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New York Criminal Law Newsletter

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Inside

NYSBA

Message from the Chair

In my first message as Chair to the membership of this Section, I first wish to extend my sincere appreciation to all of the members who have had the confidence to select me as your Chair. I would also like to thank those who have offered me assistance in the upcoming months. Finally, it goes without saying that this Section would not have prospered and grown without the tireless and dedicated efforts of Past Chair Jean Walsh and officers Marvin Schechter and Malvina Nathanson. I look forward to working with them and the new secretary, Mark Dwyer over the next two years.

My agenda is simple but ambitious. As a Section we need to collaborate prosecution and defense services to improve the criminal justice system in this state. We need to examine criminal justice issues for their present consequences and future impact and act as a group appropriately. As a former elected District Attorney, I see a need to energize membership from more individuals in prosecution services to work toward that goal. We must increase membership to include not just prosecutors but also criminal practitioners from all parts of the state. Steps should be taken to stimulate participation and attendance at Section functions, including executive and general membership meetings, and to increase the benefits of Section membership to those who belong, including frequent and meaningful CLE sessions. Extending a friendly hand to other Sections—for example, reaching out to the Young Lawyers Section to address its needs insofar as they apply to criminal law while also seeking its member participation in our Section— must be explored. We need to be able to assert our voice to compel the NYSBA to adopt and promote our positions and apprise the governor and state legislature of legislation that can improve the criminal justice system.

Perhaps an overambitious agenda, but it is one that cannot be completed without substantial assistance. I welcome your help, large or small, in whatever form you choose to provide it. Please forward your suggestions to me by either e-mail or letter. Identify matters of concern to your practice, outlining the problems and proffering any solution you may propose. Offer to serve the Section with your time or your expertise.

I may be reached by e-mail at jsubjack@netsync.net. My mailing address is separately listed in this publication. I look forward to working with you.

James P. Subjack

Message from the Editor

In our last issue, we briefly discussed in summary form the final recommendations which were made by the New York State Sentencing Commission. In this issue we are pleased to provide the entire executive summary from the report, which provides details regarding the various issues presented as well as background information on the sentencing structure in New York, and the reasons for the proposed changes. The Legislature and Governor have already acted on the issue of drug crime modifications raised by the Commission and is currently reviewing the Commission's other recommendations. It is important that all criminal law practitioners be fully aware of the recommendations made, and the possible legislative enactments which will be forthcoming. We thank the Commission Chair, Denise O'Donnell, and legal counsel John Amodeo for providing us with the complete report of the sentencing commission, and with keeping our Section apprised of developments in this area as they occur.

As our second feature article, we also provide an interesting discussion by Attorneys Thomas F. Liotti and Drummond C. Smith on the issue of jury nullification. This issue has received a great deal of attention in the last few years, and the insights and comments of two experienced and practicing attorneys should be of interest and benefit to our readers.

The New York Court of Appeals and the U.S. Supreme Court were both extremely active in the last few months, rendering significant decisions in the area of criminal law. As a result, there are more than 15 reported decisions in our Court of Appeals review dealing with a variety of matters, including the constitutionality of New York's persistent felony offender law. The U.S. Supreme Court rendered important decisions in the area of search and seizure and issued further clarifications on the extent of the *Apprendi* rulings. These cases are covered in detail in our United States Supreme Court section.

We also continue to provide a variety of articles of general interest in our For Your Information Section, with an emphasis in this issue on the economic impact of the current recession on the judicial system as a whole and on the legal profession in general. This is also our first issue in which Jim Subjack has issued his first message as the newly elected Chair of the Section, effective June 1, 2009. I congratulate Jim and the other officers, and look forward to working with them as we begin our sixth year of publication. I again thank our members for their support of our *Newsletter*, and continue to request their assistance in providing articles and comments with regard to our publication.

Spiros A. Tsimbinos

The Future of Sentencing in New York State: Recommendations for Reform—A Report by the New York State Commission on Sentencing Reform

Prepared by the New York State Commission on Sentencing Reform

Executive Summary

I. Overview

New York's sentencing laws are rarely examined in a comprehensive manner and have not undergone a thorough revision in more than 40 years. The sentencing statutes have, however, been subjected to piecemeal and ad hoc revisions over the years, ranging from minor amendments to the revision of entire articles of law. The result today is an incredibly complex sentencing structure capable of confounding even the most experienced practitioners. Against this backdrop, the New York State Commission on Sentencing Reform was established by Executive Order on March 5, 2007, and charged with conducting a full review of the state's sentencing structure and practices and making recommendations for reform to all three branches of government.

Throughout its tenure, the Commission strived to gain an in-depth understanding of the myriad issues surrounding New York's sentencing laws, and to devise a series of recommendations, both experience-based and data-driven, to simplify, streamline and make more equitable the State's overly complicated system of sentencing. The Commission heard from state and national sentencing experts, and formed subcommittees to explore and make recommendations on sentencing policy, simplification of the current sentencing structure, re-entry, and supervision of offenders in the community. It organized focus groups and conducted public hearings throughout the State to obtain feedback on these issues from judges, sentencing experts, criminal justice professionals, elected officials, practitioners, crime victims, formerly incarcerated individuals, advocacy groups and others.

In the Commission's October 15, 2007 Preliminary Report, a substantial majority of members recommended the adoption of a mostly determinate sentencing structure for New York State and proposed other targeted reforms to help simplify the state's labyrinthine sentencing structure. The Report called for a comprehensive review of the state's mandatory drug sentencing laws for certain non-violent felony offenders to determine whether further reforms would be appropriate and consistent with public safety, particularly with respect to the diversion of drug-addicted nonviolent felony offenders from prison to community-based treatment. It also recommended the broader use of evidence-based sentencing and correctional strategies to reduce crime and enhance public safety, as well as the development of more efficient and cost-effective ways to use the State's limited correctional and community-supervision resources. In addition, it recommended streamlining and strengthening the State's statutory framework for crime victims and, finally, proposed the creation of a permanent sentencing commission for New York.

Relying on an extensive body of data, the Commission, in its Final Report, offers an expanded and more detailed series of proposals and recommendations for simplification of New York's sentencing structure, reform of the state's drug laws, implementation of evidence-based practices and other reforms in the areas of re-entry and community corrections.

Part One of the Report provides a detailed history of sentencing law in New York as an important focal point for understanding the critical role of sentencing in New York's criminal justice system and the influences that have shaped it over time.

Part Two of the Report calls for simplification of New York's sentencing structure by adoption of a primarily determinate sentencing system and offers extensive sentencing data to guide the State in establishing fair and workable sentencing ranges for more than 200 nonviolent felony offenses that currently carry indeterminate sentences.

Part Three of the Report examines positions both for and against additional drug law reform, the disproportionate impact of drug sentencing on persons of color, the success of drug courts and drug diversion programs, and data regarding the availability of diversion programs throughout the state. The Commission provides recommendations for the future direction of drug law reform and offers a menu of options to expand the ability to divert prison-bound, drug-addicted, nonviolent felony offenders into treatment and to impose alternative, non-prison, sentences for certain first-time felony drug offenders.

Part Four reiterates the Commission's call for a more evidence-based approach to sentencing, inmate programming, re-entry planning and community supervision through the use of a common, validated, risk- and needs-assessment methodology. The Commission also recommends that Parole adopt a system of "graduated respons-

es" for parole rule violators and that New York continue to expand recent reentry initiatives designed to facilitate the seamless transition of formerly incarcerated persons from prison back to the community.

Part Five of the Report includes proposals to expand eligibility for the Department of Correctional Services's (DOCS) successful and cost-effective Shock Incarceration and Merit Time programs, as well as recommendations to improve the program at the Willard Drug Treatment Campus.

Part Six offers several victim-related proposals, including recommendations designed to improve the ability of crime victims to meaningfully participate in sentencing-related matters and to enhance the collection of restitution from an offender when ordered by a court.

Finally, Part Seven urges the creation of a permanent sentencing commission to better respond to emerging sentencing trends in New York.

As was the case with the Commission's Preliminary Report, not every proposal and recommendation described in this Final Report had the support of all the Commissioners, but the members did reach unanimous, or near-unanimous, agreement on most proposals. The lack of unanimity in these instances reflects the weighty and complex nature of the subject matter and the deliberate approach taken by the Commission members to their charge.

II. Greater Simplicity in Sentencing

A. Adopting a Predominately Determinate Sentencing System: Determinate Ranges

Sentencing experts and practitioners alike stressed to the Commission the difficulties of navigating a system of sentencing that has not been comprehensively revised in more than four decades. Operating in a hybrid system where most violent, sex and drug offenses are punished by determinate sentences while hundreds of nonviolent, non-sex, non-drug offenses are punished by indeterminate sentences makes sentencing in New York needlessly complex. Determinate sentencing has been the unmistakable trend in New York, with the Legislature recently adding all felony drug and sex offenses to the list of crimes carrying a determinate, rather than indeterminate, sentence.

As a step toward greater simplification in sentencing, the Commission, in its Preliminary Report, recommended converting from indeterminate to determinate the authorized prison sentences for more than 200 nonviolent, non-sex, non-drug felony offenses. Supported by all but two members, the Commission's recommendation was based on the belief that, as compared to indeterminate sentencing, the determinate model promotes greater uniformity, fairness and "truth-in-sentencing." The determinate model facilitates more informed plea bargaining and allows the parties, the court, and the victim to have a clearer picture of the actual time the defendant is likely to spend under custody.

The challenge for the Commission was to arrive at a set of fair and workable sentencing ranges for these offenses. Most members agreed that, given the extremely diverse types of crimes included in this "catch-all" group of nonviolent felony offenses, the Commission's proposed determinate ranges should preserve the fairly broad range of prison sanctions currently available to sentencing judges under the indeterminate structure, while taking into account the very different ways these two types of sentences are calculated. These Commissioners further believed that the new determinate ranges should be informed by time-served data for the various crimes so the conversion to determinate sentences does not result in appreciably longer or shorter periods of incarceration than for offenders serving sentences under the existing indeterminate model. In what may be the first such effort in the state's history, the Commission conducted a comprehensive review of DOCS's prison release data over a 23-year period (1985 to 2007) to determine the actual prison time served by offenders sentenced under the existing indeterminate scheme for each of the targeted Class B through Class E non-violent felony offenses.

The Commission examined three distinct models for establishing determinate ranges for these offenses:

- A Conditional Release-Based ("CR-based") model that establishes the maximum determinate sentence by matching, as closely as possible, the conditional release point of the proposed maximum determinate sentence to the conditional release point of the current maximum indeterminate sentence.
- A "Time-Served" (or "98%") model that uses time-served data for the 23-year DOCS's release group to determine the point at which 98% of all releasees in a given classification level (e.g., 98% of all Class B felons) had been released on their indeterminate sentences; that number is then used to fix the proposed maximum determinate sentence.
- A "Determinate Drug" model that adopts the same sentence ranges for these 200-plus nonviolent felony offenses that were established by the legislature when it converted prison sentences for all felony-level drug offenses from indeterminate to determinate in 2004.

Most Commissioners preferred the CR-based model because they agreed that it came closest to the stated goal of preserving the scope of prison sanctions available to judges under current law. Under this model, the minimum determinate term for Class B through Class E first-time felony offenders would be fixed at one year, and the maximum terms would be fixed at 16, 12, 5 ½ and 3 years, respectively. For second-felony offenders, the minimum

terms for Class B through Class E felony offenses would be fixed at 5, 3½, 2 and 1½ years, respectively, and the maximum terms would be identical to those for first-time felony offenders. Both first- and second-time felony offenders would be required to serve a post-release supervision period of one to three years as directed by the judge.

Although some of the proposed ranges under the time-served model were comparable to those of the CR-based model, the time-served proposal was rejected by most Commission members in part because it would call for the reclassification of one, and possibly two, more serious offenses to a higher felony classification level to avoid having to fix unduly long ranges for the remaining, less serious, crimes.

While two Commissioners strongly supported adoption of the determinate drug model, the remaining members felt that the drug ranges were simply not broad enough at the higher end of the sentencing spectrum to account for the wide variety and potential seriousness of the criminal conduct encompassed by the more than 200 offenses targeted for conversion. These members noted that the express purpose of the 2004 drug reform legislation was to substantially reduce prison sentences for drug offenders, not to convert existing indeterminate drug ranges to comparable determinate ranges.

As a critical component of any system of criminal justice, a state's sentencing structure must be intelligible, honest and fair. The public, as well as the defendant and the victim, must have a clear understanding of the actual term of the sentence to be served. The Commission believes that the transition to a determinate sentencing structure in New York will provide more clarity and fairness in sentencing, and thereby further streamline New York's complex hybrid system of indeterminate and determinate state prison sentences.

B. Targeted Simplification of New York's Sentencing Laws

In addition to proposing determinate sentencing ranges for nonviolent felony offenses, the Commission believes that adopting additional targeted reforms would help to simplify and clarify New York's overly complicated sentencing laws. Accordingly, the Commission proposes amendments to existing law to: replace the sometimes misleading "violent felony offense" designation in Penal Law § 70.02 with "aggravated felony offense" while retaining all sentencing and other statutory requirements pertaining to these crimes; replace the special indeterminate sentencing provision for domestic violence-induced first-time violent felony offenders with a comparable determinate sentencing provision; simplify the Penal Law §§70.25 and 70.30 rules regarding consecutive and concurrent sentences and the Penal Law § 70.30 consecutive sentence "cap" provisions; move (or cross-reference) all "back-end" sentencing provisions such as those relating to good time, merit time and Shock Incarceration to a single article of law; provide for an exception to existing Criminal Procedure Law (CPL) plea bargaining restrictions where the court and parties agree; and address existing anomalies in the Penal Law and CPL.

III. A Measured Approach to Reforming New York's Drug Laws

A. The Rockefeller Drug Laws and the 2004 Drug Law Reform Act

In 1973, then-Governor Nelson Rockefeller, in response to a burgeoning heroin epidemic and a rising tide of substance abuse and drug-related crime, introduced and obtained passage of comprehensive legislation to overhaul the state's drug laws. The new laws required a minimum sentence of 15-years-to-life for a first-time conviction for selling one ounce, or possessing two ounces of a controlled substance, and mandated incarceration for all Class A, B and C drug felonies. Collectively, New York's "Rockefeller" drug laws were considered the toughest in the nation at the time of their enactment.

Amendments to the state's drug laws in 2004 and 2005 reflected the view of the legislature and Governor that the lengthy mandatory minimum terms and long maximum prison sentences associated with the Rockefeller drug laws were unnecessarily harsh for many nonviolent felony drug offenders. By converting sentences from indeterminate to determinate, fixing significantly shorter ranges for most of these crimes, raising the minimum required weights for certain Class A felony drug possession offenses, and allowing the resentencing of certain felony drug offenders serving life sentences, the 2004 Drug Law Reform Act (DLRA), and follow-up legislation in 2005, ameliorated some of the more onerous aspects of the decades-old drug statutes. Although these revisions were seen by many as a long overdue change in New York's drug sentencing policy, their enactment did not quell the drug reform debate. To the contrary, in public hearings, focus group sessions and Commission meetings, defense advocates and others argued that the reforms did not go far enough, while law enforcement officials voiced strong opposition to further reform of the drug laws.

B. Examining the Data: The Case for Reform

Consistent with its approach to sentencing reform generally, the Commission examined the emotionally and politically charged issue of drug law reform from a data-driven perspective. The Commission reviewed data to assess the impact of the DLRA and found that a growing number of drug offenders have benefitted from reduced sentences as a result of the 2004-2005 drug law changes. As of December 31, 2008, a total of 252 Class A-I felony drug offenders had been resentenced pursuant to the DLRA and released from DOCS's custody an average of 50 months prior to their previously calculated earliest release dates. A total of 232 Class A-II felony drug offenders had been resentenced and, on average, released

13 months prior to their previously calculated earliest release dates. Three years after the DLRA was enacted, the average minimum term for new drug commitments, as well as the average time served in custody, decreased by approximately six months. Significantly, this has been achieved without a detrimental impact on public safety: crime continued to fall to historic lows in 2006 and 2007.

The Commission focused, in particular, on data relating to the diversion of drug-addicted non-violent felony drug offenders from prison to community-based treatment, and questioned whether New York's broad network of existing diversion programs provided equal access to diversion for non-violent drug-addicted offenders in all parts of the state. The Commission began by conducting an in-depth examination of the state's large and successful network of felony drug treatment courts and proven prosecutor-based diversion programs like the flagship Drug Treatment Alternative-to-Prison (DTAP) program in Kings County. It reviewed eligibility criteria, program characteristics, retention, completion and recidivism rates and other details of these established diversion models to learn how they operate and what makes them successful. The Commission came away with a strong appreciation of the effectiveness of these programs and their successful use of "legal coercion" to motivate non-violent felony offenders whose criminal behavior is precipitated by their addiction to enter and remain in long-term treatment.

To shed light on the question of equal access to diversion alternatives, the Commission compared data on the likelihood of receiving a state prison sentence on a felony drug indictment or superior court information in 18 counties around New York. It found that for similarly situated offenders who were indicted following a Class B felony drug arrest, the chances of receiving a sentence to state prison could vary dramatically, in some cases by a factor of five or even seven, depending on the county where the case was prosecuted. The Commission also studied drug admission and "under custody" data from DOCS and, consistent with national data on admissions to prison for drug crimes, found disturbing racial and ethnic disparities. In each of the last five years, African-Americans constituted a dramatically higher percentage of total DOCS's admissions for drug offenses than did whites. The DOCS's data show that, from 2003 to 2007, white offenders, on average, made up 10% of total drug admissions to DOCS, while African-Americans made up 55%. During the same five-year period, Hispanic drug offenders constituted, on average, 34% of total DOCS's drug admissions. While African-Americans and Hispanics comprised 32% of the state's population ages 16 and older in 2008, they accounted for nearly 90% of all offenders in DOCS custody for a drug offense that year.

Finally, the Commission noted well-documented disparities in the availability of substance abuse treatment providers, especially between rural and urban areas of the State, as well as in eligibility criteria for existing diversion programs. For example, while some upstate and suburban New York City jurisdictions operate substantial second-felony offender diversion programs similar to DTAP, many counties have only a limited program or no program at all for second-felony offenders. While all but five counties in the state currently have a felony-level drug treatment court, many of these courts target primarily first-time felony offenders and some do not accept offenders charged with drug sale offenses. The result is what might best be characterized as a "patchwork" system for diverting drug-addicted non-violent felony offenders from prison into treatment.

C. Principles of Reform

Based on this data, and on information gathered from Commission meetings, focus groups and public hearings held around the state, the Commission reached near-unanimous agreement on several key principles in the area of drug law reform.

First, as noted in its Preliminary Report, "the judicious use of community-based treatment alternatives to incarceration to address an underlying drug, alcohol or other substance abuse problem can be an effective way to end the cycle of addiction and the criminal behavior that inevitably follows." Stated differently, community-based substance abuse treatment—especially when applied in a "legally coerced" criminal justice setting where the addicted offender faces swift and certain punishment for failure in treatment—*does work*, and should be a readily available option in every region of the state.

Second, New York's existing network of diversion programs and drug courts is well-established and effective for thousands of nonviolent drug-addicted offenders who have seized the opportunity to turn their lives around by choosing treatment in lieu of prison. As such, the Commission believes that any uniform diversion model adopted in the state should supplement, not supplant, these proven models and must be carefully structured to avoid undermining or negatively impacting them.

Third, despite the availability of drug treatment courts and other diversion programs such as DTAP, there is evidence that a sizable number of potentially eligible nonviolent drug-addicted felony offenders may be "slipping through the cracks" of the existing diversion network, ending up in prison instead of community-based treatment. As a matter of simple fairness, diversion options should be made available to drug-addicted, nonviolent felony drug offenders regardless of the county or region of the state in which their case is prosecuted. Nearly all Commission members agree that by creating uniform standards for determining which offenders are drug addicted and would benefit from treatment, and giving courts additional authority to divert such offenders into treatment, fewer offenders who are otherwise suitable for

diversion will be overlooked or denied the opportunity for treatment.

Fourth, the Commission recognizes that no drug diversion program exists in a vacuum. Unless the necessary treatment beds and other community-based resources are in place and adequately funded, no diversion model, no matter how well-designed or operated, can succeed. As such, the Commission reiterates its earlier call for a comprehensive plan to provide statewide access to treatment programs and eliminate identified gaps in treatment services.

Finally, the Commission believes that New York must continue to reserve costly prison resources for high-risk, violent offenders while making greater use of community-based alternatives to incarceration for nonviolent felony drug offenders. Over the last decade, New York has made substantial progress in that direction. While many states continue to face exploding prison populations and increases in crime, New York enjoys the distinction of having significantly reduced its prison population and the percentage of nonviolent drug offenders in DOCS's custody while simultaneously improving public safety. Against this backdrop, the Commission believes that while it is important to continue to reform New York's drug laws, such reforms should be carefully tailored so that the state's significant gains in public safety are not lost.

D. Proposals for Reform

To further the goal of establishing a uniform statewide model for diverting drug-addicted nonviolent felony offenders from prison to treatment, the Commission examined a series of new and existing diversion proposals, including a "Court Approved Drug Abuse Treatment" (CADAT) model contained in a sweeping drug reform measure (A. 6663-A / S. 4352-A [2007]) which was introduced in the New York State Senate and passed by the State Assembly in 2007, and a Commission-devised proposal for "Judicial Diversion." It also reviewed two drug reform proposals for first-time Class B felony drug offenders that would allow imposition of a local jail or probation sentence in lieu of the current mandatory minimum one-year state prison sentence for these offenders without regard to whether the offender suffered from or was in need of treatment for drug addiction.

Although the Commission was unable to reach unanimous agreement on any one reform proposal, a majority of the Commissioners agreed that the Judicial Diversion model was the most promising in that it struck an appropriate balance between the need to give judges expanded authority to divert drug-addicted nonviolent felony offenders into treatment and the need to ensure public safety. Even those supporting Judicial Diversion recognized, however, that there were certain drawbacks to the model and certain positive and negative features of the other models. In the end, it was agreed that the best approach, and the one most likely to advance the cause of real drug law reform in New York, was to provide a "menu" of options, laying out the specifics of the various models considered, together with a frank and informed discussion of the advantages and disadvantages of each, for the benefit of the governor, legislature and judiciary.

1. Judicial Diversion

Under the Judicial Diversion proposal, certain drug-addicted, first-time and repeat nonviolent felony offenders would be eligible for diversion provided the offender's criminal history does not include certain disqualifying offenses and he or she is found to be in need of treatment for substance dependency. Under this proposal, prosecutorial consent is not required. Both first-time and second-felony offenders would be required to complete 12 to 24 months of drug treatment, with second-felony offenders required to spend a minimum of six months in intensive residential treatment. First-time felons would be required to complete outpatient or residential treatment under the supervision of the local probation department as part of an "interim probation" disposition. Second-felony offenders would complete treatment as part of a five-year probation sentence or, at the discretion of the judge, would be supervised by the State Division of Parole as part of a newly created "interim parole supervision" disposition. Consistent with the drug court model, all offenders, during periods of outpatient treatment, would be required to appear regularly before the judge, who would use a system of graduated sanctions to respond to relapses or other negative behavior. Offenders who ultimately fail in treatment or violate another significant condition of supervision would face a sentence of imprisonment; those who successfully complete treatment and probation (or parole) supervision would avoid prison and have the case record sealed.

To measure the possible impact of the Judicial Diversion proposal, the Commission applied the proposal's legal eligibility criteria to a pool of felony drug offenders admitted to DOCS in 2006. Based on its analysis, the Commission estimated that as many as 3,000 additional felony offenders might be diverted from prison into treatment each year under the model. Notably, 89% of these potentially eligible offenders were African-American or Hispanic. Further, the felony drug offenders in this potentially eligible pool of 3,000 represent nearly half (46%) of all felony drug admissions to DOCS in 2006.

Some prosecutors and drug court judges were concerned that implementation of Judicial Diversion could lead to "program shopping" by defense attorneys in search of the "best deal" for drug-addicted clients, and this could threaten the very existence of proven diversion options like DTAP and drug courts. Some Commissioners who were generally supportive of the Judicial Diversion proposal also were concerned that the state's existing network of intensive residential treatment and community residence beds is already strained and cannot accom-

modate the additional volume of offenders who would likely be diverted under the model. They noted that the situation almost certainly would be exacerbated by the state's economic crisis, which is likely to have an immediate and lasting impact on funding for probation departments and treatment programs. These members recommended that, as a matter of public safety, Judicial Diversion for second-felony offenders be deferred until more intensive residential treatment beds, halfway houses and other necessary treatment and supervision resources are in place throughout the State.

2. Judicial Diversion on Consent of the Parties

Consistent with the views of a majority of the state's prosecutors, one Commission member argued in favor of adopting the Judicial Diversion proposal for first-time and second-felony offenders, but with the added requirement that diversion be permitted *only* where the prosecutor consents to the disposition. While agreeing that the concept of an additional, statewide diversion model has merit, it was argued that the decision to divert a particular offender into treatment should be a shared decision, and should not be left to the judge alone. Although there are sound reasons for requiring that the court and the prosecutor both agree that a particular offender be diverted to drug treatment, a large majority of Commission members believe that, as reflected in the Judicial Diversion proposal, judges should make the final decision about whether an offender should be diverted.

3. Court-Approved Drug Abuse Treatment

Under the CADAT model, certain first-time and repeat felony drug offenders would be eligible to apply to the court for a CADAT diversion order. Persons currently or previously convicted of a violent felony offense, sex offense or one of a number of other disqualifying crimes would be ineligible for CADAT. Upon application of an apparently eligible defendant, the court would order an alcohol and substance abuse assessment and adjourn the matter for 21 days to allow a prosecutor to make a determination as to the defendant's suitability for diversion. If it appears to the court that the defendant also may be a person with a mental illness, the court must order that the assessment include a mental health examination to be conducted by an examining physician or certified psychologist. The court would be authorized to issue a CADAT order for a period of not less than one nor more than two years, with possible additional periods of up to six months. In the court's discretion, a CADAT order could be issued either prior to the entry of a guilty plea—in which case all discovery requests, pre-trial motions and other proceedings in the case would be automatically stayed pending the offender's completion of treatment—or following a guilty plea, in which case sentencing on the plea would automatically be deferred pending completion of treatment.

Upon ordering CADAT, a court would impose reasonable conditions related to supervision and treatment and direct that the local probation department or another entity supervise the defendant. Such treatment must include a period of residential treatment unless the court finds it unnecessary. As with Judicial Diversion, the court would be required to employ a system of graduated responses or sanctions designed to address inappropriate behaviors. A defendant sentenced for a conviction following a termination of CADAT could receive up to the maximum term that the court would have imposed had the defendant not participated in CADAT. Upon the defendant's successful completion of CADAT, the court would be required to comply with the terms and conditions it set for final disposition, which may include *vacatur* of any guilty plea entered prior to issuance of the CADAT order.

Those who preferred the CADAT model stressed that the proposal had fewer criminal history exclusions and would result in more diversions of qualified offenders from prison into treatment. They further noted that the proposal, as part of a much more comprehensive drug law reform measure that had already passed the Assembly, had been fully vetted through public hearings and legislative debate and was supported by many drug law reform advocates. Opponents of CADAT argued that, unlike the Judicial Diversion proposal, the model categorically excludes from diversion nonviolent second-felony offenders charged with *non*-drug felony offenses, and allows judges to divert offenders without first requiring a plea of guilty, thereby creating potential problems for prosecutors who, following a failure in treatment, may have to proceed to trial months or even years after the initial CADAT order was issued.

4. Eliminating the Mandatory Minimum Prison Sentence for First-Time Class B Felony Drug Possession and Sale Offenses

Two proposals considered by the Commission would allow judges, without regard to a defendant's addiction status or need for treatment, to sentence certain first-time Class B felony drug sale and possession offenders to a probation or local jail sentence in lieu of the current mandatory minimum prison sentence of one year.

Under the first proposal, dubbed the "aggravated sale and possession" model, a judge would be authorized to impose this alternative sentence upon a first-time felony offender convicted of the Class B felony of criminal sale of a controlled substance in the third degree or criminal possession of a controlled substance in the third degree. The proposal would, however, create new "aggravated" versions of these crimes that could be charged in cases where the defendant either sold drugs to a minor or, at the time of the sale or possession or the arrest thereon, possessed a loaded or unloaded firearm or other gun. Defendants convicted of the aggravated offense would be ineligible for the alternative, non-prison sentence.

The second proposal would simply eliminate the mandatory minimum prison sentence for first-time Class B felony drug sale and possession offenders without creating "aggravated" versions of these crimes.

These proposals received only limited support among Commission members. Commissioners heard from drug court judges and prosecutors that enacting a non-prison sentencing alternative for first-time Class B felony drug offenders could have a detrimental impact on existing drug courts, which hold the promise of a non-prison disposition as the "carrot" to entice drug-addicted first-time felony offenders to undergo the rigors of long-term treatment. Moreover, because the proposals allow for a reduced sentence for felony drug offenders without requiring a dependency assessment of the defendant or treatment for those found to be drug dependent, many Commissioners felt that the proposals would do little to end the cycle of addiction and could result in an entirely new class of drug-addicted predicate felons who, upon commission of a subsequent felony drug offense, would face a 3½-year mandatory minimum prison sentence.

5. Recommendation

Despite New York's established network of successful diversion programs and drug courts, evidence suggests that a significant number of nonviolent felony offenders who could benefit from diversion to community-based treatment for substance dependence are not provided this potentially life-changing alternative to prison. A majority of Commissioners agree that establishing a uniform statewide diversion program for drug-addicted nonviolent felony offenders would help close this gap in access to diversion and would benefit, in particular, those African-American and Hispanic offenders whose nonviolent criminal behavior is rooted in addiction. The Commission recognizes that this will require an investment in additional resources for evaluation, treatment, referrals and supervision of offenders and that finding these resources will be a challenge given New York's current fiscal crisis. The Commission believes, however, that in the long run this investment will result in substantial savings in judicial, law enforcement, correctional and supervision resources by reducing the costly cycle of addiction and recidivism. More importantly, it will offer much-needed relief to those families and communities adversely impacted by disproportionate drug incarceration rates by transforming formerly drug-addicted offenders into productive family and community members.

IV. Using Evidence-Based Practices to Improve Offender Outcomes

New York is one of the few states in the nation that has continually reduced crime while simultaneously decreasing its prison population. While this is an impressive achievement, the State's criminal justice policymakers must continue to identify areas that can yield further gains in public safety while reducing reliance on costly prison resources.

Data show that more than one in three offenders (39%) who are released from incarceration in the state return to prison within three years of release. While New York has taken significant steps to increase the likelihood of successful offender reentry, more can be done. The Commission recommends, for example, that DOCS, the Division of Parole and the Division of Probation and Correctional Alternatives adopt a common risk- and needs-assessment methodology to help identify those who pose the greatest risk to public safety and are most likely to reoffend. The Commission further recommends that Parole and Probation concentrate their resources in the earliest stages of supervision and reserve intensive supervision for those offenders who pose the highest risk of reoffending. Adopting these policies will allow supervisory agencies to effectively allocate limited resources to the population of offenders most in need of those resources, and will focus resources on that initial period of supervision when offenders are most likely to recidivate.

Another area where New York can significantly improve the chances for successful reentry and reduce recidivism is in the way it deals with parole rule violators. As the most expensive resource, prison should be reserved for those offenders who pose the greatest threat to public safety. In 2006, more than 12,000 parolees were returned to incarceration in New York State for violating a condition of parole (an 11% increase from 2005). More than 40% of those returns occurred in the absence of a new criminal charge.

The Commission was committed to finding an alternative to the all-or-nothing approach of responding to parole rule violators. With the assistance of the Division of Parole and the Vera Institute of Justice, the Commission examined New York State offender data pertaining to parolees returned to prison and reviewed how other states respond to such violations. The Commission determined that by creating a comprehensive system of graduated responses, parole officers throughout the state will be able to quickly and proportionately respond to parole violations. The application of graduated responses, such as curfews, electronic monitoring, and increased reporting, coupled with the use of a risk- and needs- assessment instrument, will allow parole officers to impose the appropriate community-based sanction, not based solely on the condition that was violated, but also on the assessed risk posed by the individual offender. These tools will help parole officers reserve incarceration for those offenders who pose the highest risk, without unduly jeopardizing reentry progress made by low-risk offenders. New York should implement these policies to make immediate gains in public safety and re-entry, while reducing reliance on expensive prison resources for low-risk offenders.

Finally, the Commission recommends expanding upon the recently established reentry initiatives in New York State, such as the county reentry task forces, the Orleans Reentry Unit and the Edgecombe pilot program for parole violators in need of drug treatment.

V. Expanding Successful DOCS Programs and Improving Willard

The Commission examined programs operated by DOCS that not only reduce the amount of time offenders are incarcerated and thereby reduce prison costs, but also prepare those same offenders for successful transition back into the community. DOCS's Shock Incarceration Program combines a rigorous regimen of physical activity, discipline and drug treatment within a structured, military-like environment. After applying the statutory eligibility criteria, DOCS screens each eligible inmate for program suitability. The recidivism rates for Shock participants have yielded better results than for comparison groups. Moreover, the program has saved the state an estimated $1.06 billion since the program began in 1987. The Commission believes that the State can further capitalize on DOCS's proven expertise in running this cost-effective program and its success in screening out inmates who are inappropriate for Shock participation. Accordingly, the Commission recommends extending the statutory age of eligibility for Shock participation to those who are under 50 years of age; currently inmates must be under 40 to enter Shock. Additionally, the Commission recommends expanding Shock eligibility criteria to allow inmates to be admitted who are otherwise eligible for the program but do not meet the current statutory requirement that they be within three years of their parole eligibility date (for indeterminate sentences) or conditional release date (for determinate sentences) at the time they are initially received at a DOCS's reception center. This proposal would, for the first time, allow DOCS to recruit suitable Shock participants from general confinement into the program when they come within the three-year eligibility time frame.

Similarly, DOCS's Merit Time Program aims to prepare eligible inmates serving sentences for nonviolent felony offenses for successful reentry through the opportunity to earn a one-sixth time allowance off the minimum period of their sentence (one-seventh for determinate drug sentences) by engaging in beneficial programming while incarcerated. The Commission believes that a flat six-month merit credit also should be made available to violent offenders (other than sex offenders), as well as certain Class A-I non-drug felony offenders, who demonstrate a likelihood of rehabilitation in prison and successfully complete specified enhanced DOCS program requirements.

In its Preliminary Report, the Commission recommended that DOCS and OASAS work together to improve the quality of drug treatment within DOCS and, in particular, at the Willard Drug Treatment Campus in Seneca, New York. Since then, DOCS and OASAS have collaborated on key recommendations to improve Willard's 90-day intensive substance abuse treatment program. These include conducting smaller therapy groups of no more than 15 offenders, increasing one-on-one counseling and updating curricula, including a concentration on reentry issues during the final 30 days of the program. The Commission supports these joint recommendations.

VI. Crime Victims and Sentencing

New York has enacted a number of statutes that reflect the critical role played by victims in the criminal justice process and, in particular, in sentencing-related matters. The Commission learned that in some instances there is a disconnect between the many rights granted crime victims under the law and the actual exercise of those rights by victims. The Commission believes that this is due, in part, to the sheer complexity of the numerous statutory provisions governing crime victims' rights and the absence of any effective means of enforcing those rights. In order to streamline and make more accessible to judges, lawyers and crime victims the multitude of statutory and regulatory provisions governing the rights of crime victims in the state, the Commission recommends that these provisions be moved to a single article of law or that a cross-referencing chart or other similar resource tool be created and incorporated into the Criminal Procedure Law or Penal Law and be periodically updated so that crime victims, and the criminal bench and bar, can easily access a list of all victim-related statutes.

The Commission further recommends that the statutorily required training of prosecutors and judges in the area of victims' rights be expanded and enhanced to ensure that they are made fully aware of their obligations with respect to victim notification and the substantive rights of crime victims. Of particular importance are the obligations that prosecutors and judges have in preserving the restitution-related rights of crime victims. The Commission also finds that certain existing rights, such as the right to seek and collect restitution or reparation from an offender, might be significantly advanced through relatively minor amendments to existing law, including the addition of a provision allowing offenders to pay restitution by credit card. Finally, the Commission finds that the existing statutes establishing the rights of crime victims in the area of sentencing may be unduly narrow and that expansion of those rights should be considered.

VII. Permanent Sentencing Commission

Based on testimony presented to the Commission by policymakers, practitioners, academics and advocates, it has become clear that criminal justice in general, and sentencing in particular, are areas where law, practice, research and policy are constantly evolving. There was a consensus among members of the Commission that the

state should give serious consideration to the creation of a permanent body dedicated to the ongoing evaluation of relevant sentencing laws and policy. A permanent sentencing commission would serve as an advisory body to the legislative and executive branches of government and would review and comment on proposed sentencing legislation.

VIII. Conclusion

The sentencing function is arguably the most critical in any criminal prosecution. The judge's sentencing decision has immediate and often dramatic consequences for the offender and the victim and profound consequences for the community over the long term. The principal recommendations in the Commission's Final Report—to clarify and streamline the sentencing laws and expand the ability of judges to divert drug-addicted nonviolent felony offenders from prison into community-based treatment—reflect these principles and are intended to improve a sentencing system that is overdue for reform.

The Commission recognizes that sentencing in the broadest sense does not end with the judge's pronouncement at the conclusion of a criminal case. In most instances, this pronouncement marks the beginning, rather than the end, of a lengthy journey toward successful reintegration of the offender as a productive and law-abiding member of society. In recommending further reforms aimed at expanding the use of proven programs and evidence-based methods to improve the transition of offenders from prison back into the community, the Commission believes New York can reduce its reliance on costly prison resources while enhancing public safety.

In fulfilling its broad mandate, the Commission has a historic opportunity to have a positive and lasting effect on criminal justice policy in the state. The Commission respectfully submits this Final Report to the governor, legislature and judiciary with the expectation that it will serve as a roadmap for future sentencing reform and help make New York's sentencing system the standard by which all others are measured.

Editor's Note:

In early April the Legislature dealt with one of the issues raised by the Sentencing Commission—to wit Drug Law Reform—by passing as part of the Budget Bill provisions allowing for greater judicial discretion in placing certain drug-crime defendants in court-supervised rehabilitation programs rather than incarceration. The Legislature also eliminated the necessity of prosecutorial consent for placement in these diversionary programs.

Governor Paterson signed the legislation on April 7, 2009. Some of the new provisions are effective immediately, others within 60 days, six months or on November 1, 2009. Although the Sentencing Commission made several recommendations for change and the Legislature is presumably considering them, it appears that at this legislative session only the drug law reforms will be acted on. We will, however, report on any new developments.

Our annual review of new legislation, written by Judge Barry Kamins, will appear in our Fall Issue and will include specific details on the new drug law provisions.

Nullification as a Defense

By Thomas F. Liotti and Drummond C. Smith

Nullification is not listed as a legal defense anywhere.[1] In fact, lawyers are not ethically permitted to tell jurors to disregard the law. *Model Rules of Professional Conduct, Rule 3.5*; *see also U.S. v. Thomas,* 116 F.3d 606 (1997). Yet, in many cases that is precisely what lawyers try to do and have done for years after the nation's founding. The Founders understood that trials by juries and ordinary citizens, fully informed of their powers as jurors, would confine the government to its proper rule as the servant, not the master of the people. For example, a necessity defense is in essence a form of nullification. *U.S. v. Berrigan,* 283 F. Supp. 336 (1968). It says that a protest is politically necessary in order to stop death that might result from nuclear power plants, other environmental hazards and war. The defense has to do with getting jurors so angry at the government's conduct that they vote to acquit even though an application of the law to the facts might point in the direction of guilt.[2] In *Zenger's Case (*1735), the defendant, John Peter Zenger, had been arrested and charged with printing critical but true stories about the governor of New York Colony. The court told the jury that "truth is not defense," but the jury acquitted and gave us the basis of the law which holds that truth is a defense to a defamation claim.

In order to effectively assert the defense of nullification, the jurors need to know from pre-trial publicity why the case is a political one. Nullification defenses are based upon challenges to government policies, or sometimes challenges to procedures that may violate civil or human rights. It becomes a matter of publicly stating what the political issues are and how they will be challenged in the courts, through the judicial process. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), a well-known attorney held a press conference and was suspended from the practice of law for two years. Attorney Dominic Gentile, during a pretrial press conference read the following prepared statements regarding his client, Grady Sanders;

> When this case goes to trial . . . you're going to see that the evidence will prove not only that Grady Sanders is an innocent person . . . but that the person that was in the most direct position to have stolen the drugs and money is Detective Scholl.
>
> I feel that Grady Sanders is being used as a scapegoat.
>
> With respect to these other charges . . . the so-called victims . . . four of them are known drug dealers and convicted money launderers . . .

Then, citing ethical restrictions, Gentile answered only a few press questions, stating the following: "I know I represent an innocent man," when referring to the outcome of an earlier charge in the indictment, . . . and I told you that the case would be dismissed and it was."

Ultimately, Mr. Sanders was acquitted after a jury trial.

The Nevada State Bar alleged that Gentile had violated its disciplinary rule, which is the equivalent of the *ABA Model Rule of Professional Conduct 3.6* by making statements to the effect that:

- the evidence demonstrated the client's interest;
- the likely thief was a police detective;
- the other alleged victims were not credible.

The matter was affirmed by the Nevada Supreme Court, but on a 5-4 vote, the U.S. Supreme Court reversed. The majority wrote the following:

> The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press. . . .

The Supreme Court later held that his speech was protected by the First Amendment.[3] Similarly, Steve Yagman, known civil rights lawyer based in California, found that his criticism of judges was protected by the First Amendment as opinion. See *Standing Committee on Discipline v. Yagman,* 55 F.3d 1430 (1995) and Thomas F. Liotti, *A Perspective on Yagman: The Outer Limits of Judicial Criticism*, The Attorney of Nassau County (May, 1996) at 6 and 19.

In nullification cases, lawyers are striving to inform prospective jurors or actual jurors of legal issues or facts that are not necessarily before them. Pre-trial publicity is an ingredient that can inform jurors of issues that lawyers may not be able to bring out during the course of trial itself.

In a civil case the summons and complaint or the notice of claim may, by themselves, signal the start of a political case or a challenge to government policy. The lawyer chosen to advance these issues may also be identified as a spokesperson for the cause. For example, when the late William Kunstler was defending against a heinous criminal charge, the public knew that in addition to questioning the alleged facts, he might also be fighting against police brutality or other violations of his clients'

civil rights. In representing African-Americans he would often allege that the police in the City of New York had engaged in systematic discrimination against the minority community. *People v. Larry Davis,* N.Y.S.2d 430 (1988).

Driving While Black (DWB) cases along the Jersey Turnpike were used to show the lack of probable cause for arrests or even stops by the police there.[4] The video of Rodney King being savagely beaten by Stacey Koon, a well-known Los Angeles police officer, was used in the civil and criminal cases arising out of that incident, but also the first O.J. Simpson verdict was, in part, considered to be the result of a payback by jurors for what happened to Rodney King. The O.J. case highlighted the use of the "N" word in extra-judicial statements by Mark Furman.

The deaths of 85 people at the Branch Davidian compound in Waco, Texas were blamed on the FBI and private militia in criminal cases arising out of that incident. *U.S. v. Branch,* 91 F.3d 699 (5th Cir. 1996); *United States v. Castillo*, 179 F.3d 321 (5th Cir. 1999); *Castillo v. United States*, 530 U.S. 120 (2000). In the Chicago 7 cases, lawyers eventually won victory and marketed their opposition to President Johnson, the Vietnam War and Mayor Daley's Chicago police, by making their trial into a political one. They made federal Judge Julius Hoffman and his bizarre judicial rulings into an analogy, which then enabled them to criticize the federal government as a whole. *U.S. v. Dellinger,* 472 F.2d 340 (1972).

Lawyers representing Abner Louima not only repelled criminal charges against their client, but also had the police prosecuted and obtained a large civil award against them. *U.S. v. Schwarz,* 283 F.3d 76 (2002). This result was achieved in some measure by the political pressure placed upon city of New York as a result of the pre-trial publicity. That publicity caused investigations by Internal Affairs, the F.B.I. and others. It also resulted in the suspension, termination and jailing of police officers.

Nullification may also occur during *voir dire*. Submitting proposed questions in federal court, for the court to ask in a questionnaire or in its actual questioning of jurors, may augment what the lawyer can do to advance nullification. These questions may begin with: "Have you ever sued or been a party to litigation of any kind with the state or federal government? If so, state the nature of the suit and the outcome." Other questions that may be asked by the federal court or the lawyer in state court may include:

1. If you are the sole juror who feels a certain way, do you have the courage of conviction necessary to deliberate, and if unpersuaded, stick to your opinion?
2. What is your understanding of an indictment that is frivolous or brought in bad faith?
3. Do you believe that prosecutors / agents who bring wrongful, malicious prosecutions should be penalized for doing so?
4. Will you follow the instruction given by the judge?
5. What will you do if you disagree with the judge's instructions?
6. Do you understand that you can disagree with your fellow jurors?
7. Will you vote to go along and get out of here?
8. Do you think that the police ever lie?
9. Do you think that the police ever cover up?
10. Are you familiar with the term, "shoot first, ask questions later"?
11. How do you know if a witness is a perjurer?
12. How do you know if the government is suborning perjury?
13. If you think that the judge is being unfair in his / her ruling to one side or the other, what will you do about it?

Opening statements are a time to lay down more tracks to further the idea of nullification.

1. "The judge and the lawyers take an oath which says that we promise to uphold, protect and defend the Constitution of the United States. To the extent that we do or do not means that we have either followed our oaths or broken them. To that extent, I remind you that the Constitution is on trial in every case and I am here to defend it and the rights of my client or you if you were in his unenviable position of sitting over there."
2. "The government holds up this flag and announces to you that they represent the United States of America. Well that is true, but they are from the Department of Justice. Listen to that word. Justice. Justice. It is their responsibility to do justice and not merely prosecute because they can or because they have the great might and resources of the government behind them. We do not have that. On our side we have just the two of us to defend against the prosecution team. Just the two of us, that is, and the Constitution and all of you. You really are the essence of democracy, the final check and balance. Your duty is to question the evidence, the motives of witnesses, and that of the government in bringing these trumped up, frivolous charges."
3. "We have one judge, one defense lawyer and one prosecutor. Our jobs are not as important as yours. Why? Because it takes 12 of you to do it."

Cross examination requires a good-faith basis for asking questions. It is up to the reader to decide if he has that, but if you do, then here are some questions to consider:

1. "Tell me in your own words what the probable cause was for my client's arrest?"
2. "Have you ever taken a bribe?"
3. "Have you ever lied?"
4. "Have you ever told a white lie?"
5. "Have you ever been sued civilly?"
6. "Were you taught in the Police Academy to lie, testily?"[5]
7. "Will you get a promotion or a raise if you get more collars?"
8. "Do you dislike me for asking these questions?"
9. "We don't need the jury, do we? You think the defendant is guilty? You want these jurors to believe you, don't you?

Closing arguments follow the theme which you have established.

1. "By now you have seen and heard the government's case. You may wonder why you are here, that they have the wrong man. You are allowed to have your own thoughts, to be free thinkers, to disagree with your fellow jurors and they must deliberate with you. If you are resolute in your views after listening to your fellow jurors, then you may stick to your guns, that is your right. That is a fair trial."

Although nullification is not a named legal defense, it has served as a valid and powerful mechanism advanced by lawyers since the formation of America's justice system. Lawyers play a crucial role as spokespersons advocating for needed change in political or governmental policy, but equally important is the attention media give to these topics. If media are a reflection of the pulse of the common man, lawyers are simply employing a legal tool through the judicial process to reflect the present concerns of a changing society. Allowing nullification to serve as a defense is, in essence, preserving and promoting the fabric of our nation's democratic principles and ensuring a government that continues to function "by the people" and "for the people." In a nation as young as America, the use of nullification as a defense is one way among many to allow for growth and advancement according to the political and social necessities of any particular time.

Endnotes

1. However, jury veto power has been recognized by some courts. In 1972, the D.C. Circuit Court of Appeals held that a jury has an "unreviewable and irreversible power" to acquit in disregard of the instructions on the law given by the trial judge.
2. John Adams, our second President, said the following about jurors: "It is not only his right but his duty . . . to find the verdict according to his best understanding, judgment, and conscience, though in direct opposition to the direction of the Court."
3. This situation is not entirely dissimilar from early English Law pursuant to the Magna Carta. In the political trial of William Penn, who was charged with preaching Quakerism to an unlawful assembly, four of the 12 jurors voted to acquit and confirmed to vote to acquit even after being imprisoned and starved for four days. Some of the holdouts finally agreed to pay fines imposed for holding out; however, one of the jurors, Edward Bushell, refused to pay and brought his matter before the Court of Common Pleas. The Court in *Bushell's Case* (1670) held that jurors could not be punished for their verdicts.
4. According to CounterPunch's article, *Driving While Black*, edited by Alexander Cockburn and Jeffrey St. Clair, and available at http://www.counterpunch.org/drivingblack.html: In 1995, a New Jersey state judge threw out charges against 15 black drivers who, the judge said, had been pulled over without probable cause. During one of these trials, evidence was uncovered that on a 26 mile stretch of road on the southern part of the New Jersey Turnpike, minorities accounted for 46% of the drivers stopped, although blacks constituted 15% of the drivers.
5. Thomas F. Liotti and Katherine Ginnis, "Testifying: Law Enforcement's Specialty?" *The Attorney of Nassau County*, August 1995 at pages 4 & 6.

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New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from February 2, 2009 to April 2, 2009.

Speedy Trial

***People v. Romeo*, decided February 11, 2009 (N.Y.L.J. February 13, 2009, pp. 1, 6 and 26)**

In a unanimous decision, the New York Court of Appeals dismissed a Defendant's manslaughter conviction on speedy trial grounds. The Court found that the decision of the Suffolk County District Attorney's Office to turn over the Defendant to the Canadian Government to be tried on another murder charge, plus the officer's failure to seek the Defendant's extradition back to the Untied States for trial, violated his constitutional rights to a speedy trial. In applying the five-part speedy trial analysis set forth in *People vs. Taranovich*, 37 N.Y.2d 442, the Court found that the extraordinary period of 12 years between the indictment and the filing of the first speedy trial motion constituted improper prosecutorial action which prejudiced the Defendant's right to a fair trial. Judge Ciparick wrote the opinion for the Court.

Imposition of Consecutive Sentences

***People v. Taveras*, decided February 11, 2009 (N.Y.L.J. February 13, 2009, pp. 1, 6 and 27)**

In a unanimous decision, the Court of Appeals upheld the imposition of consecutive sentences imposed for the crimes of criminal sexual act in the third degree and falsifying business records in the first degree. The Defendant was accused of sexually abusing a number of students at the school where he was an assistant principal. In an effort to cover up his activities, he falsified the records of summer youth employment programs so that the boys were paid for work they did not perform. The Defendant argued that the *actus reus* underlying the crime of criminal sexual act constituted a material element of the falsifying business records charge and that therefore consecutive sentences could not be imposed. The Court, in a decision written by Judge Graffeo, rejected the Defendant's argument and concluded that each of the charges in question were separate offenses and that therefore the sentencing court was within its discretion to impose consecutive terms.

Speedy Trial Pursuant to CPL 30.30

***People v. Rouse*, decided February 11, 2009 (N.Y.L.J. February 13, 2009, p. 27)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and dismissed the indictment in question. The Court found that the People had violated the six-month speedy trial period for felony offenses under CPL § 30.30. The People had argued that a 30-day period should have been properly excluded, because the Defendant's Co-Defendant was without counsel. The Court of Appeals rejected this argument, noting that the record established that substitute counsel had been appointed to the Co-Defendant during the adjournment period in question. The Court further noted that any claim made by the People that sufficient time should also have been allowed for new counsel to become familiar with the case was not a valid consideration for purposes of CPL § 30.30.

Impeachment of Defendant's Testimony by Prior Convictions

***People v. Riley Williams*, decided February 11, 2009 (N.Y.L.J. February 13, 2009, p. 27)**

In a unanimous decision, the Court of Appeals found that the trial court was within its discretion to allow the prosecutor to elicit from the Defendant that he had one felony conviction and numerous misdemeanor convictions. The trial court did not allow inquiry into the underlying facts or circumstances of the convictions. The Court noted that the issue had been fully explored during a Sandoval hearing. The Court further emphasized that on the question of proper impeachment, trial courts are usually given wide latitude to exercise their discretion, and in the case at Bar there was no legal reason to overturn the trial court's ruling.

Search and Seizure

***People v. Ryan*, decided February 12, 2009 (N.Y.L.J. February 17, 2009, p. 18)**

In a unanimous decision, the New York Court of Appeals held that police officers had detained a Defendant in their police car for too long of a period, following an investigatory stop. In the case at Bar, the police had received descriptions of Defendants who had committed an early-morning carjacking. Based upon these descriptions, the police stopped the Defendant's vehicle and placed him in the seat of a police car, where he was detained there for more than 13 minutes. Subsequently, the Defendant's photograph was selected from an array that was shown to the victim, and he was arrested. On appeal, the Defendant contended that he was detained for a period of time that exceeded the limits established by *People v. Hicks*, 68 N.Y.2d 234 (1986).

The New York Court of Appeals agreed with the Defendant's position, finding that even though there may

have been reasonable suspicion to conduct an initial investigatory stop, the Defendant's lengthy detention exceeded permissible limits, and was merely designed to make it convenient for the police to arrest the Defendant if the victim made a positive identification from the subsequent photo array. The identification in question should therefore have been suppressed. The Court of Appeals then remitted the matter back to the trial court for further proceedings with respect to other suppression issues.

Consecutive Sentences

***People ex rel Gill v. Greene*, decided February 12, 2009 (N.Y.L.J. February 17, 2009, pp. 6 and 19)**

In a unanimous decision, the Court of Appeals held that it was not necessary for sentencing judges to declare in open court that second-felony offender sentences must be served consecutively with any unserved time from previous convictions. During the last several years, it had become an accepted practice for the Department of Correctional Services to verify upon receipt of inmates that they were subject to the consecutive sentencing rules contained in the 1978 Omnibus Crime Control Bill, even though the sentencing judge had not mentioned the situation at the time of sentence. The Appellate Division, Third Department, relying upon *Matter of Garner*, which had invalidated terms of post-release supervision that were not pronounced by sentencing judges, had similarly invalidated the Correction Department administrative actions with respect to consecutive sentences.

However, Judge Robert Smith, writing for a unanimous court, held that the Third Department's legal analysis was flawed, and that the situation in the case at Bar was clearly distinguishable from the post-release supervision issue. The Court's opinion stated that although post-release supervision is a form of punishment that defendants must be informed about during sentencing, the consecutive sentencing provision does not impose an additional punishment on an unsuspecting defendant. "Nothing in the Statute, and nothing in the Constitution, requires the sentencing court to say the word consecutive, either orally or in writing, though nothing in the Statute even requires that the sentencing court be made aware that the prior sentences are un-discharged." The Court's unanimous decision consisted of six judges, since Judge Lippman, who recently joined the Court, did not participate in the original oral arguments.

Admissibility of Prior Conduct by Defendant Against Victim

***People v. Dorm*, decided February 12, 2009 (N.Y.L.J., February 17, 2009, p. 19)**

In a unanimous decision, the New York Court of Appeals held that a trial court had properly permitted the jury to hear evidence of conflicts between a Defendant and the victim before and after the incident which was the subject of the indictment. The defendant and the victim had been involved in a romantic relationship, and after a New Year's Eve party, the Defendant was accused of pushing and shoving and attempting to manually choke the victim. The Court of Appeals determined that the evidence that was admitted was relevant to the Defendant's motive and provided necessary background regarding the couple's relationship that tended to explain aspects of the victim's testimony that might otherwise have been unbelievable or suspect. The Court emphasized that with respect to the issue at hand, trial judges are granted broad discretion to balance the probative value of the evidence against its possible unfair prejudice. In the case at Bar, the trial court had a sufficient basis to allow the evidence in question.

Molineux Evidence

***People v. Small*, decided February 12, 2009 (N.Y.L.J. February 17, 2009, p. 19)**

In a unanimous decision, the Court of Appeals upheld a Defendant's conviction and denied a claim that the trial court had improperly allowed evidence of the Defendant's prior bad acts. In the case at Bar, the Defendant, during the trial, had advanced the theory of an agency defense. The prosecutor thereafter made an application to introduce evidence of prior drug dealing to counter the Defendant's proffered defense. After the trial court had granted the prosecutor's request, it provided a limited instruction to the jurors, specifically informing them the evidence in question was no proof that the Defendant possessed a propensity or disposition to commit the crime charged in the indictment, but was offered solely for rebutting the defense of agency on the issue of intent. In light of the circumstances in the case at Bar, and the specific limiting instruction given to the jury, the Court of Appeals unanimously concluded that the Defendant's conviction should be upheld.

Search of Body Cavity

***People v. Hug*, decided February 12, 2009 (N.Y.L.J. February 17, 2009, p. 19)**

In a unanimous decision, the New York Court of Appeals ordered the suppression of cocaine which had been discovered in a baggie that had been forcibly removed from the body cavity of a Defendant following a search at a police station. The search in question had occurred without a warrant after a police officer saw it protruding from the Defendant's body. The Court of Appeals determined that there were no exigent circumstances, and that the police should have applied for a judicial warrant before conducting the search in question.

Mandatory Surcharge

***People v. Guerrero*, decided February 19, 2009 (N.Y.L.J. February 20, 2009, pp. 6 and 27)**

In a unanimous decision, the New York Court of Appeals rejected a Defendant's contention that he had been improperly assessed a mandatory surcharge of $150 for his felony conviction, and a $2 victim assistance fee. The Defendant argued that these constituted penalties that should have been pronounced as part of his sentence in open court. The Defendant was relying upon the Court's recent decision in *People v. Sparber* regarding post-release supervision in support of his claim.

The Court of Appeals, however, determined that the state statutes have intentionally drawn a distinction between surcharges and fees and other types of penalties imposed for crimes. Judge Read, who wrote the Court's opinion, emphasized that the use of assessments and fees was designed to raise revenue as well as for punitive purposes, and, as such, was distinguishable from other penalties such as imprisonment, which must be pronounced by a court.

Based upon its ruling in the Guerrero case, the Court of Appeals summarily upheld the lower court rulings in four other cases and dismissed the Defendant's contentions. These cases were *People v. Washington, People v. Harris, People v. Furet,* and *People v. Hoti,* all decided on February 19, 2009 and appearing at page 28 of the *New York Law Journal* of February 20, 2009.

Unsworn Witness

***People v. Moye*, decided February 19, 2009 (N.Y.L.J. February 20, 2009, pp. 6 and 28)**

In a unanimous decision, the New York Court of Appeals decided that a new trial was necessary for the Defendant because the prosecutor at trial had made himself an unsworn witness. The prosecutor, during summation, told the jury that he should be fired if he allowed a witness to perjure himself. The Court found that the prosecutor's remarks could not be excused as a fair response to a defense argument, and that the remarks in question were so prejudicial as to warrant a new trial.

Registration of Sex Offenders

***People v. Nox*, *People v. Cintron*, and *People v. Jackson*, decided February 17, 2009 (N.Y.L.J. February 18, 2009, pp. 1, 9 and 27)**

In a unanimous decision, the New York Court of Appeals held that there was no constitutional due process violation of a Defendant's rights under the New York system of including Defendants who abduct or unlawfully imprison children as "sex offenders," even when there is no sexual component to their crime. The Defendants in question challenged their obligation to register as sex offenders, claiming that there was no proof that their crimes involved any sexual act or were sexually motivated. However, the Court of Appeals ruled, in a decision by Judge Robert S. Smith, that there was a rational basis for the legislature's determination, and that often people who kidnap or unlawfully imprison children have a sexual motive for their actions. Because a legislative statute is presumed to be valid, the Defendants were unable to sustain their burden of showing that there was no rational basis for the legislature's actions.

Admissibility of Blood Sample

***People v. Elysee*, decided February 17, 2009 (N.Y.L.J. February 18, 2009, pp. 9 and 27)**

In a unanimous decision, the New York Court of Appeals upheld the admissibility into evidence of a blood sample taken by a hospital emergency room resident from a Defendant who was suspected of drunk driving. The Defendant argued that the police seizure of the blood sample pursuant to a search warrant violated his doctor patient privilege under CPLR 4504. The Court of Appeals determined that Vehicle and Traffic Law § 1194 provides that anyone with driving privileges in New York State is deemed to have given his consent to a blood test, and that therefore any doctor / patient privilege was overcome when the police officers executed the court order pursuant to the VTL provision. The Court's opinion was written by Judge Theodore T. Jones, Jr.

Constitutionality of New York's Persistent Felony Offender Statute

***People v. Quinones*, decided February 24, 2009 (N.Y.L.J. February 25, 2009, pp. 1, 2 and 27)**

In a unanimous decision, the New York Court of Appeals once again upheld the constitutionality of New York's Persistent Felony Offender sentencing scheme, which allows judges, on a discretionary basis, to sentence persistent felony offenders to increased incarceration, with a maximum life sentence. In the case at Bar, the Defendant argued that his Sixth Amendment rights were violated pursuant to the U.S. Supreme Court rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2001) and *Blakely v. Washington*, 542 U.S. 296 (2004). The New York Court of Appeals had previously upheld the constitutionality of the New York Statute in *People v. Rosen*, 96 N.Y.2d 329 (2001) and *People v. Rivera*, 5 N.Y.3d 61(2005). The Defendant, however, based his most recent attack on the basis of the Supreme Court's decision in *Cunningham v. California*, 549 U.S. 270 (2007), where the Supreme Court struck down California's enhancement statute for persistent offenders as violating the *Apprendi* ruling.

The New York Court of Appeals, however, distinguished the New York Statute on the basis that it is not totally discretionary with the sentencing judge but is only triggered by the prior felony convictions of the defendant.

Judge Jones, writing for a unanimous Court, specifically stated that it was inaccurate to equate New York's Persistent Felony Offender statute with California's sentencing scheme. California's law allowed judges, and not juries, to enhance sentences based upon aggravating circumstances. New York's statute, on the other hand, establishes eligibility for enhanced sentences solely on the felony conviction history of defendants. According to the New York Court of Appeals, this fact places New York scheme outside the scope of the *Apprendi* ruling.

The issue of the constitutionality of New York's Persistent Felony Offender statute has been the subject of much comment and litigation in the last few years, and some federal litigation on the issue is still pending. It should be noted that the U.S. Supreme Court refused to grant *certiorari* in the case of *People v. Rivera,* which was decided in 2005. Whether, based upon the *Cunningham* decision, the U.S. Supreme Court will grant review of the instant *Quinones* case appears unlikely. In fact, as can be seen from the case of *Oregon v. Ice,* 129 S.C. 711 (Jan. 14, 2009), which was recently decided by the U.S. Supreme Court, and which is discussed at page 21 of this issue, the Supreme Court appears to have reached the limits of its *Apprendi* holding, and is now more inclined to defer to state statutory schemes that do not clearly violate the original *Apprendi* concept.

Preservation of Issue

People v. Coreno, decided February 24, 2009 (N.Y.L.J., February 25, 2009, p. 28)

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and refused to address an issue that had not been preserved in the lower courts. In the New York Court of Appeals, the Defendant raised the issue that his *Miranda* rights were violated. However, after reviewing the record, the Court of Appeals determined that this issue was not raised at the county court level, and that none of the arguments advocated by the Defendant in the Court of Appeals was addressed in the courts below. Under these circumstances, the Court of Appeals invoked its strict rules regarding preservation and refused to consider or review the issue raised.

Duplicitous Indictment

People v. Bauman, decided March 26, 2009 (N.Y.L.J., pp. 6 and 28)

In a 7-2 decision, the New York Court of Appeals held that a count in an indictment that charged the Defendant with depraved indifference assault was duplicitous because it alleged 11 separate acts over an eight-month period. The Court found that the provisions of CPL § 200.30 (1) were violated, and that therefore the count in question had to be dismissed. The Court's opinion was written by Justice Jones, and was joined in by Chief Judge Lippman and Judges Ciparick, Graffeo and Reed.

Judge Pigott and Judge Smith dissented, arguing that depraved indifference assault can be a continuing offense involving a course of conduct, and therefore the indictment in question was not subject to dismissal under the duplicitous provisions.

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

The United States Supreme Court, during the last several months, issued several significant rulings in the area of criminal law. These cases are summarized below.

***Jimenez v. Quarterman*, 129 S. Ct. 681 (Jan. 18, 2009)**

In a unanimous decision, the U.S. Supreme Court held that when a state court grants a Defendant a right to file an out-of-time direct appeal, this action resets the date when a conviction becomes final under the *habeas corpus* statute which governs the time limits related to the federal courts.

***Herring v. United States*, 129 S. Ct. 695 (Jan. 14, 2009)**

In a 5-4 decision reflecting the traditional split within the Court, the Supreme Court determined that the exclusionary rule did not apply to a police recordkeeping error. In an opinion written by Justice Roberts, the Court found that when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systematic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. Justice Roberts was joined in the majority opinion by Justices Scalia, Alito, Kennedy and Thomas. Justice Ginsburg filed a vigorous dissent in which Justices Stevens, Souter and Breyer joined.

***Oregon v. Ice*, 129 S. Ct. 711 (Jan. 14, 2009)**

In a 5-4 decision, the Supreme Court strongly signaled that it had reached the limits of its *Apprendi* rulings. The Court found that in light of historical practice and the state's authority over the administration of their criminal justice systems, the Sixth Amendment does inhibit states from assigning to judges rather than to juries findings of fact that are necessary to the imposition of consecutive rather than concurrent sentences for multiple offenses. In an unusual lineup, Justice Ginsburg issued the majority opinion of the Court, and was joined in her opinion by Justices Kennedy, Alito, Breyer and Stevens.

Evidently reacting to the serious consequences that have been felt by many states as a result of the *Blakely* and *Apprendi* rulings, the Court, in a specific reference within the majority opinion, noted, "The Court declines to extend the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context that supplied the historic groundings for the decisions."

In a rigorous dissent, Justice Scalia, who was the architect of the *Apprendi* and *Blakely* decisions, argued that the majority opinion specifically contradicted the *Apprendi* and *Blakely* holdings and their specific reaffirmation in a series of recent decisions. Joining Justice Scalia in dissent were Chief Judge Roberts and Justices Souter and Thomas.

***Arizona v. Johnson*, 129 S. Ct. 781 (Jan. 26, 2009)**

In a unanimous decision, the Supreme Court held that police officers had a right, after a traffic stop, to pat down an exiting passenger before questioning him. The Court emphasized that the police action was necessary to protect the person of the officers and that under the *Terry* principles, it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation, and if police harbor reasonable suspicion that the person subjected to the stop is armed and dangerous, they may conduct a pat-down of a driver or passenger to insure their personal safety.

***Van De Kamp v. Goldstein*, 129 S. Ct. 855 (Jan. 26, 2009)**

In determining a § 1983 federal lawsuit, the Supreme Court held that a district attorney and the chief deputy district attorney are entitled to absolute immunity and cannot be the subject of litigation arising out of their official duties. The Court's ruling was unanimous.

***United States v. Hayes*, 129 S. Ct. 1079 (Feb. 24, 2009)**

In a 7-2 decision, the Supreme Court upheld a broad application of the Federal Gun Control Law, and ruled that a domestic relationship need not be a defining element of the predicate offense to support a conviction for possession of a firearm by a person convicted of misdemeanor crimes of domestic violence. The ruling, in effect, holds that under federal law no one who has a conviction for any crime of domestic violence may own a firearm. The most recent ruling appears to be a clear limitation on the *Heller* decision, which was announced in June 2008 and which struck down Washington D.C.'s gun control law. In the *Heller* decision, the Court did make clear that reasonable restrictions could be placed on the ownership and possession of firearms. This latest ruling from the Court limits gun rights for thousands of persons who were convicted of or had pleaded to an assault against a spouse, a live-in partner, a child, or a parent. These crimes include both felonies and misdemeanors. Justice Ginsburg, who issued the Court's majority opinion, stated that firearms and domestic strife are a potentially deadly combination and that the federal government had a right to impose reasonable restrictions in this area. Chief Justice

Roberts and Justice Scalia dissented, arguing that any restrictions on gun ownership should be applied narrowly.

Vermont v. Brillon, 129 S.Ct 1283 (March 9, 2009)

In a unanimous decision, the Supreme Court held that a state is not responsible for a public defender's delay in bringing a criminal case to trial. The Court also rejected the contention that an indigent Defendant with assigned counsel is entitled to broader speedy trial rights under *Barker v. Wingo,* 407 U.S. 514 (1972) than defendants who retain private counsel.

Rivera v. Illinois, 129 S.Ct. 1446 (March 31, 2009)

The Court unanimously ruled that a judge's mistake in failing to exclude a juror pursuant to a peremptory challenge did not require an automatic reversal of a defendant's conviction. Justice Ginsburg, writing for a unanimous Court, noted that the U.S. Constitution does not require a state to provide defendants with peremptory challenges. Justice Ginsburg thus wrote, "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good faith error is not a matter of federal constitutional concern."

Corley v. U.S., 129 S.Ct ___ (April 6, 2009)

In a 5-4 decision, the Supreme Court held that even voluntary confessions may not be used in a federal court if a defendant was held for more than six hours before speaking to interrogators. The five-judge majority relied upon a federal rule of criminal procedure that requires that suspects should be taken before a magistrate for arraignment as soon as possible. The five justices who comprise the majority opinion were Justices Ginsburg, Breyer, Souter, Stevens, and the perennial swing vote, Justice Kennedy. Justices Scalia, Thomas, Alito and Chief Judge Roberts joined in a dissenting opinion.

Justice Ginsburg Returns to Court After Undergoing Surgery

Justice Ruth Bader Ginsburg joined her colleagues on the bench on Monday, February 23, 2009, when the Court resumed its sessions after a brief recess. Justice Ginsburg returned to the Court a little more than two weeks after she had undergone surgery with respect to a recent diagnosis of pancreatic cancer. Initial public reports indicated that the Judge's cancer was diagnosed at a very early stage, and that the prognosis for a full recovery appears good. Justice Ginsburg appeared to immediately immerse herself in the work of the Court, asking sharp and challenging questions during several of the oral arguments that were held on that day. She also apparently has been able to carry a full workload for the Court, having participated in or written several of the Court's major decisions which were recently issued and which are reviewed above. Justice Ginsburg recently reached the age of 75, and there has been some speculation as to whether she is contemplating retiring from the Court. The Judge herself, in a recent interview, appeared to quash early retirement rumors, indicating that she expected to be on the Court for several more years. It is good to see that Judge Ginsburg has vigorously returned to her duties on the Court. The entire legal community is aware of the Judge's scholarship and contributions during her years of service on the Court, and we extend every best wish for a speedy recovery and her continued service as a member of the U.S. Supreme Court.

The possibility of one or more vacancies on the Supreme Court continues to be the subject of some discussion, since in addition to Justice Ginsburg's possible retirement, Justice Stevens has reached the age of 88 and Justice Souter will shortly reach the age of 70. Any one of these three Judges could decide to retire within the near future. Justice Ginsburg herself may have recently offered some recent inside information on a possible forthcoming retirement when she spoke to a group of law students in early March and indicated that the nine Justices only take pictures together when a new member is added, and that "although we haven't taken a picture for some time, surely we will soon." In fact as we were going to press, Justice Souter announced his retirement.

During the recent Presidential election, the possibility that a new President would, during his term, select one or more Supreme Court Justices was a campaign issue. The current 5-4 split in the Court on various social and political issues could be impacted by the changing personnel on the Court, and any new appointments to be made in the future. We will keep our readers advised of any developments in this area.

District Attorney's Office for the Third Judicial District of *Alaska v. Osborne*, 129 S. Ct. ___ (April ___), DNA Case Argued and Awaiting Decision

On March 2, 2009, the Supreme Court heard oral argument on a case where a Defendant from Alaska, who was accused of rape, is claiming that he has a constitutional right to receive biological evidence for DNA testing. The case is testing a prisoner's ability to obtain evidence years after conviction in order to take advantage of the new DNA technology. During oral argument, it appeared that the Court was somewhat divided on the issue, with various Justices raising concerns on both sides of the question. Prosecutors are basically arguing that this issue should be left to the state legislatures, and some 31 states joined the case in support of this proposition. They basically contended that allowing every prisoner to automatically have a right to DNA testing would often result in a time-consuming and meaningless exercise that would tax the resources of the community. The Supreme Court had not yet rendered its decision in this matter as we were going to press. We will report on the Court's holding in our next issue.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from January 12, 2009 to April 2, 2009.

***People v. Davis* (N.Y.L.J., January 12, 2009, pp. 1 and 4, and January 15, 2009, p. 18)**

In a unanimous decision, the Appellate Division, Third Department, upheld the suppression of nine bags of various drugs found in a vehicle that had been pulled over in rural Schenectady by an officer who had observed the Defendant's vehicle encroach on the fog line three or four times within a half-mile. The officer, believing that a vehicle and traffic infraction had occurred, pulled the vehicle over and after conducting a search, discovered the drugs in question. The Appellate Division concluded that encroachment on the fog line on a few occasions was insufficient to justify the stop and search that occurred, and that therefore suppression of the evidence was warranted.

***People v. Price* (N.Y.L.J., February 20, 2009, p. 29)**

In a unanimous decision, the Appellate Division, Second Department, dismissed an indictment filed by the Suffolk County District Attorney's Office in 2006. Following an Appellate Division determination in the case of *People v. Kozlow,* which placed any further proceedings against the instant Defendant in grave doubt, the Suffolk County District Attorney ceased any further proceedings in the instant matter. However, after the New York Court of Appeals had reinstated the *Kozlow* conviction, the Suffolk office attempted to proceed with the indictment in question.

The Appellate Division determined, however, that based upon the speedy trial dictates of CPL § 30.30, the period of time in which the *Kozlow* issue remained in doubt did not constitute exceptional circumstances so as to extend the statutory period. The Defendant's indictment was therefore properly dismissed.

***People v. Mayo* (N.Y.L.J., February 20, 2009, pp. 1 and 6, and February 23, 2009, p. 18)**

In a 3-2 decision, the Appellate Division, First Department, reinstated counts in an indictment charging the Defendant with possession of cocaine. In the case at Bar, the cocaine had been discovered in 96 Ziploc bags hidden under a pair of men's jeans. The police had been pursuing a Defendant who had entered a Brooklyn apartment. When they entered the apartment, they found Mr. Mayo in the rear bedroom with 47 Ziploc bags containing a white rocky substance in plain view. They subsequently recovered another 96 bags. On appeal, the Defendant challenged the counts in the indictment which related to the 96 bags and which elevated the seriousness of the felonies in question. The three-judge majority concluded that the facts surrounding the Defendant's arrest were sufficient to create an inference that he possessed the 96 bags, as well as the other amounts of cocaine that were found in the apartment. The majority opinions consisted of Justices Friedman, McGuire and DeGrasse. The majority pointed to several factors from which a jury could draw an inference that the Defendant exercised dominion and control over the area in which the drugs were found. The majority noted that all of the drugs in question were packaged in the same type of Ziploc bags, the bedroom premises were small and the Defendant was in close proximity to all of the drugs in question.

Justices Acosta and Freedman dissented, arguing that the statutory room presumption had been extended beyond permissible limits, and that in the case at Bar, too wide a net of criminality had been cast. Due to the sharp 3-2 split in the Court, it appears clear that this matter will be headed to the New York Court of Appeals for eventual decision and determination.

***People v. Scerbo* (N.Y.L.J. February 11, 2009, pp. 1 and 2 and February 18, 2009, p. 18)**

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Defendant's conviction for sexual molestation and ordered that a new trial be held. In the case at Bar, a juror had issued a statement to a Syracuse newspaper that two teachers on the jury panel had told fellow jurors that teachers are trained never to touch students. The jurors' comments lead to a post-trial hearing in which four jurors testified that two separate teachers on the panel had discussed teacher training procedures during deliberations. The Appellate Division ruled that these discussions constituted an improper influence on the jury's deliberations and that a new trial was required. The Appellate panel concluded that the information in question that was provided to the jury was not within the common understanding of the average juror, and that thus the jury had improperly received out-of-court information which went to a material issue in the case. The case in question involves a 44-year-old music teacher at an Onondaga Indian school who was charged with molesting 16 students between 2002 and 2006. The case had received widespread publicity in upstate New York. Based upon the Appellate Division ruling, the Defendant now faces a retrial on the charges in question.

***People v. Moore* (N.Y.L.J. February 23, 2009, pp. 1 and 8, and February 26, 2009, p. 18)**

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial because the trial court had improperly allowed prosecutors to present evidence on its direct case that a Defendant charged with sexually abusing his step-

daughter had previously sold marijuana. The Appellate Division based its ruling on the fact that prosecutors had failed to inform the defense that it intended to use information regarding the Defendant's marijuana dealing, as was required by the New York Court of Appeals ruling in *People v. Ventimiglia,* 52 N.Y.2d 350 (1981). In addition, the Court found that the information regarding marijuana was irrelevant background information of a highly prejudicial nature, and violated the principles enunciated in *People vs. Molineux,* 168 NY 264 (1901). The Appellate Division, Third Department, based its ruling on its interests of justice jurisdiction, foreclosing any attempt by the prosecution to seek Court of Appeals review. A retrial of the Defendant is therefore required.

***People v. Williams* (N.Y.L.J. March 2, 2009, pp. 1 and 26)**

In a unanimous decision, the Appellate Division, First Department, found that a Defendant's purported waiver of his right to appeal was invalid as it applied to a suppression decision, since the Court had not conducted a proper allocution to determine whether the Defendant's waiver of appeal also voluntarily and knowingly included the suppression matter. In reviewing the colloquy that ensued following the Defendant's plea of guilty, the Court found that the sentencing Judge did not fully cover the suppression issue, and that therefore the Defendant would not be barred from raising the matter in the Appellate Court.

After deciding that it could review the issue, the Appellate Division determined that the court below had properly denied the Defendant's motion, and that probable cause for the issuance of the search warrant was present. The Defendant's conviction was therefore affirmed.

***People v. Mojica* (N.Y.L.J. March 4, 2009, pp. 1 and 4, and March 9, 2009, p. 18)**

In a unanimous decision, the Appellate Division, Second Department, upheld the constitutionality of a statutory presumption that when a person operating a motor vehicle while intoxicated causes a serious physical injury, the serious injury is the result of the driver's intoxication. The presumption, which was enacted into New York's penal law in 2004, lowers the bar for prosecuting drunken driving accidents as felony vehicular assaults by shifting the burden to the Defendant driver once prosecutors establish the driver caused the injury while intoxicated. The Appellate Division concluded that the 2004 enactment did not violate a Defendant's due process rights, and was not void for vagueness. The Court's opinion was written by Justice McCarthy, and was joined in by Justices Fisher, Covello and Leventhal. Because the constitutionality of a statute was an issue, this matter may eventually be determined by the New York Court of Appeals.

***People v. Grant* (N.Y.L.J. March 3, 2009, pp. 1 and 8, and March 6, 2009, p. 26)**

In a unanimous decision, the Appellate Division, Second Department, vacated a Defendant's guilty plea and remanded the matter for further proceedings because the trial court had improperly coerced the Defendant into taking a plea. In the case at Bar, a Nassau County judge had given a Defendant five minutes to decide whether to plead guilty or to be remanded and to spend his time in jail until the next court appearance. The Appellate panel found that the Court's actions constituted an impermissible incursion of a defendant's bail status into the plea bargaining process. In a decision written by Justice Fisher, the Court further stated that it was an improper use of the plea-bargaining system to require a Defendant to, in effect, choose between admitting guilt and remaining free or maintaining innocence and going to jail.

***People v. Jeannot* (N.Y.L.J. March 3, 2009, pp. 1, 4 and 40)**

In a unanimous decision, the Appellate Division, Second Department, reversed a first-degree murder conviction on the grounds that the Defendant's attorney had rendered ineffective assistance of counsel. The Appellate Court found that the defense attorney's introduction of an implicating statement that was otherwise inadmissible constituted ineffective assistance of counsel and required the holding of a new trial. In the case at Bar, during the Defendant's third trial, following two hung juries, the Defendant's attorney, while cross examining a police officer, offered into evidence a hearsay statement that was made by a co-defendant and that implicated the Defendant. The Appellate Division found that the statement in question would not have been admissible under the cases of *Bruton v. United States,* 391 U.S. 186 and *Cruz v. New York,* 481 U.S. 186. The Court further concluded that there was no strategic or legitimate explanation for defense counsel's introduction into evidence of the statement in question. Under these circumstances, the Defendant was able to establish the requisite requirements for demonstrating ineffective assistance of counsel, and a new trial was required.

***People v. Diaz* (N.Y.L.J., March 27, 2009, p. 26)**

In a unanimous decision, the Appellate Division, Second Department, held that pursuant to CPL § 250.10, notice is required to be provided by a Defendant who intends to interpose an affirmative defense of extreme emotional disturbance, even when he intends only to present lay testimony in support of that defense, and the prosecution is entitled to conduct a psychiatric examination pursuant to such notice. In the case at Bar, the prosecution utilized the testimony of their psychiatrist, who had examined the Defendant. On appeal, the Defendant argued that the trial court had committed reversible error in requiring the Defendant to provide the statutory

notice in question, and in forcing the Defendant to submit to the People's psychiatric examination. The appellate panel rejected the Defendant's contention and issued its conclusion that where a Defendant intends to offer mental health evidence in the nature of late testimony, the notice requirement still must be complied with, and that the People are entitled to request a psychiatric examination by their own expert.

***People v. Bosa* (N.Y.L.J., March 27, 2009, pp. 1, 2 and March 30, 2009, p. 26)**

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction even though a trial judge had been absent for a short period of time during the *voire dire* of a Defendant's jury pool. The New York Court of Appeals, in *People v. Toliver*, 89 N.Y.2d 843 (1995), had held that a Defendant has a fundamental right to have a judge preside over, and supervise *voire dire* proceedings. The Appellate Division's ruling in the instant matter sought to distinguish the *Toliver* holding by finding that the Judge's absence was *de minimis*, and that the record reflected that he may have been absent for only a few moments. Further, there was no objection on the record regarding the Judge's absence by defense counsel. In light of the Court of Appeal's decision in *Toliver*, it appears likely that the New York Court of Appeals will grant leave to appeal in this matter, in order to finally resolve the issue.

For Your Information

Economic Downturn Affects Crime Statistics

It appears that the sharp economic downturn is having an effect on crime statistics throughout the United States. As is traditional with bad economic times, many cities are reporting increases in thefts and robberies, and even some violent crime appears on the upswing, with murders in New York City rising during 2008. The bad economy has also led to a sharp decrease in migration from Mexico into the United States, both for legal and illegal immigrants. A recent report stated that the outflow of Mexicans between August 2006 and August 2007 was approximately 455,000, while in August 2007 to August 2008, the figure had dropped to 204,000. Mexican authorities specifically attributed the sharp drop to the tough economic conditions abroad and to increased border enforcement in the United States.

In fact, the sharp crackdown on illegal immigration in the last two years has pushed Hispanics to the top of the list with respect to crime statistics. The Pew Hispanic Center, which analyzed federal sentencing data, found that in 2007, 40% of the offenders were Hispanic, compared with 27% white, 23% black and 10% from other groups. In 1991, whites constituted 43% of those sentenced in federal courts, and only 24% were Hispanics. Nearly half of the federal cases involving Hispanics were immigration related. The study also reported that with respect to black and white criminal defendants, most of these offenses were for drug-related crimes. It therefore appears that during the last several years, a good deal of Justice Department and federal law enforcement resources have been utilized as a crackdown on illegal immigration. Whether this has caused a drain in prosecuting other types of crimes is something that must be considered, and hopefully some long-term definitive immigration policy may lead to a decrease in crimes that are strictly related to immigration violations.

Number of Confined Sex Offenders Substantially Less Than Forecast

More than 21 months after the initiation of a controversial program of civil confinement regarding dangerous sex offenders in mental hospitals after their prison terms have expired, it is apparently affecting far fewer offenders than had originally been projected. At present, approximately 68 former inmates have been sent to secure mental health facilities compared with the 175 that had been projected when the program began. To accommodate the program, a large number of positions were added to the Office of Mental Health, the Department of Correctional Services, and the Attorney General's Office. Because of the less-than-anticipated number of confinements, Governor Paterson recently announced that significant reductions would be made in the number of positions needed to operate the program. While the number of staff attorneys in the Attorney General's Office will remain at 20 so as to process the cases in question, the number of positions in the Office of Mental Health is proposed to be reduced to 217 from 440. Further, the number of positions in the Department of Correctional Services is slated to be reduced to 28 from 133.

Due to the State's fiscal crisis, Governor Paterson's proposed cuts would save approximately $30 million in the 2009-2010 fiscal year. As further evidence to support the proposed cuts in question, the Governor noted a report by the Division of Criminal Justice Services, which stated that between April 2007 and November 2008, some 2,638 sex offenders were screened but only 288 petitions for confinement were filed.

Senior District Attorneys Announce Retirement

Within a few days of each other, the two longest serving District Attorneys in the state announced that they would not be seeking an additional term of office, and would retire at the end of their current terms. The two District Attorneys in question are Robert A. Morgenthau, who is the longest serving District Attorney in the state, having served for some 35 years, and Stephen F. Lungen, who is the second-longest-serving District Attorney, with 29 years of service.

In late February, New York County District Attorney Morgenthau announced that he would not be seeking reelection, and that he would officially retire as of December 31, 2009. Mr. Morgenthau will reach 90 years of age in July of 2009. Mr. Morgenthau's Manhattan office is viewed as one of the busiest and most prominent District Attorney's offices in the nation, and it is estimated that during his 35 years of service, Mr. Morgenthau has processed nearly 3.5 million cases through his office.

Mr. Morgenthau has been mostly unopposed during his tenure as District Attorney, but during the last election he was challenged in a vigorous contest by former Supreme Court Justice Leslie Crocker Snyder. During the last several months there has been increased speculation that Mr. Morgenthau might not choose to run for reelection, and there are already many announced and unannounced candidates in the wings seeking to succeed him.

The potential candidates include Judge Snyder, Cyrus Vance, Jr., Richard Aborn, and Daniel Castleman, who has served as Mr. Morgenthau's Chief Assistant. It was reported that Mr. Castleman had sought D.A. Morgenthau's support for his expected candidacy, but Mr. Morgenthau at present has refused to announce for any potential candidate. As a result, Mr. Castleman announced that he was resigning his position as Chief Assistant, and the current status of his candidacy is unknown.

State Senator Eric Schneiderman, who was considered a likely candidate, announced in late March that he would not seek the District Attorney's post. In making his announcement, Senator Schneiderman stated that he was happy to continue to serve as Chair of the Senate Codes Committee and was looking forward to working on drug law reform legislation and other bills pending before the legislature. It is likely that additional candidates may enter the race. The Democratic primary, which will determine Mr. Morgenthau's successor, will be held in September, and it appears that a lively contest is in the making. We will keep our readers advised of developments as the race commences.

Within a few days of Mr. Morgenthau's announcement, Sullivan County District Attorney Stephen F. Lungen also announced that he would not be seeking another term of office. Mr. Lungen is 63 years of age, and in making his announcement stated that he has enjoyed a challenging and rewarding experience that has fulfilled a lifetime goal to serve the public. Mr. Lungen did not indicate what his future plans might be, but he did endorse his Chief Assistant, James R. Farrell, as his preferred successor. Both Mr. Lungen and Mr. Farrell are Republicans, and it also appears likely that several candidates from both parties will soon emerge as Mr. Lungen's possible successor. We congratulate both Mr. Morgenthau and Mr. Lungen on their many years of distinguished service, and wish them all the best in their future endeavors.

Spending on Correctional Facilities Increases at a Rapid Rate

Although some states, including New York, have in recent years made a determined effort to reduce their prison populations and the costs of maintaining these facilities, on a national level, the number of incarcerated persons in our nation's state and federal facilities continues to grow, and the costs of maintaining these inmates appears to be skyrocketing. One of the latest studies recently concluded that approximately seven million Americans, or one in every 31 adults, is either in prison, on parole, or on probation. The cost to the various states for these seven million individuals is estimated at $47 billion. The average state's spending on a prisoner currently appears to be about $29,000 a year, with the cost of a probationer hitting $1,250 a year, and the expense to supervise a parolee, estimated at $2,750 per year. Recent state and federal data concludes that criminal corrections' spending is outpacing budget growth in education, transportation, and public assistance. In the past two decades, only Medicaid spending has grown at a faster pace than state correction spending.

Among the largest states, Texas, California and Florida now have inmate populations that well exceed 100,000. In fact, Florida recently reported that in 2008, one in every 31 people were under some type of correctional control, and that during 2008, Florida was forced to spend $2.8 billion to provide correctional services. Increased incarceration is also occurring within the federal system. The U.S. Sentencing Commission recently reported that the rate at which federal offenders are being sentenced to prison time has increased by 10 percentage points in the last 10 years, from 75.4% to 85.3% since 1997. At the same time, the use of alternative sentences, such as probation, has continued to decline.

Fortunately, New York State appears to have been at the forefront of efforts to reduce prison population and to move in the direction of alternatives to incarceration and the use of rehabilitation programs. This has resulted in the state prison population remaining at approximately 65,000 inmates over the last five years, a much better track record than Florida, California or Texas. Perhaps these other states should look to New York as a model for reducing both inmate populations and the huge economic costs that such populations engender. This is especially critical in today's very poor economic times.

There are already some indications that various states are beginning to look at alternatives to prison as a means of decreasing the current high levels of financial expenditures needed to operate their correctional systems. Recently, Kansas closed two detention facilities in order to save approximately $3.5 million. In addition, last year Kentucky adopted an early release policy for nonviolent offenders who had a six-month balance on their terms. Similar initiatives have either been adopted or are being considered in California, New Mexico and Colorado. Last year, 31 states reported budget gaps with respect to the operation of their correctional systems, and various legislatures are seeking ways to reduce the financial strain on state budgets without adversely impacting public safety. Even those states that have been particularly tough on crime are now beginning to revisit their policies and laws in an effort to reduce prison costs. Only recently, the Governor of California, which has the largest prison population, called for a $400 million cut from the state's correctional budget, and officials were contemplating proposals to remove low-level drug offenders from the parole system, and to provide them with cheaper options.

Governor Paterson Begins Filling Appellate Division Vacancies

During the last few months, several vacancies existed in the various Appellate Divisions, and Governor Paterson has proceeded on a case-by-case basis to fill some of the available seats. The governor is making his selections from a list of candidates supplied by the various screening panels. Justice Davis S. Ritter, who has been sitting on the Appellate Division, Second Department, since 1990, recently announced that he was resigning from his seat and would be returning to trial duties in Orange County. Judge Ritter's resignation brought to five the number of vacancies within the Appellate Division's First and Second Departments. Further, since Judge Lippman was recently elevated to the New York Court of Appeals, a vacancy also existed for Presiding Justice of the First Department.

The various screening committees have already interviewed some 20 Supreme Court Justices who are eligible for elevation to the Appellate Division benches. Governor Paterson began filling some of the vacancies in question when he announced in early March that he had selected five new members to serve on the Appellate Courts. Justice Rosalyn H. Richter, who had been serving in the Manhattan Supreme Court, was designated to sit in the Appellate Division, First Department. Justice Plummer E. Lott, who had been sitting in Brooklyn, and Justice L. Priscilla Hall, also from Brooklyn, as well as Leonard B. Austin, who had been serving in Nassau County, were all designated to serve in the Appellate Division, Second Department. In the Third Department, Justice Elizabeth A. Garry, who had been serving in Chenango County, was appointed to fill an existing vacancy.

To date, Governor Paterson has made eight appointments to the Appellate Division. In late March, the Governor also announced that he had reached a decision with respect to filling the seat of Presiding Justice of the First Department. His selection was Justice Louis A. Gonzalez, who had been sitting as an Associate Justice in the Appellate Division, First Department, since 2002. Justice Gonzalez had previously served as Administrative Judge of the Bronx Supreme Court. He also previously served in the Bronx Civil Court, where he was first elected in 1987. Justice Gonzalez is a graduate of Columbia Law School and is 63 years of age. Born in Puerto Rico, he is the first Hispanic to be appointed a Presiding Justice of the Appellate Division. Justice Gonzalez will succeed Judge Lippman, who was recently elevated to Chief Judge of the New York Court of Appeals. Governor Paterson made his selection from a group that included several other sitting Justices in the Appellate Division, First Department, including Peter Tom, who was serving as acting Presiding Justice, and Justices Acosta, Andrias and Mazzarelli. The Appellate Division, First Department, which will now be headed by Justice Gonzalez, currently has a complement of 18 Appellate judges and is the second busiest Appellate Division in the state.

In the near future, Governor Paterson is also expected to fill two existing vacancies in the First and Second Departments, and one seat in the Third Department. Justices elevated to the Appellate Divisions currently earn an annual salary of $144,000, compared with the $136,700 annual salary for Supreme Court trial judges.

Economics May Prove the Death of the Death Penalty

In light of declining governmental budgets, many states are beginning to reconsider the use of the death penalty, since it has proved to be a long, drawn out and expensive proposition. With the numerous appeals and the lengthy legal process that is almost always involved in a death penalty case, it is not unusual for 10 to 15 years to elapse before any execution is actually carried out. As a result, many, including some former supporters of the death penalty, have concluded that "it is a waste of time and money." Only recently, in 2007, the State of New Jersey decided to abandon its system of execution and opt for life without parole. One of the main reasons for the switch was the tremendous legal costs involved. It was estimated in New Jersey that approximately $4.2 million had to be spent for each death sentence that was actually carried out. Currently, of the 34 states that still have a death penalty, seven are considering legislation to end it. These states are Maryland, Nebraska, Colorado, Montana, New Hampshire, Washington and Kansas. In March 2009, New Mexico became the latest state to ban the death penalty when Governor Richardson signed legislation which repealed New Mexico's death penalty statute. In all of these states, one of the principal reasons advanced for the possible change is the cost and time involved. That the number of executions in the United States is drastically declining is evident from a recent report that showed executions in the United States during 2008 at 37, the lowest reported since 1994.

In New York, although the death penalty technically still remains on the books, the Court of Appeals decisions striking down its various provisions have effectively nullified the statute. Further, in light of the changing attitudes toward the death penalty and the political changes in the makeup of the state legislature, it appears almost certain that the death penalty is dead in New York. During the years of its operation, the huge economic cost of any possible execution was fully illustrated by the many millions of dollars that had to be allocated to the Capital Defender's Office, as well as equivalent increases for the prosecution of such cases and the additional resources required for judicial review of any death penalty matters. The New York experience has been that after spending many millions of dollars, no execution ever took place as

a result of the reinstatement of the death penalty in New York.

Legal Profession Dramatically Affected by Economic Downturn

During the last several months, the legal profession has been hit with several announcements involving firm closings, staff cuts and loss of revenues, all as a result of the current economic crisis. In addition to the demise of such well-known firms as Thacher Proffitt and Wood, LLP, several of the nations's largest law firms recently announced a significant drop in revenues and profitability. Cravath, Swaine & Moore LLP reported in late February that its gross revenue for 2008 fell by 13%, causing profits per partner to fall by 24%. Milbank, Tweed also reported that its gross revenue had fallen by 3%, and that profits per partner had dropped by 16%. At the end of February, Stroock & Stroock & Lavan LLP also reported that it had experienced an almost 9% drop in profits in 2008 comapred with 2007. The gross revenue of the firm also declined by nearly 7%. The firm, which is one of the largest in the nation with 750 lawyers, was still able to report substantial revenue of $270 million.

Due to the decline in profitability, many firms are considering additional layoffs, salary freezes or temporary furloughs as possible options if economic conditions continue to deteriorate. In fact, in late March, Chadbourne & Parke LLP announced the layoff of 25 associates, White & Case LLP laid off 200 associates, and Pillsbury Winthrop Shaw Pitman LLP announced that it was cutting 155 lawyers from its staff. The U.S. Department of Labor reported that the U.S. economy lost 4,200 legal sector positions in the month of February alone, and approximately 21,000 legal sector positions during the last year. Another recent survey conducted by an industry group found that since January of this year, major law firms alone have reduced their attorney and legal assistant staffs by more than 10,000. These latest revelations are but a continuing chorus of bad news for law firms, large and small, who are being seriously affected by the economic downturn in general, and by the meltdown in the securities and banking industries.

New Criminal Law and Court-Related Legislation May Depend upon New Senate Committee Chairs

As a result of the recent election, in which the Democrats, after many years, took control of the New York State Senate, two important Senate Committees, which control the flow and possibly the eventual passage of legislation related to criminal law and the operation of the judicial system, have seen the appointment of new committee chairs. With respect to the Senate Code's Committee, the new Chair is Eric T. Schneiderman. Mr. Schneiderman, who is 54 years old, was elected to the State Senate in 1999 and represents the 31st District, which covers Manhattan and the Bronx. He is a partner in a Manhattan law firm and is a graduate of Harvard Law School. Mr. Schneiderman is a member of the New York State Sentencing Commission, which recently issued its recommendations for changes in New York's sentencing structure. Senator Schneiderman recently was the guest speaker at our Section's annual luncheon, and he will be an important person in the legislative process that reviews proposed criminal law legislation. Mr. Schneiderman has already expressed the view that too many persons are being incarcerated in both our state and the nation, and that alternatives to incarceration should be examined and adopted wherever possible. Mr. Schneiderman has already been supportive of efforts to bring about further modification of the Rockefeller drug laws. Senator Schneiderman replaced Senator Dale Volker, a Republican who previously held the committee post for 21 years

The important Senate Judiciary Committee, which also passes on all court-related legislation, also has a new Committee Chair, in the person of John L. Sampson. Mr. Sampson is 43 years old, and was elected to the State Senate in 1997 from the 19th District in Brooklyn. He is currently a counsel to a New York City law firm and was a former staff attorney for the Legal Aid Society. He is a graduate of Albany Law School. Senator Sampson has already expressed some interest in changing the method by which Judges of the New York Court of Appeals are selected. Senator Sampson expressed some disappointment that the list of nominees presented to Governor Paterson with respect to Chief Judge Kaye's replacement contained no women and only one minority member. The failure to include Judge Ciparick, who is the senior associate Judge on the Court of Appeals, on the list of nominees, while several other candidates with no prior judicial experience were placed on the list, raised some serious criticisms of the current nominating process. Chairman Sampson has already undertaken to hold public hearings in the next few months on the nomination process, with a view toward making recommended changes. Senator Sampson has also indicated that he would support more severe penalties against persons who attempt to practice law without a license, by making such actions a felony crime rather than a misdemeanor. Senator Sampson replaced Republican Senator DeFrancisco as Chair. Senator DeFrancisco had served as Chair of the Judiciary Committee for five years.

Now that the Democrats control the governorship and both houses of the state legislature, it appears that the usual gridlock may be somewhat eased, and the two new Senate Committee Chairs may have an easier time in pushing and promoting the legislation approved by their committees. We will keep our members advised of any legislative actions, especially with respect to the sentencing area, as they occur.

New York State Law Enforcement Council Issues Its Recommendations for Legislative Enactments

The New York State Law Enforcement Council, which was formed in 1982 as a legislative advocate for New York's law enforcement community, recently issued its 2009 recommendations for legislative action. The Council's members represent the leading law enforcement professionals throughout the state, including the Attorney General of the State of New York, the District Attorneys Association of the State of New York, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizen's Crime Commission of New York City.

The Council summarized its 2009 recommendations as follows:

- Create a requirement that all new semi-automatic handguns have microstamping technology.
- Deter criminals with greater penalties for aggravated identity theft.
- Expand the state DNA Identification Index.
- Enhance protections for police officers.
- Create a felony charge for serious repeat misdemeanants.

The Law Enforcement Council has been issuing legislative recommendations for many years, and has recently issued detailed reports in support of its recommendations. This year's report consists of 65 pages, and those seeking to obtain more details on the Council's recommendations and position can write to the New York State Law Enforcement Council at One Hogan Place, New York, NY 10013. The telephone number is 212/335-8927.

State Faces Financial Consequences of Post-Release Supervision Fiasco

As another unexpected consequence of the post-release supervision fiasco, in which hundreds of inmates were improperly sentenced because of the failure of the sentencing judge to impose a required period of post-release supervision, the state is now facing a series of lawsuits commenced by inmates claiming they were illegally incarcerated. The situation arose when the Department of Correctional Services, on its own, attempted to administratively correct the failure to impose the post-release supervision term by simply adding the required term to the inmate's period of incarceration. In 2008, in *Garner v. New York State Dept. of Correctional Services*, 10 N.Y.3d 358 (2008), the Court of Appeals ruled that this practice was improper. As a result, inmates are now seeking financial compensation for any imprisonment that occurred as a result of the wrongful confinement. In fact, a court of claims judge recently ruled in a motion for summary judgment that an inmate was legally entitled to damages, and that all that had to be determined was the amount of such damages. The ruling was made by Judge Frank P. Milano, and it involved inmate Farrah Donald, who claimed that he was illegally confined for 676 days because of the improper sentence imposed by the Department of Corrections. The Department of Corrections estimated that some 467 inmates may have been improperly sentenced to post release supervision terms through their administrative policy. It is therefore likely that based upon Judge Milano's ruling, many additional lawsuits will be forthcoming. Thus, the post-release supervision fiasco will now also cause an additional financial burden at a time when the state's economy is already in serious difficulty.

Judge Lippman Moves Quickly to Change Administrative Structure of the Court System

In early March, just weeks after assuming the position of Chief Judge, Judge Lippman announced that he was making an important change in the administrative structure of the court system by reducing the number of deputy chief administrative judges from five to two. Judge Ann Pfau will continue to serve as Chief Administrative Judge, but only two positions of Deputy Chief Administrative Judge will remain—one covering the courts within New York City, and the other covering the courts in the rest of the state. To fill the position of Deputy Chief Administrative Judge for the Courts in New York City, Judge Lippman announced that he had selected Supreme Court Justice Fern Fisher. Judge Jan H. Plumadore will continue to serve on a temporary basis as the Chief Administrative Judge for courts outside of New York City. Judge Lippman also announced that Juanita Bing Newton, who had served as one of the Deputy Chief Administrative Judges, has been appointed Dean of the New York State Judicial Institute at Pace University.

In announcing his administrative changes, Judge Lippman stated that the grim state of New York's finances and the national economy are in large part dictating the streamlining of the court system. In recent years, there has been some criticism of the operation of the court system as being too bureaucratic and top-heavy with administrative personnel. Judge Lippman's recent changes appear to be in response to some of these criticisms, and come at a time where economies at all levels of government are warranted. Judge Lippman also indicated that the changes he has instituted were made in consultation with the Presiding Justices of the four Appellate Divisions, and that other changes would be forthcoming.

State Legislature Moves on New Drug Law Reform Legislation

The New York State Sentencing Commission issued its final recommendations to the Governor and legislature

on February 3, 2009, including proposals for drug law reform. Many legislative leaders and the Governor had indicated their support for modification in the sentencing structure relating to drug law crimes. At first, legislative leaders indicated they wanted to move slowly in this area and to consider the finanacial impact on the state of any proposed changes. Thus Senate Majority Leader Malcolm Smith announced that any sentencing modifications would have to be linked to financial consideration and would have to be dealt with as part of the state budget.

In fact in early April, as part of the actual budget bill, the legislature added several provisions dealing with drug crimes. The new provisions basically provide greater judicial discretion for placement of certain offenders into court-supervised diversionary rehabilitation programs rather than incarceration. The legislation also eliminates the need for consent by prosecutors.

Governor Paterson signed the new provision into law on April 7, 2009 and we will provide all the details of the new enactments in our next issue.

Gideon Day Celebration Leads to Additional Calls for Statewide Indigent Legal Defense System

As part of the annual Gideon Day program, which was held in Albany in March, supporters of a proposal to create a statewide commission to oversee legal defense programs for the indigent in New York State once again called upon the legislature and the governor for immediate action. The new proposal would require local governments to continue to pay their share for indigent defense services, but an independent statewide commission would run the system, thereby relieving the localities of some of their administrative costs and burdens. The new proposal was outlined by Jonathan E. Gradess, Executive Director of the New York State Defenders Association. Our Criminal Justice Section and the New York State Bar Association as a whole have repeatedly supported the concept of a statewide commission, and we will report on any legislative action on the proposal in question. This year, the proposal appears to have the support of several influential state lawmakers, and the prospects for legislative action appear somewhat brighter than in the past.

New Study Shows Decline in Personal Income Growth

A recent report issued by the Bureau of Economic Analysis of the U.S. Department of Commerce indicated that although on a national basis Americans had a slight increase in personal incomes, the costs of various items also increased, so that in several states Americans actually experienced a decline in overall personal income growth. Nationwide, Americans experienced only a 2.9% increase from 2007 to 2008. The states that experienced the lowest level of overall personal income growth were Florida, Utah, Georgia, Nevada, Idaho and Arizona. The states that experienced the highest percentage of personal income growth were North Dakota, Alaska, Wyoming, Oklahoma, Iowa and West Virginia.

Pennsylvania Overturns Hundreds of Convictions Due to Judicial Corruption

During the last several years, we have been bombarded by a series of moral and ethical lapses in our nation's leaders, which have affected all segments of our society, including government, business and the judicial system. Now, in a recent report from Pennsylvania, comes another disheartening example of how far the moral decay has reached, even within the criminal justice system. On March 27, 2009, Pennsylvania's highest court overturned hundreds of juvenile convictions that were issued by two judges who apparently were taking millions of dollars in kickbacks from privately run prison facilities for sentencing juveniles to their youth detention centers. Federal prosecutors stated that this was one of the most egregious cases of judicial corruption, in which the two Pennsylvania Judges received $2.6 million to put juvenile defendants in privately owned lockup facilities. The judges pleaded guilty to fraud charges and are currently waiting their own sentences. The convictions of the juvenile defendants occurred between 2003 and 2008.

About Our Section and Members

Wrongful Convictions Task Force Holds Public Hearings and Issues Final Report

During the month of February, the New York State Bar Association Task Force on Wrongful Convictions held several public hearings to obtain further input before issuing its final recommendations at the summer meeting of the House of Delegates. Testifying at the hearings were several District Attorneys, including Staten Island District Attorney Daniel M. Donovan and Queens District Attorney Richard A. Brown. Also testifying were Barry Scheck and Peter Neufeld, Co-Directors of the Innocence Project, and Bruce Barket, who recently won the release of Martin Tankleff after he had served 17 years in prison for the alleged murder of his parents.

The Task Force is headed by Barry Kamins, currently a Judge of the Criminal Court of the City of New York, and longtime and very active member of our Criminal Justice Section. The Task Force currently consists of 22 members, and has reviewed some 53 cases that occurred between 1964 and 2004, and in which either a judge or a prosecutor acknowledged that a wrongful conviction had occurred. The Task Force did not conclude that all 53 prisoners in the cases studied were innocent of the charges upon which they had been convicted, but that their convictions had been wrongfully obtained. The Task Force has already made some preliminary proposals, including additional training for law enforcement personnel, the videotaping of interrogations, and allowing defendants who plead guilty to raise post-trial claims of innocence. The Task Force issued its Final Report in early April and the report was approved and adopted by the House of Delegates at its Spring session.

Upcoming Activities

Our new Section officers under the leadership of James Subjack, Section Chair, are currently planning and organizing several events and programs for the benefit of our members, to be held in the next few months. Information regarding these programs will be forwarded under separate cover, and wherever possible will also be mentioned in future issues of our *Newsletter*. We urge all of our members to participate in the upcoming activities.

The Criminal Justice Section Welcomes New Members

We are pleased that during the last several months, many new members have joined the Criminal Justice Section. We welcome these new members and list their names below.

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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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