.

Applying these principles to the facts of each of the two cases involved, the Court concluded that affirmances were required in both cases. The Court found that the defendant in *People v. Parris*, who was convicted after trial, did not make reasonable efforts to mitigate any of the harm resulting from the loss of the minutes. With respect to the defendant in *People v. Hoffler*, who pleaded guilty, the Court concluded that the defendant had identified no issue to which the missing minutes were relevant. The Court's decision in each of the two cases was by a unanimous vote.

***People v. Marquez*, Decided December 21, 2004 (N.Y.L.J., December 22, 2004, p. 22)**

In a related case the Court of Appeals reversed a decision of the Appellate Division and remitted the matter back to that court for further consideration in light of the principles enunciated in *People v. Parris* cited above. The Court found that the record before it did not permit it to conclude that as a matter of law the defendant had not acted with reasonable diligence. Since the issue involved a conviction after trial the Court of Appeals remitted the matter back to the Appellate Division with the instructions that it should decide (or if it thinks better, should instruct the Supreme Court to decide), after giving the parties an opportunity to make appropriate submissions, whether the defendant acted with reasonable diligence as *Parris* requires. If he did, a reconstruction hearing should be ordered, and if he did not, his conviction should be confirmed. The Court of Appeals ruling was unanimous.

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

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

On January 12, 2005, the United States Supreme Court issued its long-awaited decision regarding the constitutionality of the federal sentencing guidelines. Following its *Blakely* decision last year the viability of the guidelines was in serious question and in *United States v. Booker* and *United States v. Fanfan*, the Court in a 5-4 decision expressly held the guidelines to be constitutionally defective. The Court determined that the guidelines could no longer be mandatorily imposed but could only serve in an advisory capacity. The law notes from several students at St. John's Law School that are printed below discuss the sentencing guideline cases and other important recent decisions from the Supreme Court.

ENHANCEMENTS UNDER THE FEDERAL SENTENCING GUIDELINES—The Sixth Amendment requires that, other than prior convictions, every fact relevant to sentencing (not otherwise admitted) must be found by a jury, not a judge. The Federal Sentencing Guidelines are now advisory and no longer mandatory.

***United States v. Freddie J. Booker, United States v. Duncan Fanfan*, 2005 LEXIS 628**

Respondent Booker was found by a jury in violation of 21 U.S.C. § 841(a)(1) for possessing 92.5 grams of crack with the intent to distribute. The Federal Sentencing Guidelines prescribe incarceration for between 210 and 262 months based on the jury's findings. The judge held a post-trial sentencing proceeding and found by a preponderance of the evidence that respondent possessed an additional 566 grams of crack and found him guilty of obstructing justice. Based on these new findings, the judge increased respondent's sentence, under the Guidelines, to between 360 months and life imprisonment. The judge sentenced respondent to a 30-year sentence. The Court of Appeals for the Seventh Circuit held that the judge's conduct and application of the Sentencing Guidelines was in opposition to the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which stated that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490. The Seventh Circuit instructed the District Court to resentence respondent in accordance with the jury's original findings or to hold a sentencing hearing before a jury.

Respondent Fanfan was convicted for conspiracy to distribute and to possess with intent to distribute in excess of 500 grams of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B)(ii). Under these facts, the maximum sentence prescribed by the Sentencing Guidelines is 78 months' imprisonment. The judge in respondent's case then conducted a sentencing hearing at which he found, by a preponderance of the evidence, that respondent was "responsible" for 2.5 kilograms of cocaine and 261.6 grams of crack. He also found that respondent was a leader in the criminal activity accused. Together, these facts elevated respondent's sentence under the Guidelines to between 188 and 235 months. See *United States v. Booker*, 2005 LEXIS 628 at *18-19. Despite these findings and in reliance on *Blakely v. Washington*, the judge refused to enhance respondent's sentence beyond that authorized by the jury findings alone. *Blakely v. Washington*, 125 S. Ct. 21 (2004).

The Supreme Court granted certiorari in both the *Booker* and *Fanfan* cases and held that this application of the Federal Sentencing Guidelines violates the Sixth Amendment requirement that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker* at *45-46. The Court founded this conclusion on application of *Blakely* and *Apprendi*, rejecting government challenges to *Blakely's* relevance on *stare decisis* and separation of powers basis. Justice Stevens, invoking numerous precedents, stated that the Sixth Amendment right to jury trial "is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict" but acknowledged that this decision does not disturb a judge's discretion to sentence within the Guideline spread supported by that verdict. *Booker* at *25.

In a separate opinion, Justice Breyer, writing for a plurality, concluded that 18 U.S.C.A. § 3553(b)(1), the provision of the Federal Sentencing Guidelines that mandates application by district judges, must be severed from the statute, rendering the Guidelines advisory. The Court reasoned that Congress would ultimately prefer excision of the offending provisions to superimposing a jury fact-finding requirement or striking down the statute in its entirety. Severance was deemed the most effective way to sustain Congress' goals in enacting the Guidelines: increased uniformity in sentencing

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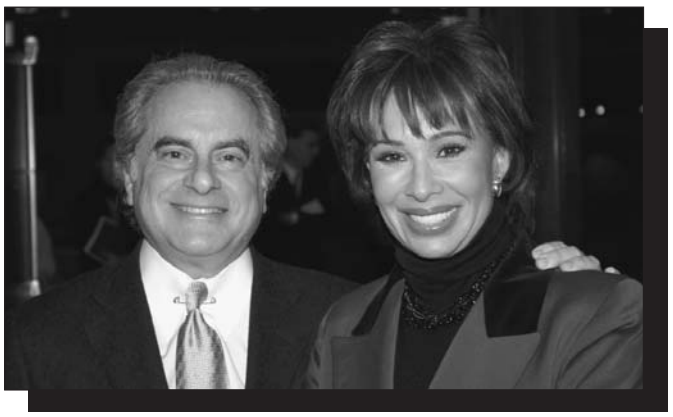

FROM THE STICE SECTION MEETING LUNCHEON OS PROGRAM

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and punishment that reflects defendants' "real conduct." *Booker* at *49. Section 3742(e), which set forth the standard for review of sentencing appeals, was excised as well because it was critically dependent on section 3553(b)(1). The Court stated that the standard of review implicit in the revised statute is unreasonableness of the sentence.

By Susan Elizabeth Frazzetto

DEPORTATION OF LEGAL ALIENS CONVICTED OF VIOLENT CRIMES—Conviction for driving under the influence under a state law that lacks a *mens rea* component or requires only a showing of negligence does not qualify as a crime of violence allowing deportation of a legal alien.

***Josue Leocal v. John D. Ashcroft, Attorney General, et al*. 125 S. Ct. 377; 160 L. Ed. 2d 271; 2004 U.S. LEXIS 7511; 73 U.S.L.W. 4001 (2004)**

Petitioner, a Haitian immigrant, became a lawful permanent resident of the United States in 1987. In January of 2000, he was in a car accident resulting in injury to two other individuals. Under Florida law, petitioner pled guilty to two counts of driving under the influence of alcohol (DUI) and causing serious bodily injury, a third degree felony. See Fla. Stat. § 316.193(3)(c)(2) (2003). He was sentenced to two and a half years in prison.

Approximately a year into petitioner's sentence, the Immigration and Naturalization Service initiated proceedings to remove him from the country pursuant to § 237(a) of the Immigration and Nationality Act, which grants the Attorney General authority to eject a legal alien who has been convicted of an "aggravated felony." Title 18 U.S.C. § 16 defines an aggravated felony as a "crime of violence" punishable by at least a year of imprisonment. A "crime of violence" is in turn defined as "(a) an offense that has as an element, the use . . . of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See 18 U.S.C. § 16. An immigration judge on the Eleventh Circuit reviewed petitioner's conviction and held him deportable for commission of a crime of violence. The Board of Immigration Appeals affirmed. Petitioner served the remainder of his sentence and was removed to Haiti in 2002. The Court of Appeals for the Eleventh Circuit then dismissed his petition for review. The Supreme Court granted certiorari and reversed.

The Supreme Court analyzed petitioner's felony conviction as a crime of violence under sections (a) and (b) of 18 U.S.C. § 16 and held the elements of the DUI crime do not establish a high enough *mens rea* to allow removal. In reviewing section (a), the Supreme Court focused on the plain meaning of the "use . . . of physical force" clause and stated that this requires active, intentional employment of force against another, beyond the mere contact that occurs during an accident. The Court found no *mens rea* element in petitioner's DUI conviction that reached the higher level of intent suggested by 18 U.S.C. § 16, and held this section inapplicable to him.

The Court found the same with respect to 18 U.S.C. § 16(b). Though their analysis suggested that section (b) has a broader reach than (a), covering "offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense," the Court refused to read this to include all negligent conduct. See *Leocal v. Ashcroft*, 125 Sup. Ct. at 383. Instead, the Court interpreted section (b) to include crimes such as burglary which are classified as violent not simply because force against an object is employed in the crime's commission, but instead because the nature of the crime involves a "substantial risk" that the force will be used against a person to further the crime. *Id*. In the absence of a heightened *mens rea* against another individual, sections (a) and (b) were both found inapposite to petitioner's DUI conviction, and the case was remanded to the Eleventh Circuit.

By Susan Elizabeth Frazzetto

INEFFECTIVE ASSISTANCE OF COUNSEL—Counsel's concession of guilt in capital case without defendant's express consent is not automatically deficient so as to constitute the ineffective assistance of counsel.

***Florida, Petitioner v. Joe Elton Nixon*, 125 S. Ct. 551, 73 U.S.L.W. 4047 (2004)**

Respondent Nixon was indicted in Leon County, Florida for the first-degree murder, kidnapping, robbery, and arson of a woman found tied to a tree and burned to death. In recognizing overwhelming evidence that established respondent had committed the crime, respondent's counsel decided the best trial strategy was to concede guilt during the guilt phase of trial and to present extensive mitigation evidence during the penalty phase. Counsel attempted to explain such strategy to respondent at least three times, but respondent was generally unresponsive and never verbally approved or protested the proposed strategy.

At trial, counsel did not put on a defense case, but counsel cross-examined witnesses for clarification, argued against the introduction of prejudicial evidence, actively contested several jury instructions, and argued in an opening and closing statement that the jury should spare respondent's life in the penalty phase. After the jury found respondent guilty and sentenced him to death, respondent directly appealed to the Florida Supreme Court, which affirmed. Respondent then was denied two motions for post-conviction relief. The Florida Supreme Court ultimately held the respondent did not "affirmatively and explicitly" agree to counsel's strategy, and thus counsel's representation was inadequate. The Supreme Court granted certiorari and reversed.

The Supreme Court held counsel acted reasonably, even without express consent of respondent, because "in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed." *See Nixon* at 561, 563. The Court further explained that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive," the applicable standard is that from *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), which asks whether counsel's representation falls "below an objective standard of reasonableness." *See Nixon* at 555, 563.

The Supreme Court distinguished respondent's concession of guilt from that of a guilty plea because the respondent "retained the rights accorded to a defendant in a criminal trial." *Id*. at 561. Not only was the state obliged to establish its *prima facie* case at the guilt phase of respondent's trial, but the defense also reserved the right to cross-examine witnesses and to endeavor to exclude prejudicial evidence. *See id*. at 561. Moreover, the concession of guilt did not hinder respondent's right to appeal. *See id*.

Given such a distinction, the Supreme Court specifically noted that contrary to the ruling of the Florida Supreme Court, the standard from *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984), was not applicable in respondent's case. *See Nixon* at 555. Such standard would apply a presumption of deficient performance and a presumption of prejudice, but the presumption of prejudice would only apply where counsel entirely failed to function as the client's advocate, which clearly had not occurred. *See id*. at 555, 557-59.

By Vincent R. Vigueras

The United States Supreme Court to Determine Several Unique Cases in the Field of Criminal Law

The United States Supreme Court presently has before it several interesting cases which involve unique issues in the field of criminal law. One case involves a Missouri death row inmate who is challenging the constitutionality of forcing defendants to appear before the jury in chains and shackles. Missouri apparently allows the chaining of inmates while juries consider their fates without proof of being an escape risk or other security problems. The Supreme Court has previously held that people on trial can be shackled if prosecutors or the court can demonstrate a strong reason to do so. The Supreme Court only recently accepted this case and oral arguments are expected to be heard in the fall of 2005.

The Supreme Court has also agreed to review a case involving the legal rights of foreign citizens in death penalty cases. The Court recently accepted the case of a Mexican man who was sentenced to the death penalty in Texas. The case has significant international implications since the International Court of Justice requested the United States to undertake an effective review of convictions and sentences imposed upon some 51 Mexican citizens in 9 states. The International Court ruled that the 51 defendants had been deprived of their rights under the Vienna Convention to meet with Mexican governmental representatives. The question thus to be determined by the United States Supreme Court is whether the federal government can permit the state of Texas to execute a Mexican citizen whose rights under a binding international treaty were violated when he was tried and sentenced to death without Mexican officials being notified. The Supreme Court accepted his case in December 2004 and a decision is not expected until the summer or fall of 2005.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting and informative decisions from the various Appellate Divisions, which were decided between October 15, 2004 and January 21, 2005.

People ex rel. Hinspeter v. Senkowski **(N.Y.L.J., October 19, 2004, p. 18)**

In a unanimous decision the Appellate Division Second Department denied a defendant's habeas corpus petition challenging the constitutionality of CPL section 530.50 which denies post-conviction bail pending appeal to certain defendants. The Appellate Division found that habeas corpus review was unavailable under the circumstances presented and that the constitutionality of the post-conviction bail statute could not be challenged through the habeas corpus procedure.

People v. Collins **(N.Y.L.J., October 22, 2004, pp. 1 and 2, and October 27, pp. 18 and 23)**

In a unanimous decision the Appellate Division, First Department reversed a drug conviction on the grounds that the prosecutor had committed various improprieties during his jury summation. The prosecutor had referred to the defendant as a liar, had vouched for the credibility of an undercover officer and had improperly used evidence of a previous drug sale to establish the defendant's propensity for crime. The Appellate Court concluded that the combination of the prosecutor's actions had denied the defendant a fair trial. The Court reemphasized the long-standing policy that the prosecutor plays a pivotal role in the criminal justice system and as a quasi-judicial officer must act properly in the interests of justice.

People v. Feuer **(N.Y.L.J., October 21, 2004, pp. 1 and 2 and October 25, p. 18)**

In a 3-2 decision the Appellate Division, Second Department reversed a manslaughter conviction because of a faulty jury charge even though no defense objection had been raised at trial. The three-judge majority ruled that the error was significant enough so that the conviction had to be reversed in the interests of justice. The trial court had provided a justification charge to the jury but had failed to explain that this defense was applicable to the manslaughter conviction as well as to the original charge of second degree murder. The Appellate Division majority ruled that the trial judge's failure to indicate that the defense of justification was applicable to both the murder and manslaughter counts could have accounted for the jury's conviction on the manslaughter charge following its acquittal on the murder charge. The two dissenting justices viewed the trial judge's charge as being adequate and noted that defense counsel's failure to object could have been made as part of a tactical decision and that his current appellate issue was not adequately preserved.

People v. Van Hoesen **(N.Y.L.J., October 25, pp. 1 and 9)**

In a unanimous decision the Appellate Division, Third Department reinstated several drug counts which had been dismissed by the trial court on speedy trial grounds because the prosecution had not obtained a laboratory analysis of the alleged illicit substance. The Appellate Division ruling held that a formal testing of suspected narcotics is not required to establish readiness for trial. Many trial courts have been dismissing cases on speedy trial grounds because of failure to obtain lab reports, relying upon interpreted language in the Court of Appeals decision in *People v. Swamp*, 84 N.Y.2d 725 (1995). The Appellate Division, however, ruled that the lower courts had been misinterpreting the *Swamp* decision. On the contrary the Appellate Division found that the Court of Appeals finding in *Swamp* that a formal laboratory analysis is not required to support an indictment indicates that it is also not required to establish readiness. The interesting nature of this case and the prior lower court interpretations indicate that the matter may eventually reach the Court of Appeals for a determinative decision.

People v. West **(N.Y.L.J., November 5, 2004, p. 1 and November 8, 2004, p. 25)**

In a unanimous decision the Appellate Division, First Department issued a ruling upholding the constitutionality of New York State's Persistent Offender Statute. As indicated in our prior issues the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), cast some doubt on the constitutionality of Penal Law section 70.10 which allows a judge discretion to impose a heavier sentence on persistent felony offenders. The Supreme Court had indicated in the *Apprendi* and *Ring* decisions that juries, not judges, must make factual findings that would subject criminal defendants to jail terms beyond those prescribed for by the crime.

The New York Court of Appeals had previously upheld the Persistent Offender Law in *People v. Rosen*, 96 N.Y.2d 329 (2001). The Appellate Division ruled that it was bound by the *Rosen* decision and that under the facts of the case the sentencing court had based its enhancement on the defendant's prior convictions, a

procedure which has been upheld by the Supreme Court even in the light of the *Apprendi* ruling.

Because several federal courts have also questioned the validity of the Persistent Offender Statute, the ultimate ruling on the constitutionality of New York's provision must await the determination of the New York Court of Appeals and the United States Supreme Court. This first ruling in the case of *People v. West* by an appellate division moves the process one step closer to an ultimate determination.

***People v. Hodges* (N.Y.L.J., November 17, 2004, pp. 1 and 2 and November 19, p. 28)**

In a unanimous ruling the Appellate Division, Second Department reversed a dismissal of an indictment and reinstated the matter for trial. The Court found that the trial court had improperly computed the speedy trial time mandated by CPL section 30.30 and had incorrectly charged prosecutors for time spent appealing a subpoena the defendant had served for city records. The Appellate Court found that since the defendant could not be tried until the validity of the subpoena was determined, prosecutors should not have been charged with the delay. The Court also found that the trial court had made other errors in calculating the time charged against prosecutors, including several delays that were instigated by the defense or by the trial judge herself.

***People v. Goldstein* (N.Y.L.J., December 1, 2004, p. 1 and December 6, pp. 18 & 27)**

In a unanimous decision the Appellate Division, First Department upheld the murder conviction of the defendant who pushed Kendra Webdale in front of an oncoming subway train. The court found that the evidence overwhelmingly established the defendant's guilt beyond a reasonable doubt and that he failed to establish a sufficient lack of responsibility due to mental disease or defect. The court found that the uncontroverted testimony at trial established that the defendant had planned and carefully executed his attack upon the victim and that he clearly understood the nature and consequences of his conduct and that it was wrong. The defendant had a history of some schizophrenic problems and the case led to the passage in 1999 of legislation now known as Kendra's Law. The legislation established court-ordered assisted outpatient treatment for some potentially violent or suicidal mental health patients.

***People v. Samuels* (N.Y.L.J., December 3, 2004, pp. 1 and 5 and December 6, p. 30)**

In a 3-2 decision the Appellate Division, Second Department overturned a defendant's conviction and dismissed an indictment against the defendant who was accused of throwing acid on a former husband and severely injuring him. The three-judge majority found that the case was fatally flawed because prosecutors had failed to tell the grand jury that they could consider the defense of justification. The majority found that the indictment had to be dismissed even though the jury during the trial was given instructions regarding the justification defense by the trial judge.

The dissenting opinion sharply criticized the majority result and expressed the view that the prosecutor's failure in the grand jury was not arbitrary and could be viewed as being reasonable under the circumstances. Justice Ritter, writing for the dissenters, stated that to compel the prosecution to represent charges to a new grand jury with regard to an incident that was almost five years old was a tremendous waste of resources and totally unnecessary under the circumstances. The sharp split within the Appellate Division and the long-standing policy that many types of errors which occur in the grand jury are subsequently waived by proper trial instructions makes this case almost certain to be accepted and decided by the New York Court of Appeals.

***People v. Carvajal* (N.Y.L.J., December 10, 2004, pp. 1 and 2 and December 15, p. 18)**

In a unanimous decision the Appellate Division, First Department upheld a defendant's conviction for criminal possession of a controlled substance in New York County even though both he and the drugs were in California at the time of the arrest. Relying upon CPL section 20.20, the Appellate Division concluded that the evidence amply supported the prosecution's claim that an element of the crime had occurred within New York. Specifically the court found that the defendant exercised control over drugs located within the state as was evidenced by telephone calls that he made to local operatives. The court also found that under CPL section 20.60, the defendant could be deemed to be physically in New York by virtue of his total control over the drug enterprise. The defendant's arrest involved a two-year sting operation relating to the Cali Cartel.

***People v. Norcott* (N.Y.L.J., December 20, 2004, pp. 1 and 4 and December 27, 2004, pp. 18, 28, 29)**

In a 4-1 decision the Appellate Division First Department upheld a defendant's murder conviction, side-stepping the defendant's claim that the trial court had improperly precluded the defendant's attorney from eliciting testimony intended to show that the prosecution's main witness had a motive to lie. The four-judge majority stated "we need not determine whether the challenged ruling was erroneous because the record before us makes it clear that the witnesses' motive to lie was readily apparent to the jury and therefore the court's error if any was harmless." The majority thus

concluded that the witnesses' motive to lie was already apparent to the jury without the precluded line of inquiry.

Justice Andrias vigorously dissented in a 19-page decision. Judge Andrias argued that the majority was incorrect in its harmless error analysis and that the motive to lie about the very facts surrounding the crime charged is never a collateral issue.

People v. Lewis **(N.Y.L.J., December 22, 2004, pp. 1 and 2 and December 23, p. 18)**

In a sharply divided 3-2 decision the Appellate Division, First Department held that a judge was not required to instruct the jury that the violation of a court order to refrain from entering an apartment does not constitute the intended crime underlying the burglary. Defense counsel had requested an additional instruction from the trial court further spelling out that the jury had to find that the crime the defendant intended to commit within the dwelling had to be different from the crime of unlawful entry. The majority discounted the defendant's request and found that the main charge on the burglary count by tracking the statutory language and Pattern Jury Instructions sufficiently informed the jury that unlawful entry into the premises and intent to commit a crime within the premises are separate elements of the offense.

Justices Lerner and Tom dissented, agreeing with the defendant's argument. The interesting nature of this case and the sharp 3-2 split makes it likely that the issue will eventually be determined by the New York Court of Appeals.

People v. Allan **(N.Y.L.J., December 27, 2004, pp. 1 and 2)**

In a unanimous decision the Appellate Division Third Department overturned a rape conviction on the grounds that the trial judge had improperly allowed testimony from witnesses that the victim had reported the alleged attack to friends. The trial judge had allowed the testimony on the basis of the "prompt outcry" exception to the hearsay rule. The Appellate Division, however, found the lengthy two-month delay removed the testimony from the prompt outcry exception and there was no sufficient explanation for the delay in question. Within the decision the court also faulted the prosecutor for committing reversible error in improperly asking several questions which shifted the burden of proof from the prosecution to the defense.

People v. Gorghan **(N.Y.L.J., December 28, 2004, pp. 1 and 2)**

In a unanimous decision the Appellate Division, Third Department reversed a rape and sodomy conviction on the grounds of prosecutorial misconduct. The misconduct consisted of repeated questioning regarding uncharged crimes and ignoring admonitions from the trial court. The prosecution was also cited for improper references in its opening statement and repeated comments on matters not in evidence. The court concluded that "a review of the record reveals a pervasive pattern by the prosecutor of pushing beyond accepted boundaries on key issues and in a fashion prejudicial to a fair trial." The prosecutor involved was the District Attorney of Rensselaer County and this matter was the third time in recent months that the Appellate Division has reversed convictions within that jurisdiction and criticized the prosecutor's actions in those cases.

People v. Brand **(N.Y.L.J., December 28, 2004, p. 18)**

In a unanimous decision the Appellate Division, Third Department upheld a murder conviction and ruled that the trial court did not commit error in denying the defendant the opportunity to present expert evidence regarding his sleepwalking defense. The defendant had shot his wife with a .22-caliber rifle while she was in bed at their home. The Appellate Division concluded that the defendant at trial had the benefit of some psychiatric testimony that he was in a sleepwalking state at the time of the attack. The court also noted that the people did not dispute that the defendant suffered from a sleep disorder but instead sought to prove that the defendant was entirely conscious and acted intentionally at the time of the act and that he was merely fabricating an amnesia defense. Under these circumstances the Appellate Court found no abuse of discretion in denying the additional expert evaluation services sought by the defendant.

People v. James **(N.Y.L.J., January 3, 2005, pp. 4 and 38)**

In a unanimous decision the Appellate Division Second Department reversed a drug conviction and ordered a new trial where a defendant had proceeded pro se at a suppression hearing and a subsequent trial. The court found that the trial judge had not conducted an inquiry regarding the defendant's ability to afford an attorney and had refused to consider whether the defendant was eligible for assigned counsel. The Appellate Division concluded that the defendant had been denied his right to counsel and ordered a new trial. The Appellate Court emphasized that the trial judge had failed to warn the defendant of the dangers of proceeding pro se and failing to properly ascertain whether he was entitled to assigned counsel or had the ability to obtain private representation.

People v. Russell **(N.Y.L.J., January 3, 2005, pp. 4 and 40)**

In a unanimous decision the Appellate Division Second Department reversed a defendant's drug pos-

session conviction. The court found that the trial judge had committed two substantial errors. The first involved allowing a juror to remain on the case after she indicated that she could not be fair because of her feelings regarding illegal drugs. Defense counsel had exercised a challenge for cause but the court had refused to remove the juror.

The Appellate Division also found that an erroneous determination had been made with respect to a suppression motion regarding evidence that had been discovered in the defendant's vehicle. The court concluded that the evidence adduced at the suppression hearing was clearly insufficient to satisfy the prosecutor's initial burden of establishing a valid inventory search and therefore the evidence should have been suppressed.

***People v. Powell* (N.Y.L.J., January 5, 2005, pp. 1 and 2 and January 20, 2005, p. 18)**

In a unanimous decision the Appellate Division, Third Department reversed a murder conviction because the prosecutor was allowed to exercise a challenge for cause after the defense had exhausted all of its challenges for cause and its peremptory challenges. The court's decision is a logical extension of a prior determination by the New York Court of Appeals in *People v. Williams*, 26 N.Y.2d 62 (1970), where the high court ruled that the failure to afford the defense the final opportunity to exercise a peremptory challenge is reversible error. The *Powell* decision is the first case to address the issue when the exercise involves a challenge for cause and it may be that the New York Court of Appeals may wish to have the final say on the matter.

For Your Information

Female Prison Population Continues to Rise

The Justice Department recently reported that the number of women in state and federal prisons is at an all time high and growing rapidly. In the year 2003 there were 101,179 women in prisons, a 3.6% increase over 2002. The Justice Department reported that this was the first time that the women's prison population had topped 100,000 and continues a trend of rapid growth. The incarceration rate for females increased at nearly twice that of men. Overall men are still far more likely than women to receive jail terms. At the end of 2003 there were 1,368,866 men in prison. This was a 2% increase over 2002. In terms of the population at large the Justice Department figures reveal that in 2003 one in every 109 U.S. men was in prison. For women the figure was one in every 1,613.

The rapid increase of persons in prison began three decades ago when many longer sentences were imposed resulting from drug crimes. Since 1995, the male prison population has grown by 29%, while the women prison population has increased by 48%. The reported statistics also indicated that in 2003, 11 states had increases in the prison population over the prior year of at least 5%. Eleven other states experienced decreases with the state of Connecticut having the largest drop of 4.2%.

Study Finds "Get Tough" Youth Programs Not Effective

In a detailed study conducted by The National Institute of Health, a thirteen-member panel concluded that "scare tactics" used in a variety of "get tough" youth programs do not work. Such programs have gained a great deal of notoriety during the last several years and have been adopted in many communities in an effort to counteract increasing rates of youth crimes. The National Institute of Health report concluded that boot camps, group detention centers and other "get tough" programs, rather than provide a solution to the youth crime program, often aggravate the situation. These programs bring together young people who are inclined toward violence and they simply teach one another how to commit more crime. The study also found that programs consisting largely of adults lecturing teenagers also do not work. The panel's Chairperson, Dr. Robert L. Johnson of the University of Medicine and Dentistry of New Jersey, stated "many communities are wasting a great deal of time and money on these types of programs."

After reviewing available scientific and sociological data the report indicated that the better types of programs are those involving smaller groups and intercommunication between the teenagers and their adult counselors. The report specifically cited two types of programs as proving to be more effective. One involved a therapy program where youth and their families attend 12 one-hour sessions over three months and a community-based treatment program that targets violent and chronic offenders. The second type of program provided about 60 hours of counseling over a four-month period with therapists being available at all hours. Both of these types of programs led to a reduction of arrest rates among the teenagers enrolled in the program.

ABA Adopts Recommendations to Change Direction of Sentencing Procedures

At its August 2004 Annual Meeting, the American Bar Association approved recommendations of a special committee calling for changes in sentencing procedures throughout the country. The Committee which was formed in August of 2003 after Supreme Court Justice Anthony M. Kennedy had called for a public review of the sentencing structures in the United States issued a lengthy and detailed report in support of its recommendations. The Committee known as the Justice Kennedy Commission consisted of fifteen members and represented both the bench and bar from various sections of the country. Summaries of the four recommendations of the Justice Kennedy Commission as approved by the American Bar Association House of Delegates are printed below. In light of the recent Supreme Court decision modifying the use of the federal sentencing guidelines the ABA's recommendations are particularly timely.

I. Recommendations on Punishment, Incarceration, and Sentencing

The Resolution urges states, territories and the federal government to ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration. Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses, and alternatives to incarceration should be available for offenders who pose minimal risk to the community and appear likely to benefit from rehabilitation efforts.

The Resolution sets out a series of recommended actions, including:

- Repealing mandatory minimum sentences
- Providing for guided discretion in sentencing, consistent with *Blakely v. Washington*, 542 U.S. __, 72 U.S.L.W. 4546 (June 24, 2004), while allowing courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence.
- Requiring sentencing courts to state the reason for increasing or reducing a sentence, and allowing appellate review of such sentences.
- Considering diversion programs for less serious offenses, and studying the cost effectiveness of treatment programs for substance abuse and mental illness.
- Giving greater authority and resources to an agency responsible for monitoring the sentencing system.
- Developing graduated sanctions for violations of probation and parole.

In addition, the Resolution urges Congress to give greater latitude to the United States Sentencing Commission in developing and monitoring guidelines, and to reinstate a more deferential standard of appellate review of sentences.

II. Recommendations on Racial and Ethnic Disparity in the Criminal Justice System

The Resolution urges that state, territorial and federal governments strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by

- Establishing a Criminal Justice Racial and Ethnic Task Force to study and make recommendations concerning racial and ethnic disparity in the various stages of the criminal justice process;
- Requiring law enforcement agencies to develop and implement policies to combat racial and ethnic profiling;
- Requiring the legislature to conduct racial and ethnic disparity impact analyses, evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation, and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

III. Recommendations on Clemency, Sentence Reduction and Restoration of Rights

The Resolution urges state, territorial and federal governments to establish standards and a process to permit prisoners to request a reduction of their sentences in exceptional circumstances. It further urges expanded use of the federal statute permitting reduction of sentences for "extraordinary and compelling reasons," and specifically urges the United States Sentencing Commission to develop guidance for courts relating to the use of this statute. It recommends expanded use of executive clemency to reduce sentences, and of processes by which persons who have served their sentences may request a pardon, restoration of legal rights and relief from collateral disabilities. Finally, it urges bar associations to encourage and train lawyers to assist convicted persons in applying for pardons, restoration of legal rights, relief for collateral sanctions, and reduction of sentences.

IV. Recommendations on Prison Conditions and Prisoner Reentry

The Resolution speaks to the need to ensure that correctional facilities are safe and secure; that correctional staff are properly trained and supervised; and that allegations of prisoner mistreatment are promptly investigated and dealt with appropriately. It further addresses the need for programs and policies geared toward preparing prisoners for release and reentry into the community, and encouraging community acceptance of returning prisoners. It urges jurisdictions to identify and remove unwarranted legal barriers to reentry. Finally, it urges that law schools establish clinics to assist convicted persons with legal issues related to their reentry into the community.

Racial Disparity Continues To Exist in U.S. Prisons

Two recent studies have confirmed that there continues to exist a wide racial disparity with respect to persons presently incarcerated in U.S. prisons. A report from the U.S. Sentencing Commission indicated that the percentage of minority inmates in U.S. prisons has increased sharply since the federal sentencing guidelines took effect some seventeen years ago with black defendants generally receiving harsher punishments than whites.

The study conducted over a fifteen-year period found that although the sentencing guidelines have made sentencing more certain and predictable, wide disparities continue to exist among races and regions. The percentage of whites in prison has dropped sharply from nearly 60% of the total prison population in 1984 to about 35% in 2002. The number of Hispanics on the other hand has risen sharply since 1984. The study also determined that the average prison sentence today is about 50 months, twice what it was in 1984. In addition the gap between sentences for blacks and whites has widened. Although blacks and whites received an aver-

age sentence of slightly more than 2 years in 1984, today blacks stay in prison for about 6 years compared with about 4 years for whites. A reason given for the sentence disparity is the harsher mandatory minimum sentences imposed for drug crimes. It is estimated that in the year 2002, 81% of drug offenders were black. The study also found wider sentencing disparities among the different regions of the country. Harsher penalties were imposed in the South as compared with the Northeast and West.

A second study conducted by the U.S. Justice Department also found similar conclusions reached by the Sentencing Commission. The Justice Department study found that among the 1.4 million sentenced inmates at the end of 2003 an estimated 403,000 were black men between the ages of 20 and 39. It also found that at the end of 2003, 9.3% of black men 25-39 were in prison compared with 2.6% of Hispanic men and 1.1% of white men in the same age group.

2004 Crime Statistics

The FBI recently reported its crime statistics for the first 6 months of 2004. The statistics reveal that overall, violent crime was down 2% in the first 6 months of the year as compared with the same period for 2003. Within the violent crime category were such crimes as murder, rape, robbery and aggravated assault. Murders in the United States dropped by nearly 4% in the first half of 2004 after experiencing a slight rise in the last 4 years. With respect to property crimes, such as burglary, larceny and automobile theft, a decline of about 2% occurred and the serious crime of arson dropped nearly 7%.

One of the few crimes which showed an increase during the first half of 2004 was the crime of rape, which experienced a 1.4% rise nation wide and a 6.5% increase in large cities with a population of 1,000,000 or more. Hopefully the overall decrease in crime will continue for the rest of 2004 and we will report the final figures for the year in one of our subsequent issues.

New York Is Safer Than You Think

For many years large cities such as New York have been viewed as high crime areas and crime has always been a major concern for New York City residents. Surprisingly however FBI statistics reveal that some of the areas throughout the country viewed as the most desirable to live in have a far greater crime rate than New York City. In fact the New York Metropolitan area for the year 2003 has one of the lowest crime rates in the country. When I recently spent the winter in Florida I came across an interesting statistical study based upon FBI statistics which was published in the *Tampa Tribune* of December 9, 2004, pages 1 and 9A. The published chart listed violent crimes in 2003 per 100,000 people for different areas. The published chart revealed the following rankings:

Tampa Bay (Tampa, St. Petersberg And Clearwater)	863.8
Miami (Miami Fort Lauderdale Miami Beach)	813.1
Los Angeles (Los Angeles, Long Beach And Santa Ana, Calif.)	721.3
New York (New York, Northern NJ, Long Island)	483.3

The published FBI statistics also reveal that even when compared with other large cities and metropolitan areas the crime rates in the New York area are still lower. Thus New York ranks below such cities as Philadelphia, Detroit and the Dallas and Fort Worth areas of Texas. Thus New Yorkers can breathe a sigh of relief, for you are safer than you think.

Violent School Crime Decreases

In a recent report issued by the U.S. Education and Justice Departments it was revealed that violent crimes against students in schools fell approximately 50% between the years 1992 and 2002. The study also found that young people are more apt to experience violent crimes away from school rather than at school. The study found that in 2002 there were 24 crimes of rape, sexual assault, robbery and physical assault for every 1,000 students. This was down from 48 per 100,000 students in the year 1992. The study indicated that the reduction in classroom crime mirrors a general nationwide trend of overall crime across the nation being at a 30-year low.

The study also attributed the reduction in school crime to the hiring of more security personnel by school officials, the installation of metal detectors and more emphasis on crime prevention programs. The report concluded that today students are more apt to be victims of violence outside of school premises. It pointed out that in 2002 there were about 659,000 violent crimes involving students at school and about 720,000 away from school property. Since 1992 there has been a steady decrease in violent crimes on school premises—welcome news to both parents and students alike.

One of the reasons for the decrease in violent school crimes may be the continued decline in illegal drug use by teenagers. A recent government study reported a third straight year of decline of drug use. Since 2001 the number of high school students reportedly using an illicit drug during the past month fell 17%. The use of

alcohol, however, among young people continues to be a serious problem.

Use of Death Penalty Declines

A recent report issued by The Washington D.C. Death Penalty Information Center revealed that the use of the death penalty continues to drop for the fifth year in a row. The 2004 figures show a 40% drop in executions since 1999. There has also been a 50% decline in death sentences which have been issued and a shrinking death row population.

The report also revealed that in the year 2004 there had been 59 executions throughout the country—down from 65 in 2003. Death sentences which were issued in the year 2004 amounted to 130 down from 144 in 2003, making the 2004 figure the lowest in 30 years. The study also concluded that the majority of executions still occurred in the southern part of the United States with 85% of the executions taking place in that region.

The report also found an increasing reluctance within the country to apply the death penalty, based in part on high profile cases in which innocent people were freed from death row after new evidence, primarily DNA results, established their innocence. Last year 12 people were freed from death row, and this year 5 people were exonerated.

Within our own state of New York, although the death penalty was re-instituted several years ago no defendant has yet been executed and the New York Court of Appeals only this year found the death penalty statute to be unconstitutional. Although the Senate has passed corrective legislation to re-institute the death penalty, the Assembly has to date resisted approving the Senate legislation and has instead ordered public hearings on the death penalty issue. The final such hearing was held on January 25, 2005 in Albany.

Governor Pataki on December 15, 2004 issued a special call to the state legislature in support of the Senate bill and urged them to take prompt action to rectify the Court of Appeals decision. During his statement the Governor expressed disappointment in the Court of Appeals decision and cited the legislature's lack of prompt action as one of the major frustrations of the past legislative session. In his recent State of the State address to the state legislature in January he again reiterated his call for legislative action to reinstate the death penalty. It thus appears that the death penalty controversy will continue to dominate the news in New York.

Velella Fiasco

In a unanimous decision the Appellate Division, First Department ordered former State Senator Guy J. Velella to return to prison on December 27, 2004, nullifying his earlier release through the conditional release program. The Senator had been released months earlier by the New York City Conditional Release Commission but it was later discovered that the Commissioners had not followed proper procedures in allowing his early release following his service of three months of a one-year sentence. The Commission's decision incited a public outrage and led to the city's mayor asking for the resignation of the Commission panel members and the appointment of new Commissioners.

A subsequent review by the new panel regarding the Velella release resulted in a finding that the former members had violated state law and the new commissioners ordered Velella to return to Riker's Island. Velella's attorneys had challenged the actions of the new Commission, claiming that the new panel was estopped and lacked the authority to reverse the prior decision to release him. The Appellate Division rejected this contention, finding that the new Commission had the authority to reverse the prior determination on the grounds of "significant irregularity." The Court ruled that a government agency may correct an error by setting it aside if it was the result of illegality, irregularity in vital matters or fraud. Mr. Velella's attorneys sought leave to appeal to the New York Court of Appeals, but the Court of Appeals in early January denied the application. Mr. Velella was thus forced to return to prison and resumed serving his sentence on December 27, 2004.

Justice Cardona Reappointed as Presiding Justice of Third Department

After a period of uncertainty Governor Pataki in early January announced that he would re-designate Supreme Court Justice Anthony V. Cardona as Presiding Justice of the Appellate Division, Third Department. Justice Cardona is an upstate Democrat and there was some speculation that the Governor, who is a Republican and who has appointed many Republicans to the appellate benches, might seek to make a change in the leadership of the Third Department. Justice Cardona, however, has developed an outstanding reputation and is highly regarded in the upstate community. In making the announcement Governor Pataki described Justice Cardona as a "strong leader, a distinguished jurist and an extraordinary public servant."

Crawford Ruling Held Not Retroactive

The United States Circuit Court of Appeals for the Second Circuit recently limited the applicability of the Supreme Court ruling in *Crawford v. Washington*, 124 S. Ct. 1354, which restricted prosecutors from utilizing unchallenged statements from unavailable witnesses. In

Mungo v. Duncan, reported in the *New York Law Journal* of January 4, 2005, pp. 1 and 2, the Second Circuit ruled that the *Crawford* decision was not to be applied retroactively.

About Our Section and Members

Former Section Chair Thomas F. Liotti has recently co-authored a new book on DNA evidence. The publication by John Wiley & Sons, Inc. is entitled *DNA Forensic and Legal Applications*. The book is co-authored with Dr. Lawrence Kobilinsky, a professor at John Jay College of Criminal Justice and Jamel Oeser-Sweet, an attorney. The foreword to the new book states that the publication is a unique combination of legal practice and scientific analysis and provides a definitive resource on methods of DNA analysis as well as the handling, potential and limitations of DNA evidence.

As well as being a Past Chair of our Criminal Justice Section, Tom Liotti served as President of the New York State Association of Criminal Defense Lawyers. The new publication is his third book and he has published over 100 legal articles. We congratulate Tom on his new publication.

Our Annual Meeting, luncheon, awards program and CLE seminar held on January 27, 2004 were highly successful and well attended**.** At the Annual Meeting the designated Officers and District Representatives for the coming year were selected. The new Officers and Representatives who will take office in June are listed as follows:

OFFICERS

CHAIR:	ROGER BENNETT ADLER
VICE-CHAIR:	JEAN T. WALSH
SECRETARY:	JAMES P. SUBJACK
TREASURER:	RICHARD COLLINS

DISTRICT REPRESENTATIVES

DISTRICT	**REPRESENTATIVE**
FIRST:	MARVIN SCHECHTER
SECOND:	STEVEN KARTAGENER
THIRD:	DENNIS B. SCHLENKER
FOURTH:	HON. JAMES F. MURPHY, III
FIFTH:	HON. KATE ROSENTHAL
SIXTH:	HON. JOHN C. ROWLEY
SEVENTH:	JOHN. F. SPERANZA
EIGHTH:	PAUL J. CAMBRIA, JR.
NINTH:	GERARD M. DAMIANI
TENTH:	GEORGE TEREZAKIS
ELEVENTH:	SPIROS TSIMBINOS
TWELFTH:	DAWN FLORIO

We were pleased to have had as our guest speaker at the luncheon the Honorable David N. Kelley, United States Attorney for the Southern District of New York. Welcoming remarks were also provided by Michael T. Kelly, our outgoing Section Chair. We thank Michael Kelly and the other Officers who worked extremely hard during the last year to provide the Section with outstanding leadership.

Following the luncheon, awards were also presented to outstanding Practitioners and Members of the Judiciary for exemplary service during the last year. The awards were presented as follows:

Outstanding Public Defense Practitioner—Capital Defender Office

Outstanding Prosecutor—William J. Fitzpatrick, District Attorney, Syracuse

Outstanding Private Defense Practitioner—Benjamin Brafman

Outstanding Jurist—Hon. Steven W. Fisher

Courageous Efforts in Promoting Integrity in the Criminal Justice System—Robert Craig Fogelnest

Outstanding Contribution to Police Work—Raymond W. Kelly, N.Y.C. Police Commissioner

Outstanding Contribution in the Field of Corrections—Lt. Thomas Dickson, Attica Correctional Facility

Outstanding Contribution to Legislation—Hon. Jeffrion L. Aubry, 35th Assembly District

In the late afternoon following the luncheon, our Section also presented an interesting and informative CLE Program on "The Examination of Witnesses." The speakers included Michael T. Kelly, who discussed the examination of forensic witnesses, Ira D. London who covered law enforcement witnesses, Lawrence S. Goldman, who discussed examining the defendant and Marvin E. Schechter, who covered the hostile witness. The CLE Program was moderated by James P. Subjack, our Section Program Chair. All of our programs on January 27th were held at the New York Marriott Marquis. (photos appear in the centerfold)

Section Committees and Chairs

Newsletter Editor
Spiros A. Tsimbinos
120-12 85th Avenue
Kew Gardens, NY 11415
(718) 849-3599

Section Officers

Chair
Michael T. Kelly
1217 Delaware Avenue, Suite 1003
Buffalo, NY 14209

Vice-Chair
Roger B. Adler
225 Broadway
New York, NY 10007

Secretary
Jean T. Walsh
162-21 Powells Cove Boulevard
Beechhurst, NY 11357

Appellate Practice
Hon. William D. Friedmann
McGuiness Conte et al.
One Barker Avenue, Suite 675
White Plains, NY 10601

Donald H. Zuckerman
P.O. Box 460
Pound Ridge, NY 10576

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

By-Laws
Malvina Nathanson
305 Broadway, Suite 200
New York, NY 10007

Capital Crimes
Barry I. Slotnick
100 Park Avenue, 35th Floor
New York, NY 10017

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

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

Correctional System
Hon. Mark H. Dadd
County Judge
Wyoming County
147 N. Main Sreet
Warsaw, NY 14569

Norman P. Effman
Legal Aid Bureau
14 Main Street
Attica, NY 14011

Criminal Discovery
Gerald B. Lefcourt
148 East 78th Street
New York, NY 10021

Edward J. Nowak
10 North Fitzhugh Street
Rochester, NY 14614

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

Jack T. Litman
45 Broadway
New York, NY 10006

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

Barry Kamins
16 Court Street, Suite 3301
Brooklyn, NY 11241

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

Evaluate Office of the Special Prosecutor
Herman H. Tarnow
800 Third Avenue, 11th Floor
New York, NY 10022

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

Funding Issues
Mark J. Mahoney
1620 Statler Towers
Buffalo, NY 14202

William L. Murphy
169 Morrison Avenue
Staten Island, NY 10310

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

Eric Warner
425 Riverside Drive
New York, NY 10025

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

David Werber
The Legal Aid Society
199 Water Street, 5th Floor
New York, NY 10038

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

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

Nominating Committee
Martin B. Adelman
225 Broadway, Suite 1804
New York, NY 10007

Terrence M. Connors
1020 Liberty Building
Buffalo, NY 14202

Hon. Robert C. Noonan
1 West Main Street
Batavia, NY 14020

Prosecution
Edward E. Key
175 Hawley Street
Lockport, NY 14094

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

Revision of Criminal Law
Prof. Robert M. Pitler
Brooklyn Law School
250 Joralemon Street, Room 704
Brooklyn, NY 11201

Hon. Burton B. Roberts
909 Third Avenue, Room 1737
New York, NY 10022

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

Specialization of Criminal Trial Lawyers
William I. Aronwald
81 Main Street, Unit 450
White Plains, NY 10601

Special Committee on Evidence
Prof. Robert M. Pitler
Brooklyn Law School
250 Joralemon Street, Room 704
Brooklyn, NY 11201

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

Traffic Safety
Peter Gerstenzang
210 Great Oaks Boulevard
Building 200, Suite 210
Albany, NY 12203

Victims' Rights
James P. Subjack
Court House
One North Erie Street
Mayville, NY 14757

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

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Editor
Spiros A. Tsimbinos
120-12 85th Avenue
Kew Gardens, NY 11415
(718) 849-3599

Section Officers

Chair
Michael T. Kelly
1217 Delaware Avenue, Suite 1003
Buffalo, NY 14209

Vice-Chair
Roger B. Adler
225 Broadway
New York, NY 10007

Secretary
Jean T. Walsh
162-21 Powells Cove Boulevard
Beechhurst, NY 11357

Criminal Justice Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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