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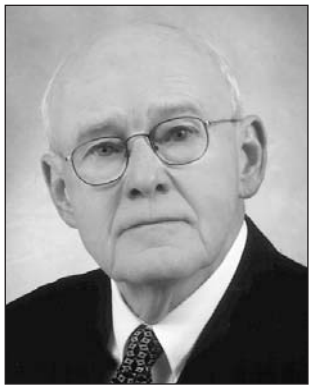
Inside

NYSBA

Message from the Chair



It is May 3, 2004, and Spiros Tsimbinos has just called me to inform me that the deadline for this message is now.

As many of you know, until this past Friday afternoon, Billy Martin, Joe Hayden and I were defending Jayson Williams. I left Buffalo and checked into the Bridgewater, New Jersey, Marriott on January 5, 2004, and checked out this past Saturday, May 1, 2004. Because of the trial I must apologize to all of you for not being able to handle the Chairmanship as well as I would have liked. However our Secretary, Jean Walsh, took control when I couldn't and did a great job!

We, as a Section, have taken the bull by the horns on the issue of taping police interrogations and should have a final resolution after our Executive Committee meeting on May 7th.

I will also attempt to schedule the meetings for all of next year so that members will know when our Executive Committee meeting is being held and have the chance to put something on the agenda if any member so wishes. Let me add that I can be contacted at (716) 886-1922 if any Section member has any concerns.

In closing let me say that after being a prosecutor for 30 years it was quite an experience to represent such a high-profile client on my very first defense case. I really know what it means to wait for a jury as a defense attorney.

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

Message from the Editor

Welcome to the Summer issue of our *Criminal Law Newsletter*. In this issue we have provided some interesting legal articles dealing with the effects of simultaneous sentencing of defendants to both state and federal terms, tips on how to adequately prepare for the trial of a criminal case, and interesting statistics from the New York Court of Appeals on its 2003 case load. In addition, we are providing some informative and detailed statistics presented by Chauncey G. Parker, New York State Director of Criminal Justice, indicating the current status in various areas of the criminal justice system. We have also included numerous recent United States Supreme Court decisions which have a bearing on criminal law practice in our state. I am also happy to report that we have reestablished a relationship with St. John's Law School whereby its students are providing us with valuable case notes on important United States Supreme Court and New York Court of Appeals cases.

Our recent Spring issue has been well-received and we are beginning to get requests for copies of our newsletters from outside the Criminal Justice Section membership. At the last meeting of our Executive Committee, it was decided to use the newsletter as a marketing tool to increase membership in our Criminal Justice Section. Our current plans are to visit various bar associations and groups in the criminal justice area and to promote both our newsletter and membership in our Section.

I thank the various authors who have so far contributed articles to our publication and I look forward to the support of our members so that we can continue to increase both the quality and quantity of our newsletter. Because the status of pending legislation on criminal law matters is still undetermined at the present time, including modification of the Rockefeller Drug Laws, we will report on legislative enactments in our Fall issue. I hope our readers continue to enjoy and look forward to our issues.

Spiros A. Tsimbinos

The Effects of Federal and State Sentencing on Time Actually Served

By Alexander Bunin

Introduction

Ten years ago, I saw a cartoon about the difference between concurrent and consecutive sentences. In the illustration, a defendant and his lawyer are standing before a judge. The judge, who is seated at his bench, has leaned to one side and cupped his hand over his mouth. Beside the judge, and facing him, is a bailiff. In a whisper, the judge asks the bewildered officer, "Which is the bad one, 'concurrent' or 'consecutive?'"[1]

Consecutive is the bad one. *Black's Law Dictionary* defines it as:

> When one sentence of confinement is to follow another in point of time, the second is deemed to be consecutive.[2]

Concurrent means:

> Two or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified.[3]

"Similarly situated defendants may receive greatly disparate sentences, merely because one is prosecuted in two jurisdictions and one is not. The former may get stacked sentences, while the latter will not, even though their conduct is identical."

Fortunately, a good many lawyers understand this difference alone does not exhaust this area of law. Unlike the cartoon judge, defense lawyers must anticipate when consecutive sentences are allowed, and when they are required. Most states still allow trial judges to decide whether multiple sentences will be consecutive or concurrent. New York allows judicial discretion, with some exceptions.[4] It is when there are multiple sentences from different jurisdictions that the situation gets confusing. This article will focus on the "state and federal" scenario because it creates the most problems. Federal sentences are addressed by statute and in the Federal Sentencing Guidelines.

An Illustration

I have encountered the following situation several times. I visited a defendant whom I was appointed to represent on federal charges. He was in state custody and appeared in federal court pursuant to a writ of *habeas corpus ad prosequendum* (a writ to bring a person who is confined for some other offense). The defendant told me that he had already pleaded guilty and had been sentenced to the unrelated state charges. He said not to worry because his state lawyer got the state judge to agree to run his state time concurrent with his potential federal sentence. The defendant also believed he would serve all of his sentences in federal prison. I then asked him how could he get out of state prison, before the end of his state sentence, in order to begin serving his federal sentence. He stared at me vacantly.

The mistake that caused that vacant stare is a common one. The error was to believe the state judge could affect the federal sentence, or that it made a difference in which order the convictions or sentences were issued. The principle that the defendant and his state lawyer did not understand is that whoever has the defendant's body keeps it until they are finished imprisoning him.[5] This is called "comity."[6] A judge cannot force some other jurisdiction to take possession of a defendant.[7] Neither can a judge force another jurisdiction to give a defendant credit for time spent in that judge's jurisdiction.[8] Comity requires that when the writ is satisfied, the second sovereign return the prisoner to the first sovereign.[9]

When a state prisoner comes to federal court on a writ, his custody does not change.[10] It is as if he has been borrowed, subject to return. Our county jail provides a good metaphor. Both state and federal prisoners are held there. State prisoners wear blue jumpsuits, and federal prisoners wear orange. State prisoners remain attired in blue even when they appear in federal court to answer federal charges. Those in the orange suits go to federal prison after sentencing. Those in the blue remain in the county jail or go on to state prison, where a federal detainer is placed upon them. In my illustration, the state had the defendant's body. The federal judge refused to order the federal sentence to run concurrent to the state sentence. This defendant will serve an entire state sentence before the Federal Bureau of Prisons (BOP) takes control of his body and starts counting his federal sentence.

This begs the question: Can anything be done, or is this all as arbitrary as it sounds? It can be quite arbitrary. Similarly situated defendants may receive greatly disparate sentences, merely because one is prosecuted in two jurisdictions and one is not. The former may get stacked sentences, while the latter will not, even though their conduct is identical.

One factor that can affect this situation is whether a defendant is indigent or not. Like all other areas of life, dual prosecutions are usually worse for poor defendants. This is because most states, like New York, still rely on a system that uses surety and cash bonds. If the defendant makes a state bond, he is no longer in state custody, even though he may remain in federal custody. (This is called "breaking into federal prison.")[11] A defendant released from state custody would not have the problem in my example.[12]

It is usually the pending federal case that causes the problems. As in all other federal sentencing situations, there are statutory requirements and guideline requirements. The statutory requirements are controlling.[13] The guideline requirements are subject to departures.[14] A departure is any deviation from the guideline requirements.[15] Departures are justified when the guidelines do not sufficiently address the defendant's offense-related conduct or criminal history.[16]

Statutes

Section 3584 of 18 U.S.C. gives a federal court discretion to impose consecutive or concurrent sentences, as long as it complies with the sentencing objectives of 18 U.S.C. § 3553(a).[17] Section 3553's objectives take into account the nature and seriousness of the offense, kinds of available sentences, policy statements of the guidelines, potential disparity, and the need for restitution.

There are exceptions to the rule allowing discretion. An attempt, and another offense that was the sole objective of the attempt, may not be consecutive.[18] A conviction for possession of a firearm in relation to drug trafficking or a violent crime must be consecutive to any other sentence.[19]

There are two presumptions under section 3584. First, multiple terms of imprisonment imposed at the same time are presumed to be concurrent, unless the court says otherwise. Second, multiple terms of imprisonment imposed at different times are presumed consecutive, unless the court says otherwise.[20] If the court wants a different result, it must be clearly stated in the judgment.[21]

Sentencing Guidelines

When a defendant has at least one prior undischarged sentence, there are three types of sentences contemplated by the guidelines. There are (1) purely consecutive sentences,[22] (2) purely concurrent sentences,[23] and (3) hybrid sentences.[24] An undischarged sentence means one that is currently in effect, whether the defendant is in custody or not. An undischarged sentence includes occasions when the defendant has been previously convicted, but not yet sentenced.[25]

The guidelines have changed quite a bit over the years. In its original version, U.S.S.G. § 5G1.3 merely repeated the directions of 18 U.S.C. § 3584. However, several later amendments restrained the courts' discretion.[26] When those proved to be too confining, the Sentencing Commission loosened the restraints again.[27] The basic premise has always been to achieve multiple sentences that would be similar to those imposed at a single proceeding.[28] The Commission recently created a downward departure for situations where prior "discharged" sentences may be considered to fashion a sentence.[29]

When reviewing the case law, one should be observant of which version of the guidelines applies. The 1989-1995 versions limited the courts' ability to fashion concurrent and consecutive sentences in a manner that the present version and pre-1989 form do not.[30] Below are examples under the present version, with references to older methodology when it is helpful.

Consecutive Sentences

A federal court is required to impose a sentence, consecutive to any undischarged term of imprisonment, if the current federal offense was committed during the undischarged sentence. An undischarged sentence includes imprisonment, probation, parole, work release, furlough, or escape status.[31] There is a split of authority regarding whether a court may impose a consecutive sentence when the undischarged sentence has not yet begun.[32]

For example, a defendant is serving a state sentence. He is to receive a federal sentence on an unrelated matter that was committed while serving the state sentence. Absent a departure from the guideline directive, the federal sentence will be ordered to begin at the expiration of the state sentence.

Concurrent Sentences

If the new federal offense did not occur during the undischarged sentence, and the undischarged sentence is relevant conduct to the instant offense of conviction, then the federal sentence shall be concurrent to the undischarged sentence.[33] For example, a defendant is convicted and sentenced in a state case. He is then charged and convicted in federal court of conduct that occurred before the state crime.[34] The state crime is then used as relevant conduct to calculate the federal sentence.[35] These sentences shall be concurrent, absent a departure.[36]

To achieve truly concurrent sentences, the court may have to adjust the federal sentence to account for time already served on the undischarged offense.[37] This is not considered a departure,[38] nor is it the same as calculating sentencing credit. For example, the above defendant has already served six months of a 24-month state sentence. Instead of a 30-month federal sentence, the sentence should only be 24 months (i.e., 30 months minus the six months already served).

A purely concurrent sentence may still be appropriate even when the undischarged offense is not fully taken into account in calculating the current federal sentence. This occurs when the combination of current and undischarged sentences reach approximately the same result as multiple federal sentences under U.S.S.G. Ch. 3, Pt. D and section 5G1.2.[39]

For example, a defendant has a federal carjacking offense with a total offense level of 32. He has already served several weeks on a one-year state drug charge. Had that drug charge been prosecuted in federal court it would have been the equivalent of a total offense level of 12. Since the carjacking is more than nine levels higher than the drug case, the length of the federal sentence will be sufficient to adequately punish the defendant even if the sentences are purely concurrent (i.e., had they both been federal cases sentenced together, the result would have been the same).[40]

Hybrid Sentences

A federal crime that did not occur during the undischarged sentence, and was not relevant conduct for establishing the sentencing range, may fall into this hybrid category.[41] This is where the court may need to do some math in order to achieve an equitable sentence—although it is no longer a requirement.[42]

First, the court should determine the current federal sentence. Second, the court should determine what the sentence for the undischarged case (or cases) would have been under the guidelines (i.e., guidelines sentencing range). Third, the court should combine the two (or more) sentences as if they were multiple federal sentences under U.S.S.G. Ch. 3, Pt. D and section 5G1.2. Fourth, the court should determine the time previously spent in custody on the undischarged sentence(s), and the potential release date(s). Fifth, the court should determine to what extent the new sentence should be concurrent or consecutive to the undischarged sentence(s).[43]

For example, a defendant is pending sentencing in federal court. Based on a total offense level of 18 and a criminal history category of III, the judge would like to impose a sentence of 40 months. The defendant has an undischarged state sentence of two years. His state release date will be shortened by three months for good conduct credit. He has already served two months on the state sentence.

The state sentence would have a range of 18–24 months (total offense level of 15 and criminal history of I),[44] if it had been charged in federal court. Assuming these are unrelated offenses that would not be grouped together, there would be an incremental increase under U.S.S.G. § 3D1.4 of two levels, for a total offense level of 21 (the higher offense level plus 2), a criminal history of III, for a combined range of 46–57 months.

Since the defendant has 19 more months to serve on the state sentence, a purely consecutive sentence would punish him more severely than the normal incremental increase under the guidelines (59 months vs. 46–57 months). If the court believes 46 months would be sufficient for both sentences, then the court should give the defendant a consecutive sentence of 25 months (46 months minus two months already served, minus 19 months before state release). If the court could not be certain when the defendant would be released on the state case (such as an indeterminate sentence under New York law), the court could fashion a partially concurrent sentence (e.g., 40 months to begin either four months after sentencing, or when the defendant is released from state custody, whichever is earlier).[45] This is true even if a mandatory minimum would have otherwise made the sentence 60 months.[46]

Crediting Time

The United States Attorney General, acting through the BOP, is responsible for calculating credit toward a federal sentence.[47] A court cannot calculate sentencing credit.[48] The BOP will only credit a defendant's previous time in custody toward a single sentence.[49] It will only credit time spent in a "jail-type facility."[50]

There are six types of custody to consider when evaluating whether the defendant will get credit from BOP: (1) presentence time for the current federal offense, (2) presentence time for a state offense for the same conduct, (3) presentence time for an unrelated

offense, (4) a sentence for the current federal offense, (5) a sentence for a concurrent undischarged offense, and (6) a sentence for a consecutive undischarged offense.

Although presentence credit and sentence credit ultimately go to calculating the total federal sentence, the criteria for applying each are different. Presentence credit is governed by the principle that BOP will only apply credit toward a single sentence.[51] Sentence credit depends upon when the sentence has been imposed and if the defendant is in an institution designated for that sentence by the BOP.[52]

Presentence Credit

Presentence credit is the time spent in a jail-type facility between the defendant's detention and imposition of a sentence.[53]

Federal Offense

Presentence credit for the federal offense will be given whenever the defendant has been in federal detention (not merely because of a writ), in a jail-type facility.[54] For example, if a defendant spends 180 days in federal custody waiting for trial and sentencing, then that time will be credited toward his federal sentence. Time spent in home confinement or in a community correctional center will not count.[55]

Same State Offense

Presentence credit for a state offense that was the same act as the federal offense will be given, if that time is not credited toward another sentence.[56] For example, a defendant is charged and convicted of federal bank robbery. He was detained for the same armed robbery in state court. The state case is later dismissed in lieu of federal prosecution. Any presentence time will be credited.

This only applies to identical acts charged in different jurisdictions, not merely charges arising from the same transaction.[57] For example, the above robbery is the same act. Different thefts in a single scheme would not be the same act. Stealing and uttering a check are different acts.

Unrelated Offense

Presentence credit for an arrest on an unrelated offense will only be given if the arrest occurred after the commission of the federal offense, and if that custody is not credited toward any other sentence.[58] For example, a defendant is arrested on state charges. He is indigent and cannot make bail. The defendant is then charged in federal court for conduct that occurred before his state arrest. If the state charges are later dismissed or the sentence is probated, the previous state custody that occurred while under federal detainer will be credited toward the federal sentence.[59]

Sentence Credit

If the judge does nothing to indicate the sentence is to run concurrent to an unexpired state sentence, and the defendant is in state custody, the BOP may treat the sentences as consecutive and give the defendant no credit for time served until the defendant actually enters federal custody.[60] If the defendant is in federal custody then only the state authorities will be able to ensure that the state sentence will be credited while the defendant is serving his federal term.

Federal Offense

The sentence for the current federal offense will be credited from the day sentence is imposed.[61] For example, a defendant with no other pending cases or sentences will begin his sentence on the day of sentencing, if that is when he goes into custody.[62] If the defendant is allowed voluntary surrender, the sentence begins on the day he surrenders to the designated institution. If the defendant is free on appeal, the sentence is stayed.[63]

Concurrent Undischarged Offense

The sentence for a state offense will be credited from the date the federal sentence is imposed, if BOP designates the state facility as the place of confinement for the federal sentence.[64] This generally happens when a defendant in state custody receives a recommendation for a concurrent federal sentence by the federal court. That defendant will remain in the state facility until his state sentence expires. If the federal sentence has expired first, he will be released.[65] If the federal sentence is not completed, he will be turned over to the BOP pursuant to the federal detainer.[66] The time from which the federal detainer was placed upon the defendant will be credited toward the federal sentence.[67]

For example, for the same act, a defendant is charged with a state armed robbery and a federal bank robbery. If the federal judge recommends concurrent sentences, the BOP may designate the state facility as the place of confinement for the federal sentence. The two convictions and sentences are not considered to place the defendant in double jeopardy.[68]

Consecutive Undischarged Offense

The sentence for another offense that is not recommended to be concurrent, will not be credited toward the federal sentence, and will be treated as consecutive.

For example, a defendant is serving a state sentence when he is charged and convicted of a federal crime. The crimes were unrelated and the federal judge did not recommend any part of the federal sentence to run concurrent to the state sentence. The defendant will only begin to receive credit for the federal sentence at the expiration of his state custody, when he is received by the BOP.

BOP regulations will bar credit for prior custody when the defendant has a prior unexpired sentence, to which this time has already been credited.[69] The way to address the BOP's failure to properly apply credit is through administrative remedies.[70]

No credit will be given for time in custody before the occurrence of the federal offense.[71] However, there is a way to have such custody credited. Section 5G1.3, Application Note 2, describes how the court may reduce a sentence by the amount of months the BOP would not otherwise credit, if that was relevant conduct to the instant federal offense.[72] This would include situations such as when an armed robbery increases a defendant's offense level in a felon in possession charge.[73] This is not considered a departure.[74] A court may even go below a mandatory minimum to apply this deduction.[75]

Example

The following is an example of the above principles. Defendant Jones is on state work release for distributing drugs. He then commits credit card fraud. Local authorities move to revoke his probation and charge him with the new fraud case. He does not make bond. Months later, a federal grand jury indicts Jones for access device fraud. He is still in state custody. A writ will have to be issued by the federal court so he may appear to answer the charge. Regardless of which order he is convicted and/or revoked, he will remain in state custody.

Jones is convicted of the federal fraud. At his federal sentencing, by statute, the judge will have the discretion to run his federal sentence consecutive or concurrent to the state sentences.

Under the guidelines, the federal sentence shall be consecutive to the revocation, absent a departure.[76] Barring a departure, the state and federal fraud cases must be concurrent because the state fraud conduct was taken into account in calculating the federal fraud offense level.[77]

In order to facilitate the concurrent sentence, the court must recommend that the state institution will be designated as the place where the defendant will serve his federal sentence. Additionally, when calculating the federal sentence, the court should recognize that the Bureau of Prisons will not credit the presentence time in state custody toward the federal sentence. If the court does not want the defendant to repeat time previously served in state custody, it must be deducted from the federal sentence.[78]

Another wrinkle occurs when by the time of the federal sentencing, the defendant is to be punished not only for the original transaction, but an intervening fraud that was calculated as relevant conduct under section 1B1.3. Here, the court could make the sentence partially concurrent so that only the additional relevant conduct is consecutive. This is not considered to be a departure.[79]

An Inkling

The interrelation between state and federal sentences is complicated. Even if you understand all the various possible results, you may still not affect the outcome. Rarely do presentence reports adequately advise the court about these considerations. However, if you are the only person in the courtroom with even an inkling about how this all works, your credibility will be enhanced, and you may get the last word.

Endnotes

1. Leo Cullum, Nat'l L.J. (Nov. 1, 1993).
2. Black's Law Dictionary, Sixth Ed. (1990), p. 304.
3. *Id*. at 291.
4. N.Y. Penal Law § 70.25 (McKinney 2001).
5. *United States v. Smith*, 812 F. Supp. 368, 371 (E.D.N.Y 1993).
6. *Ponzi v. Fessenden*, 258 U.S. 254, 260–61 (1922).
7. *Id*. at 260.
8. *United States v. Wilson*, 503 U.S. 329, 333 (1992).
9. *Smith*, *supra* at 371.
10. However, see *Brown v. Perrill*, 28 F.3d 1073, 1074 (10th Cir. 1994) (19 months on federal writ was equivalent of federal custody).
11. *McClain v. Bureau of Prisons*, 9 F.3d 503, 505 (6th Cir. 1993) (defendant released to federal custody must get federal credit from time of release to state parole).
12. Another way to reach that result is for the state to relinquish primary jurisdiction by a waiver. However, this is may provoke a fight with the Federal Bureau of Prisons. *See, e.g., Shumate v. United States*, 893 F. Supp. 137, 140–43 (N.D.N.Y. 1995).
13. 18 U.S.C. § 3553.
14. U.S.S.G. §§ 5K2.0, 5G1.3 Application Note 3(E), 5K2.23.
15. 18 U.S.C. § 3553(b).
16. U.S.S.G. § 5K2.0.
17. 18 U.S.C. § 3584(b); prior to 1987 this authority was determined under the now-repealed 18 U.S.C. § 3568.
18. 18 U.S.C. § 3584(a).
19. 18 U.S.C. § 924(c).

20. *United States v. Washington*, 17 F.3d 230, 234 (8th Cir.), *cert. denied*, 513 U.S. 852 (1994).
21. *Id*.
22. U.S.S.G. § 5G1.3(a).
23. U.S.S.G. § 5G1.3(b).
24. U.S.S.G. § 5G1.3(c).
25. U.S.S.G. § 5G1.3(a).
26. U.S.S.G. § 5G1.3, amends. (1989, 1991, 1992, 1993) (Appendix C).
27. U.S.S.G. § 5G1.3, amends. (1995, 2002, 2003) (Appendix C).
28. *Witte v. United States*, 515 U.S. 389, 404–05 (1995).
29. U.S.S.G. § 5K2.23.
30. *See United States v. Milton*, 27 F.3d 203, 210 (6th Cir.), *cert. denied*, 513 U.S. 1085 (1995) (holding that post-1988 amendments were substantive changes, limiting a court's discretion).
31. U.S.S.G. § 5G1.3(a).
32. *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991) (Yes); *Romandine v. United States,* 206 F.3d 731 (7th Cir. 2002) (No).
33. U.S.S.G. § 5G1.3(b) This language controls unless a plea agreement specifically addresses the issue. *See United States v. Williams*, 260 F.3d 160, 165 (2d Cir. 2001).
34. In 2003, language was added to clarify the requirement of accounting for previous time spent in custody for relevant conduct. Section 5G1.3(b)(2).
35. *United States v. Johnson*, 324 F.3d 875, 878–79 (7th Cir. 2003) (must be conduct within the meaning of U.S.S.G. § 1B1.3(a)).
36. *United States v. Bell*, 46 F.3d 442, 445 (5th Cir. 1995).
37. U.S.S.G. § 5G1.3(b)(1).
38. U.S.S.G. § 5G1.3, Application Note 2(C).
39. U.S.S.G. § 5G1.2(b).
40. This analysis was previously required, but is now only suggested.
41. U.S.S.G. § 5G1.3(c). Even if the sentence is discharged, a court may achieve the same result by a downward departure. Application Note 3(E).
42. *United States v. Saintville*, 218 F.3d 246, 248–49 (3rd Cir. 2000).
43. This procedure is no longer required, but it is a more methodical way to approximate the incremental increase under the guidelines. See U.S.S.G. § 5G1.3, amend. (1995) (Appendix C).
44. Do not count the prior offense toward criminal history in order to avoid double counting.
45. U.S.S.G. § 5G1.3, Application Note 4.
46. *United States v. Ross*, 219 F.3d 592, 594 (7th Cir. 2000).
47. *Wilson*, *supra* at 333.
48. *United States v. Jenkins*, 38 F.3d 1143, 1144 (10th Cir. 1994).
49. *Kayfez v. Gasele*, 993 F.2d 1288, 1290 (7th Cir. 1993).
50. *Reno v. Koray*, 515 U.S. 50, 65 (1995).
51. *United States v. Kramer*, 12 F.3d 130, 132 (8th Cir.), *cert. denied*, 511 U.S. 1059 (1993).
52. 18 U.S.C. § 3585(a).
53. *United States v. Zackular*, 945 F.2d 423, 425–26 (1st Cir. 1991).
54. *Dawson v. Scott*, 50 F.3d 884, 895 (11th Cir. 1995).
55. *Rodriguez v. Lamer,* 60 F.3d 745 (11th Cir. 1995); *Dawson*, *supra* at 895.
56. 18 U.S.C. § 3585(a).
57. Federal Prison System Statement (FPSS) No. 5880.28(3)(c).
58. 18 U.S.C. § 3585(b); *See Schmanke v. United States Bureau of Prisons*, 847 F. Supp. 134, 138–40 (D. Minn. 1994) (time for invalidated state sentence, which had prevented starting of federal sentence, should be credited).
59. *United States v. Moore*, 978 F.2d 1029, 1030–31 (8th Cir. 1992).
60. *Weekes v. Fleming*, 301 F.3d 1175, 1181–82 (10th Cir. 2002).
61. 18 U.S.C. § 3585(a).
62. *Thomas v. Whalen*, 962 F.2d 358, 364 (1992).
63. Fed. R. Crim. P. 38.
64. 18 U.S.C. § 3621(b).
65. FPSS No. 5880.28(3)(b).
66. *Bloomgren v. Belaski*, 948 F.2d 688, 691 (10th Cir. 1991).
67. *Kayfez*, *supra* at 1290.
68. *Abbate v. United States*, 359 U.S. 187, 196 (1959).
69. FPSS No. 5880.28(3)(c).
70. *United States v. McGee*, 60 F.3d 1266, 1272 (7th Cir. 1995).
71. FPSS No. 5880.28(3)(c).
72. *Ruggiano v. Reish*, 307 F.3d 121, 132 (3rd Cir. 2002) (it is properly called an adjustment rather than "credit").
73. U.S.S.G. § 2K2.1(b)(5).
74. *United States v. Hicks*, 4 F.3d 1358, 1367 (6th Cir. 1993).
75. *United States v. Kiefer*, 20 F.3d 874, 876–77 (8th Cir. 1994); *United States v. Drake*, 49 F.3d 1438, 1441 (9th Cir. 1995).
76. U.S.S.G. § 5G1.3(a). However, if the defendant had not been on work release, or another "term of imprisonment," a consecutive sentence would merely have been recommended. Application Note 3(C).
77. U.S.S.G. § 5G1.3(b).
78. U.S.S.G. § 5G1.3, Application Note 2.
79. *United States v. Parkinson,* 44 F.3d 6, 9 (1st Cir. 1994) ("sentence for instant offense" is not the same as determining "total punishment").

Mr. Bunin is the federal public defender for the Districts of Northern New York and Vermont. He also is currently serving as an adjunct professor at Albany Law School of Union University. His article is an updated version of a 1997 article, which was at that time entitled *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions,* written for *The Champion*.

A Broad Practical and Theoretical Approach to Trial Preparation: Five Tips for New Defense Attorneys

By Robert W. Bigelow

There is not an attorney I know who doesn't feel a pang of excitement and fear, myself included, when he or she is sent out to trial. For new attorneys this can feel overwhelming and can at times prove crippling to the attorney's ability to maximize his or her ability in zealously representing their clients. "Have I prepared enough?", "I don't really know what I'm doing," or "What if I lose?" are some common reactions for the new attorney. Much of this anxiety can be dispelled by approaching trial within a practical and theoretical structural framework. What is offered here is not an attempt to teach a new attorney how to try a case but a starting point which can be used in preparing for every trial and put the attorney in a better position to excel.

"There is not an attorney I know who doesn't feel a pang of excitement and fear, myself included, when he or she is sent out to trial."

1. Structural Skeleton of Trial

All trials have the same basic structure from pretrial motions through post-trial motions. The new attorney should outline the trial, stage by stage, from *Rosario* and discovery demands to locking the ADA into the theory of the case to *Sandoval* and *Molineux* motions. This should continue through jury selection, prosecution opening, defense opening, prosecution direct of witnesses, defense cross of these witnesses, trial order of dismissal (when People rest), to defense direct of witnesses and ADA cross to second trial order of dismissal (when defense rests). Finally, the defense closing, prosecution closing, jury charges and post-verdict motions. The new attorney can turn this into a checklist and prepare each portion of the trial within a manageable framework. The advantage of this approach is that the attorney can begin to prepare long before discovery is provided. It allows the attorney some feeling of control both in preparation and during the trial. The attorney should feel more comfortable knowing each stage of the proceeding rather than relying on the judge to guide them through it. Another benefit to the outline approach is that if the new attorney becomes flustered by a denied argument, a judge's comment or difficult witness, it is impossible to miss a point because it is in the outline and the attorney then focuses on the next portion of the trial.

2. Prepare, Prepare, Prepare

Now that the attorney has a skeletal outline, he or she can start to fill in preparation for each stage of the trial. It cannot be emphasized enough that unexpected things occur at trial—sometimes good for your case and sometimes bad. An attorney should never be in a position to waste time during trial on issues which should have been explored before trial because the unexpected will more than fill each waking moment. Furthermore, while new attorneys often feel that they need to be Perry Mason, many more outstanding trial performances are the result of diligent preparation and taking advantage of each stage in the trial to further the defense theory or theme to whatever level possible. The fact that the defense attorney is the most prepared person in the court provides a real advantage regardless of the skill or experience level of the opponent. The attorney may have an edge against an ADA or witness who isn't as prepared, and the fact that the attorney knows the scene so well or has such a cogent, well-honed argument can give the attorney the edge. An attorney should have every possible legal argument prepared with copies of relevant case law for the judge and ADA. A list of cases to be argued should be provided with citations to the court reporter. This kind of preparation can put one's opponent on their heels. Using the outline, the attorney should be able not only to begin to anticipate his or her own arguments but also those of the opponent. Known evidentiary issues should be dealt with well in advance. There is no excuse to be figuring out during trial how you are going to get an important piece of evidence admitted or how you will attempt to block the ADA from doing the same. The new attorney should write out each litany and practice it. Any unique issues should of course be anticipated and inserted into the outline.

3. Theory of Case (or General Idea of Theory)

A good place to begin on strategy is to start with a broad theory of what the case is about from the defense perspective. As the attorney starts to fill in the outline with his or her preparation, the attorney should consider how at each stage in the case the theme can be further integrated into the case. The attorney needs to decide how much he or she can commit to in the opening, perhaps do a non-opening opening, or, forgo opening altogether (never my choice, as it seems to pass up a chance to further your theme). The attorney should figure out what is needed out of each witness in preparing

cross or direct examination and try to ascertain how to use incontrovertible facts or prosecution-favorable facts to further the theme.

4. Don't Forget Your Audience

Many new defense attorneys chose this line of work for idealistic reasons and often quite personal ones. A new attorney should always keep in mind who the finder of fact is, be it the judge (bench trial) or the jury, and understand that not everyone thinks the way that he or she does. "How can I frame my theme in a way that gets the desired result of not guilty?" should be the question asked by the attorney. As defense attorneys, we are able to convince ourselves and often our colleagues of our argument but only the opinion/decision of the finder of fact matters.

5. Don't Make the Mountain Bigger Than It Has to Be

Oftentimes a new attorney will work the trial at one speed—attack and destroy. Challenging every witness, particularly innocuous ones, may not be wise and diminishes opportunities to show that you only attack those worthy of it. Don't make your task more than what it is. Figure out the least number of attacks necessary to make your case. Not attacking an unimportant witness only furthers your position as the reasonable advocate in the trial and lends credibility. If you can take a prosecution witness and make them your own, even better. Furthermore, as is often addressed in voir dire, a good juror needs to be willing to consider that a witness may be lying or mistaken. The attorney should give the finder of fact an "out" whenever possible, such as the witness is mistaken. It can be difficult for a finder of fact to call someone a "liar" for a myriad of reasons. If one's case calls for the credibility of a witness or witnesses to be attacked and labeled "liar[s]," choose wisely and strategically. Do not attack indiscriminately. Only attack those witnesses whose downfall is necessary to secure your theme or version of the facts. By organizing the defense strategy of attack in this manner, it may afford the finder of fact the comfort level by which to find said witness[es] incredible and, by default, find your theme more credible. If one is fortunate and prepared enough to severely damage a prosecution witness's credibility, always respect the trial attorney axiom "Don't gild the lily," meaning don't go too far with a solid cross-examination. When you get what you need, get out. An old political saying which sums up this tactic is, "When you are behind, argue. When you are ahead, vote." Make your point and get out both with a witness and with a trial.

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REQUEST FOR ARTICLES

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

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

The State of New York's Criminal Justice System

Remarks of Chauncey G. Parker, New York State Director of Criminal Justice

Chauncey G. Parker, New York State Director of Criminal Justice, on February 2, 2004, provided the Joint Legislative Fiscal Committees on the 2004-2005 State Budget with detailed and informative testimony concerning various aspects of the criminal justice system. Reprinted below are excerpts from his remarks.

I am very pleased to report that the crime rate in New York continues to decline. In the State of the State, Governor Pataki highlighted the fact that New York is the safest big state in America, and pledged to make New York State the safest state of any size in five years time. Already, our crime rate is the lowest it has been in almost 40 years.

In 1982, New York State ranked 10th highest among all states in index crime rate and 1st in violent crime. Twenty years later, New York State has dropped to 44th in index crime rate, lower than all other states except for Maine, Vermont, West Virginia, North Dakota, South Dakota and New Hampshire.

Since fewer crimes are being committed, fewer felons are going to state prison, and the prison population has continued to decline for the fifth year in a row. Today, the Department of Correctional Services (DOCS) has 7,000 fewer inmates than the nearly 71,900 housed in 1999. This represents a decrease of 10 percent.

The declining inmate population has emptied beds across the prison system. Our current-year budget assumed we would have 65,100 inmates on March 31, 2004. With 64,900 inmates under custody today, we are well-positioned to meet or even come in below that projection. And we have brought down the prison population without any reduction in public safety. In fact, parolees are being re-arrested and re-incarcerated at the lowest rates in over a decade. Our collective hard work has resulted in less crime and fewer criminals in our state.

As the prison population has decreased, the percentage of state prison inmates serving time for violent felonies has increased. When Governor Pataki took office in 1995, violent felons represented 51 percent of the prison population. At the end of last year, 56 percent of the inmate population were incarcerated for violent offenses. This improvement is the result of tough, smart laws and policies—championed by the Governor—that target the most violent criminals. The budget you enacted in 2003 included several significant and innovative changes to our incarceration and re-entry policies. We have worked hard this past year to implement these initiatives as described below:

- The Governor's Merit Time Credit for A-1 drug offenders initiative allows nonviolent offenders who have at least a 15-year minimum sentence to earn a merit time sentence reduction of up to one-third off the minimum sentence. Before the legislation passed, there were 561 A-1 drug offenders in custody. All 57 offenders—who became eligible for merit time as a result of this legislation—have been interviewed and all 57 have been granted release, earning an average of 37 months off their minimum sentence. This groundbreaking legislation represents real reform of an unduly harsh provision of the Rockefeller Drug Laws.
- Thus far, 502 inmates have been approved under the initiative allowing DOCS to grant Presumptive Release to parole supervision without a Parole Board appearance. That number is expected to rise to about 1,000 inmates by the end of this fiscal year. To be eligible, inmates' present offenses must be nonviolent, and they must have no history of violence. Inmates must also comply with the same disciplinary criteria that apply to merit time, and they must receive a certificate of earned eligibility.
- Under Merit Termination of Parole, the Division of Parole is now authorized to discharge eligible nonviolent offenders who have served at least one year of supervision, and made a positive adjustment to living in the community. This provides a mechanism to motivate and reward offenders who have turned their lives around. Initial screening of parolees who became immediately eligible as a result of this legislation began last month, after rules and regulations were promulgated and approved. We estimate that approximately 3,000 of these parolees will be granted merit termination in the coming months.

I am proud to report that these initiatives have accomplished their goal: In the past year, the number of non-violent offenders in prison has decreased, while, at the same time, the re-arrest and re-incarceration rates for parolees have also declined.

In conclusion, we can all be very proud of what we have accomplished together. Transforming New York State from the 40th safest state to where we are today—the seventh safest state in the country—is a monumental achievement. But we cannot become complacent. We must—and will—continue to innovate, to implement cutting-edge strategies, to strengthen our technological infrastructure, and to hold ourselves accountable. We will not rest until New York is the safest state in the nation.

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 January 12 to May 3, 2004.

Mixed Question of Law and Fact Requires Affirmances of Appellate Division Determination

***People v. Celaj*, decided January 12, 2004 (N.Y.L.J., Jan. 13, 2004, p. 18)**

In a memorandum decision, the Court of Appeals affirmed the Appellate Division's determination on a search and seizure matter because it involved a mixed question of law and fact. The Court stated that the "determination of reasonable suspicion was supported by the evidence in the record and that consequently the issue is beyond further review by this court."

Self-Incrimination Right Not Violated by Forced Photographing of Defendant's Body Tattoos

***People v. Slavin*, decided February 17, 2004 (N.Y.L.J., Feb. 18, 2004, p. 20)**

In a 4-2 decision, the New York Court of Appeals upheld a defendant's conviction and rejected a claim that his Fifth Amendment privilege against self-incrimination had been violated by allowing the People to introduce photographs of upper-body tattoos taken over defendant's objection as evidence of motive for committing a hate crime. The tattoos had revealed various Nazi emblems. The four-judge majority concluded:

> That defendant was not "compelled to be a witness against himself" (US Const, 5th Am) within the meaning of the privilege. The tattoos were physical characteristics, not testimony forced from his mouth (See *Schmerber v. California*, 384 U.S. 757, 764-765 [1966]; *People v. Berg*, 92 N.Y.2d 701, 704 [1999]). However much the tattoos may have reflected defendant's inner thoughts, the People did not compel him to create them in the first place (compare *United States v. Hubbell*, 530 U.S. 27, 35-36 [2000]).

Judges Ciparick and Kaye dissented, arguing that in the case at bar, the corporeal evidence was offered for its testimonial value and thus the privilege against self-incrimination was clearly implicated. The dissenters argued that the majority had ignored this critical distinction.

Evidence Failed to Establish Claim of Extreme Emotional Disturbance

***People v. Smith*, decided February 17, 2004 (N.Y.L.J., Feb. 18, 2004, p. 21)**

In a unanimous decision, the Court of Appeals upheld a defendant's murder conviction and rejected the defendant's claim that the defendant should have been allowed to introduce an extreme emotional disturbance defense and to obtain a jury charge based upon that claim. The defendant had sought to establish that she was under an extreme emotional disturbance because of her sexual relationship with the deceased over a period of months and his sexual advances on the night of the killing. The Court of Appeals rejected this claim, stating:

> While extreme emotional disturbance can be established without psychiatric testimony (*People v. Roche*, 98 N.Y.2d 70, 76 [2002]; *People v. Moye*, 66 N.Y.2d 887, 890 [1985]), defendant "cannot establish an extreme emotional disturbance defense without evidence that he or she suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control" (*People v. Roche*, 98 N.Y.2d at 75). The defense requires proof of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance (*People v. Moye*, 66 N.Y.2d at 890).

Here, there was an insufficient offer of proof by defendant in support of an extreme emotional disturbance defense. Defendant's proffered testimony did not establish that, at the time of the homicide, she was affected by her long-standing sexual relationship with the deceased to such a degree that a jury could reasonably conclude that she acted under the influence of an extreme emotional disturbance (*see People v. White*, 79 N.Y.2d 900, 903 (1992)).

"Prompt Outcry" Exception to Hearsay Rule Was Properly Applied

***People v. Shelton*, decided February 19, 2004 (N.Y.L.J., Feb. 20, 2004, p. 20)**

In a unanimous decision, the Court of Appeals affirmed the defendant's conviction and rejected the defendant's contention that the trial court had misapplied the prompt outcry exception to the hearsay rule when it allowed the complainant's daughter to testify. The Court reiterated that the prompt outcry rule is a relative concept dependent on the facts and that an outcry is prompt if made at the first suitable opportunity. The Court concluded that the trial judge was correct in determining that the complaint was prompt since it was considered that the rape occurred late at night, that the defendant warned complainant not to tell anyone, and that the defendant lived in the same apartment as the 81-year-old complainant.

Death Penalty Sentence Vacated Due to Unconstitutional Plea Bargain Provisions

***People v. Mateo*, decided February 24, 2004 (N.Y.L.J., Feb. 25, 2004, p. 18)**

The Court of Appeals again vacated a death penalty sentence, this time on the grounds that the plea bargaining provisions, held unconstitutional in prior determinations, mandated such a result. The Court indicated that the problem with Mr. Mateo's death sentence was the same one the Court addressed in its earlier cases, to wit, *People v. Harris*, 98 N.Y.2d 452 (2002) and *Hynes v. Tomei*, 92 N.Y.2d 613 (1998). Those cases held that the death penalty statute in effect at the time the prosecution began was unconstitutional in that a two-tiered punishment system like New York's, where a defendant can escape a death penalty by pleading guilty, unconstitutionally burdened a defendant's trial rights under the Fifth and Sixth Amendments.

Evidence Legally Insufficient to Establish Depraved Indifference Murder

***People v. Gonzalez*, decided March 25, 2004 (N.Y.L.J., March 26, 2004, pp. 1 and 19)**

In a unanimous decision, the New York Court of Appeals overturned a murder conviction based upon the depraved indifference theory, on the ground that the case was one of intentional murder or nothing. The prosecution had charged both an intentional murder count and a depraved indifference count. The jury had acquitted the defendant of the intentional murder charge, but had convicted him on the count of depraved indifference.

The Court of Appeals decision highlights the dangers in the prosecution routinely charging both counts when the evidence actually establishes only one theory of the homicide. In rendering its determination, the Court of Appeals went into a lengthy analysis concerning the differences between depraved indifference murder and intentional murder and concluded that "the choice to proceed under both theories does not exempt this case from the dictates of law."

Trial Court Has Great Discretion with Respect to Jury Selection Procedures

***People v. Williams*, decided March 25, 2004 (N.Y.L.J., March 26, 2004, p. 20)**

In a unanimous decision, the Court of Appeals affirmed a defendant's conviction and rejected a claim that the trial judge had exceeded his authority in the manner in which prospective jurors were questioned. The trial judge had placed in the jury box and individually questioned one juror at a time rather than utilizing the usual procedure of questioning several jurors at a time. The defendant contended that this violated provisions of CPL section 270.15(3). The Court of Appeals disagreed with the defendant's contention and held that the CPL section gave trial courts discretion in the number of prospective jurors placed in the jury box following completion of the first round. The Court of Appeals cited to its earlier decision in *People v. Alston*, 88 N.Y.2d 519 (1996), to support its conclusion. After affirming the conviction, the Court of Appeals nevertheless noted that although the trial court's procedure was not unlawful, it may have needlessly prolonged the jury selection procedure and should not be followed.

Allowing More Than One Person to Make a Statement at Sentencing Is Not Improper

***People v. Hemmings*, decided March 30, 2004 (N.Y.L.J., March 31, 2004, p. 20)**

In a unanimous decision, the Court of Appeals held that sentencing courts have discretion to allow more than one person to make a victim impact statement at sentencing beyond the single statement from the victim. The Court concluded that CPL section 380.50 gave the sentencing court discretion to allow other persons close to the victim to address the court at sentencing in order for the sentencing court to determine the proper sentence to impose.

Defendant's Request for Deposition Timely Under CPL § 100.25

***People v. Tyler*, decided March 30, 2004 (N.Y.L.J., March 31, 2004, p. 20)**

In a case involving a speeding ticket, the Court of Appeals upheld the dismissal of the charges brought against the defendant on the grounds that the prosecution had failed to timely serve a supporting deposition, which was requested by the defendant. The Court of Appeals stated that CPL section 100.25(2) does not force a defendant to wait until arraignment to request a supporting deposition. The statute provides that a defendant may request one when charged by a simplified information and defendant was charged in the case at bar when he was ticketed. Accordingly, the defendant had satisfied all the conditions for a timely request and the prosecution had not complied with the thirty-day requirement.

Police Expert Testimony Was Proper

***People v. Hicks*, decided April 1, 2004 (N.Y.L.J., April 2, 2004, p. 21)**

In a unanimous decision, the Court of Appeals concluded that the trial court did not abuse its discretion in allowing an arresting officer to testify as an expert that the packaging of drugs recovered from the defendant was inconsistent with personal use and consistent with the packaging that the officer had encountered in previous drug sales. The officer had 10 years of experience and had received special training in identifying narcotics. The Court of Appeals concluded that the officer's testimony was helpful to the jury in understanding the evidence and reaching a verdict and was therefore not improper.

Expert Testimony on Narcotics Operations Deemed Harmless Error

***People v. Smith*, decided April 1, 2004 (N.Y.L.J., April 2, 2004, p. 18)**

In a unanimous decision, the Court of Appeals concluded that a trial court abused its discretion in allowing the introduction of expert testimony as to the money-handling aspects of a street level narcotics operation where the evidence presented was of a single transaction involving only the defendant and an undercover officer. The Court concluded, however, that the error which occurred was harmless and that therefore the defendant's conviction should be upheld. The Court reached its conclusion on the grounds that there was overwhelming proof of the defendant's guilt and that there was no significant probability that the jury would have acquitted had it not been for the error that occurred.

Defendant Was Denied Effective Assistance of Counsel

***People v. Lewis*, decided April 6, 2004 (N.Y.L.J., April 7, 2004, p. 18)**

In a 5-2 decision the Court of Appeals reversed a defendant's conviction on the grounds that he was denied the effective assistance of counsel because his attorney testified against him at a hearing to determine whether the defendant had been involved with respect to the threatening of a witness. Relying on *People v. Berroa*, 99 N.Y.2d 134 (2002), the majority opinion indicated that defense counsel had in effect been converted into a witness and that thereafter he could not properly continue to represent the defendant. The defendant's conviction was therefore reversed and a new trial was ordered.

Judges Robert Smith and Reed dissented, arguing that although defense counsel should not have been called as a witness, the defendant was not prejudiced and there was no basis for requiring a new trial.

Exclusionary Rule Does Not Mandate Suppression of Identification Evidence

***People v. Jones*, decided April 6, 2004 (N.Y.L.J., April 7, 2004, p. 19)**

In another 5-2 decision, the Court of Appeals held that the state Constitution did not require the suppression of evidence of a lineup identification made after an arrest based on probable cause, but in violation of the *Payton* decision. Judges Ciparick and Kaye dissented, arguing that there was indeed a causal connection between the illegal arrest and the identification at the lineup.

The Defendant Opened Door to Otherwise Inadmissible Evidence

***People v. Massie*, decided April 6, 2004 (N.Y.L.J., April 7, 2004, p. 21)**

In a unanimous decision, the Court of Appeals affirmed a defendant's conviction when otherwise inadmissible evidence was admitted by the trial court because "the defendant opened the door" by making an argument which might otherwise mislead the jury. The evidence in question involved pre-trial identifications of the defendant. The Court of Appeals reiterated that the trial court did not abuse its discretion in admitting such evidence after the defendant's attorney opened the door during the cross-examination of the identification witnesses.

2003 Leading Court of Appeals Decisions

Reviewed by Students from St. John's Law School

Listed below are several case notes on leading New York Court of Appeals cases, which were decided in 2003. These case notes were prepared by students at St. John's Law School as part of the Frank S. Polestino Trial Advocacy Program.

THE PROPER APPLICATION OF A "MISSING WITNESS" JURY INSTRUCTION

***People v. Savinon*, 100 N.Y.2d 192, 791 N.E.2d 401, 761 N.Y.S.2d 144 (2003)**

Defendant Carlos Savinon was found guilty of first-degree rape and sexual abuse. The Appellate Division affirmed this conviction. Non-party Luis "Flaco" Camacho was present during the events in question, yet was not called as a witness by either party. Defendant appealed his conviction on the grounds that the trial court abused its discretion in giving the "missing witness" instruction to the jury. This allowed the jury to make a negative inference regarding the defendant's failure to call a witness expected to help his case—here, Camacho. Applying *People v. Gonzalez*, the Court recognized three preconditions for the missing witness charge: "First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable to the party against whom the charge is sought . . . Third, the witness must be available to the party." *People v. Savinon*, 100 N.Y.2d 192, 197. The complainant testified that Camacho was in the front seat of the car while she was raped in the back. The defendant argued that Camacho was nearby while he and the complainant engaged in consensual sexual intercourse. Because both parties claimed that Camacho was present during the activities in question, he was clearly a key witness. This satisfied the first precondition.

For the second precondition, the Court considered whether Camacho was under the defendant's control, that is, whether their relationship was so natural as to expect that Camacho would testify favorably to the defendant. The Court determined that Camacho was under the defendant's control. Camacho and the defendant were friends socially and were business associates. The Court mentioned that the "defendant was so bonded with Camacho as to have had sex with complainant with Camacho nearby." Such a close friend and business associate would be expected to provide favorable testimony for the defendant. Defendant raised the issue that the complainant also saw Camacho socially. The Court, however, relied upon her testimony that she only knew Camacho by his nickname, and that she had not had contact with him for over one year prior to the trial. Regardless, the jury was free to consider all the facts and determine whether or not to make an adverse inference from the defendant's failure to call Camacho to testify.

Whether the third precondition is met is centered upon the meaning of the word "available." A litigant should not be penalized for failing to call an unavailable witness. Availability, however, is a matter of degree. A missing witness would meet the unavailability standard, as would a witness present in court but refusing to testify under the Fifth Amendment. A person who refuses to testify should still be brought before the court and raise the privilege on the record. This high level of diligence is applied to help curb dishonesty, and to encourage witnesses to testify. The Court found that Camacho could have been produced if defendant wanted him to testify at trial. The People claimed they had no contact with Camacho. The defendant claimed that, while Camacho did respond to a telephonic page, he refused to testify without a "safe passage" agreement from immigration authorities for fear he would be arrested as an illegal alien. The Court reasoned that because of the severity of the crimes and possible sentences for the defendant, if Camacho were able to provide testimony to help the defendant, the defendant would have gone to great lengths to get Camacho to testify. Because the defendant did not even serve Camacho with a subpoena, he did not appear to earnestly want Camacho's testimony, and therefore, the trial court did not abuse its discretion in providing the "missing witness" instruction.

By David J. Kozlowski

FAILURE TO PERFECT A CRIMINAL APPEAL IN A TIMELY MANNER—An extensive delay is a waiver of one's right to appeal.

***People v. West*, 100 N.Y.2d 23, 789 N.E.2d 615, 759 N.Y.S.2d 437 (2003)**

The defendant, a poor person entitled to assigned counsel, was convicted in New York County Supreme Court of rape and sodomy in the first degree. He received written notice of his right to appeal, as well as the procedure required by the state to appeal as a poor person. The defendant received assistance from an attorney in filing a timely notice of appeal, and he moved pro se in the trial court for, and received, an order granting him copies of the pre-trial and post-trial

transcripts that would have been used in his state and federal appeals. The defendant failed to file his appeal in state court. However, he proceeded to file four petitions in federal court for habeas corpus relief, and was denied each time. On the last two occasions that his petition was dismissed, the defendant was notified that the dismissals were granted because of his failure to exhaust his state remedies. The defendant was informed that the minutes of the trial had not been prepared and that he had not moved to appeal as a poor person.

In 1998, fourteen years after his conviction and sentence, the defendant sought permission for the Appellate Division to prosecute his appeal as a poor person. The Appellate Division granted the state's cross-motion to dismiss the appeal. The Court of Appeals affirmed the dismissal.

The Court of Appeals rejected defendant's claim that he was not advised of his right to seek poor-person relief and that therefore his delay in perfecting his appeal should not be considered abandonment. The Court relied on the fact that the defendant received written notice describing specifically how to go about requesting that counsel be assigned to him and explaining the process for requesting financial assistance. Also, two of the four times his petition in federal court was dismissed he was advised that it was because he had failed to exhaust his state appeal.

The defendant made an additional claim for the first time on appeal. He claimed that the Sixth Amendment and his due process right to counsel required that he be provided with counsel to help prepare his poor-person application. The Court also rejected this claim, basing its reasoning on *Martinez v. Court of Appeal*, 528 U.S. 152, 145 L. Ed. 2d 597 (2000), which held that due process does not guarantee the right to an appeal. The Court held that when a state grants a defendant a statutory right of appeal, it must be careful to protect the defendant's rights, and "provide him with the minimum safeguards necessary to make an adequate and effective appeal" *Smith v. Robbins,* 528 U.S. 259, 145 L. Ed. 2d 597 (2000).

Since the defendant was given the opportunity to appeal, the Court then addressed the question of whether or not the defendant was afforded these proper safeguards. The Court held that he was afforded the necessary safeguards because the defendant received instructions on how to apply for the poor-person relief and sufficient notice was given of his right to appeal. Furthermore, the assistance of counsel is not needed to apply for this particular relief.

By Elizabeth Miller

PROCEDURAL DUE PROCESS—The sentencing scheme in a non-capital context must ensure that the information the sentencing court relies upon is reliable and accurate and that the defendant has an opportunity to respond to the facts upon which the court may base its decision.

***People v. Hansen*, 99 N.Y.2d 339, 786 N.E.2d 21, 756 N.Y.S.2d 122 (2003)**

Albany police arrested defendant Hansen after an informant and defendant himself made statements implicating the defendant in two crimes. The first crime involved a robbery that occurred on April 28, 1995. The defendant beat David Goyette, a cab driver in the city of Albany, in the back of his head with a hammer and robbed him. The second crime involved the fatal shooting of Santo Cassaro, another cab driver, while Cassaro was in his vehicle. Shortly after the second incident, during an August 1, 1996 investigation, shell casings from a .25-caliber handgun, hidden in the defendant's attic, were found alongside the body of Cassaro in a cab. The jury convicted the defendant of murder and robbery in the first degree. The defendant was subsequently sentenced to life imprisonment without parole for the murder and 12.5 to 25 years in prison for the robbery.

Defendant challenged the decision on the ground that the sentencing requirements in non-capital cases under CPL § 400.27 deprived him of his state and federal constitutional guarantees of due process of law. The requirements failed to provide the defendant with a separate sentencing hearing at which non-capital offenders could submit evidence of mitigating factors. Rejecting the defendant's due process claim, the Appellate Division affirmed his conviction. On further appeal to the Court of Appeals, the defendant again asserted his right to due process of the law and added an additional claim to his challenge. Unlike capital defendants, the defendant argued that he was deprived of equal protection of the law, as non-capital murder defendants were not entitled to a sentencing jury.

The Court of Appeals first rejected the defendant's equal protection challenge, holding that where an arbitrary sentencing distinction was alleged, an equal protection claim based on the same argument was subsumed by the due process claim. The Court of Appeals next rejected the defendant's due process challenge, explaining that in safeguarding against the arbitrary or capricious imposition of a death order, a heightened standard of due process was applicable only to capital cases. For non-capital cases, due process did not implicate the entire spectrum of criminal trial procedural rights. It only required that the information relied upon

by the sentencing court be "reliable and accurate." The state of New York's sentencing procedure was in accord with these due process requirements and also ensured the defendant the process he was due. Under New York criminal law procedure, procedural safeguards ensured that (1) the information on which the court relied in sentencing a defendant was accurate, and (2) the defendant had an opportunity to voice any mitigating factors and contest any facts relevant to his sentence. On these grounds, the Court of Appeals held that the equal protection and due process challenges the defendant alleged were without merit, and reaffirmed the decision of the Appellate Division.

By Sabeena Ahmed

BURGLARY—A home does not lose its character as a dwelling once its occupant dies. The vacant domicile does not lose its status as a dwelling within the definition provided in the penal law for burglary in the second degree.

***People v. Barney*, 99 N.Y.2d 367, 786 N.E.2d 31, 756 N.Y.S.2d 132 (2003)**

The defendant was arrested and subsequently indicted and convicted of burglary in the second degree and attempted petit larceny. Only three days before the commission of the burglary, the occupant of the home was killed in an accident. Fully aware of the death of the occupant, the defendant broke into his home looking for drugs that he knew the decedent kept. Upon not finding any drugs, the defendant began to collect property to steal as the residence was still fully furnished. The police were able to apprehend the defendant, while in the process of burglarizing the home, before he could escape with the fruits of his crime. At trial, the court denied the defendant's request to submit to the lesser offense of burglary in the third degree.

In a 3-2 decision by the Appellate Division, the court affirmed the conviction of the defendant. The majority noted that the "immediate past residential use" of the home enabled it to maintain the characteristics of a dwelling. Conversely, the two dissenting justices argued that the conviction should have been reduced to burglary in the third degree because upon the death of the sole occupant of the residence, the home had lost the essence that made it a dwelling. The Court of Appeals affirmed.

The unanimous Court noted that one of the nuances between burglary in the second degree and burglary in the third degree is that the former crime requires the building burglarized to also be a dwelling. The Court explained that N.Y. Penal Law § 140.00 [3] provides that a "dwelling is defined as a building which is usually occupied by a person lodging therein at night." The defendant posited that the trial judge erred by failing to allow the jury to consider the charge of burglary in the third degree. The defendant alleged that the building was no longer a dwelling upon the death of the decedent because it failed to be "usually occupied." The Court of Appeals concluded that the legislature intended the definition of "usually occupied" to be liberally construed. Following an earlier decision handed down in *People v. Quattlebaum*, 91 N.Y.2d 744, 698 N.E.2d 421, 675 N.Y.S.2d 585 (1998), the Court reaffirmed its commitment to determine whether a domicile is "usually occupied" by looking at the "nature of the structure" to ascertain "whether it was normal and ordinary, that it was used for overnight lodging, and had the customary indicia of a residence and its character and attributes." The Court proceeded to describe several factors that had been honed over the years when trying to establish whether a building was "normal and ordinary." In *People v. Sheirod*, 124 A.D.2d 14, 510 N.Y.S.2d 945 (4th Dep't 1987), the Appellate Division identified three factors aimed at determining whether a structure was usually occupied; the nature of the structure, the intent of the owner to return, and whether a person could have occupied the residence overnight. The defendant maintained that because the occupant could not return, the characteristics of the home as a dwelling additionally died with his passing. However, the Court noted that not every *Sheirod* factor must always be present in each case. Turning to the merits of the case, based upon the fact the home was fully furnished and adequate for human habitation, the Court announced that it was averse to adopting a rule that would be a windfall for any potential criminal armed with the knowledge of the death of the occupant of a home.

By Michael Curti

2003 Annual Report of the Clerk of the New York Court of Appeals

In a recently released annual report reviewing the Court's caseload for the year 2003, Stuart M. Cohen, Clerk of the Court of Appeals, reported that the Court rendered 176 decisions in 2003. This compares with between 250 and 300 decisions in the mid-1990s. In civil matters, the Court had a reversal rate of roughly 50 percent, but in criminal matters the Court affirmed in about 67 percent of the cases. Of the 176 appeals decided in 2003, 130 were civil matters and 46 were criminal cases. This compares to 107 civil cases and 67 criminal cases handled in 2002. Of special interest to criminal lawyers is the fact that the number of criminal appeals being handled by the Court is steadily dropping. This is clearly reflected by the fact that with respect to criminal leave applications, the Court granted leave in only 1.4 percent of the cases (37 out of 2,601), a record low for the Court.

Another interesting statistic indicated that of the 176 cases decided, there were only 15 dissenting opinions, down from 23 the year before. The panel was unanimous in nearly 87 percent of its decisions. Judge George Bundy Smith had the highest dissenting rate, followed by Judge Reed. The Court is also deciding its cases in a more rapid manner, taking only an average time of 31 days for appeals to be decided after oral argument.

Also according to the report, in 2003 litigants and the public continued to benefit from the prompt calendaring, hearing and disposition of appeals. The average period from filing of a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 6.5 months, roughly the same as in previous years. The average period from readiness (all papers served and filed) to calendaring for oral argument was approximately 1.4 months, again about the same as in previous years. The average length of time in 2003 from the filing of a notice of appeal or order granting leave to appeal to the release to the public of a decision in a normal-coursed appeal was 259 days.

The Court also reported that its work was performed during the 2003 year under a budget of approximately $13 million. This figure included all judicial and non-judicial staff salaries.

In issuing the report, Cohen commented, "By every measure, the Court maintained exceptional currency in calendaring and deciding appeals in the year 2003."

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

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

REQUIREMENT OF PROBABLE CAUSE FOR A POLICE OFFICER TO EXECUTE AN ARREST WITHOUT A WARRANT

***Maryland v. Pringle*, 124 S. Ct. 795 (2003)**

On August 7, 1999 at 3:16 a.m., a police officer stopped a car for speeding. The car was occupied by three men, one of whom was the defendant Pringle, who was seated in the front passenger seat.

After a check of the car's license and registration showed that there were no violations, the officers gave the driver a warning. Upon receiving consent to search the car, the officer found and seized $763 from the glove compartment and five glassine baggies of cocaine hidden behind the backseat armrest. After all three men failed to provide any information as to the ownership of the cocaine and the money, the officer arrested each of them. Pringle waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and gave an oral and written confession indicating that the cocaine belonged to him.

In a jury trial, the defendant was convicted of possession with intent to distribute cocaine and possession of cocaine, and was sentenced to ten years in prison without the possibility of parole. The Court of Special Appeals of Maryland affirmed the judgment. This decision was then reversed by the Court of Appeals of Maryland, holding that the mere finding of cocaine in a car driven by a person other than the defendant was insufficient to establish probable cause in an arrest for possession. In granting certiorari, the Supreme Court was faced with the issue of whether the officer had probable cause to believe that Pringle had committed the offense of possession of cocaine with the intent to distribute. The Supreme Court reversed the decision, holding that the officer had probable cause to arrest Pringle.

The Supreme Court stated that under the Fourth Amendment, people are "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Maryland law authorizes officers to execute warrantless arrests for felonies that have been committed or are being committed in the officer's presence. Md. Ann. Code art. 27, § 594B (1996) (repealed 2001). Relying upon *United States v. Watson*, 423 U.S. 411, 424 (1976), the Supreme Court held that an arrest without a warrant for a felony is consistent with the Fourth Amendment, as long as the arrest is supported by probable cause.

In determining if probable cause existed, the Court looks to the events leading up to the arrest through the eyes of an "objectively reasonable police officer." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Here, by looking at the money and the five glassine baggies of cocaine, coupled with the lack of an explanation for the items by all three men, the police officer could reasonably infer that any or all of the three occupants of the vehicle had knowledge, and "exercised dominion and control over the cocaine." *Pringle* at 800. Therefore, the officer would have been reasonable in concluding that there was probable cause to arrest the defendant.

The defendant's contention that the case at hand was one of guilt by association, and his reliance on *Ybarra v. Illinois*, 444 U.S. 85 (1979), to support this contention was rebutted by the Supreme Court. The Court stated that *Ybarra* involved criminal activity in a public tavern with many patrons, and a person's mere proximity to others engaged in criminal activity didn't give rise to probable cause to search that person. The case at hand was distinguished from *Ybarra* because the defendant and his two companions were in a relatively small vehicle, and it was reasonable for an officer to infer a common endeavor among the three of them.

By Anisha Mukundan

STANDARD OF REVIEW IN OVERRULING A STATE COURT'S DECISION—A state court's decision affirming the death penalty was not contrary to or did not involve an unreasonable application of clearly established federal law.

***Mitchell v. Esparza*, 124 S. Ct. 7 (2003)**

In February 1983 in Toledo, Ohio, the respondent, Gregory Esparza, entered a store, robbed at gunpoint the store employee and fatally wounded the employee by shooting her in the neck. Esparza was charged with aggravated murder during the commission of an aggravated robbery and aggravated robbery. Esparza was convicted on both counts and the trial judge accepted the jury's recommendation that he be sentenced to death for the murder conviction.

Esparza appealed to the Ohio Court of Appeals, claiming that the death penalty could not be imposed under Ohio law because he was not charged as a "principal offender." The Ohio Court of Appeals rejected

Esparza's argument because the requirement to identify a "principal offender" did not apply to a case where only one defendant was alleged to have committed the crime. Esparza again unsuccessfully appealed to the Ohio Court of Appeals, claiming that his Eighth Amendment rights were violated because his counsel did not argue that the state failed to comply with its sentencing procedures. Subsequently, Esparza filed a petition for writ of habeas corpus in the District Court for the Northern District of Ohio after exhausting all his relief opportunities in the state courts. The District Court granted the petition in part and issued a writ of habeas corpus as to the death sentence finding that the Ohio Court of Appeals' decision was an unreasonable application of clearly established federal law. The United States Court of Appeals for the Sixth Circuit affirmed the decision and held that a harmless-error review was inadequate and that the Eighth Amendment precluded the death sentence. The state of Ohio's petition for a writ of certiorari was granted.

First, the standard used by federal courts in reviewing a petition for habeas corpus under 28 U.S.C. § 2254(d)(1) is based on whether the state court's decision was "contrary to or involved an unreasonable application of clearly established Federal law." *Id*. at 11. A federal court considering a habeas petition cannot overrule a state court's decision if the precedents from the Supreme Court are ambiguous. Here, the Ohio Court of Appeals decision was not contrary to established federal law since this Court's rulings on the standard of review used, harmless error (for failing to instruct a jury on all of the statutory elements of an offense in capital or non-capital cases) have been ambiguous.

Second, the Court looked to whether the court's decision was an unreasonable application of clearly established federal law. A federal court can only grant a petition for habeas corpus if the state court applied harmless-error review in an "objectively unreasonable manner." Here, the Ohio Court of Appeals defines a "principal offender" as "the actual killer." *Id*. at 12. The jury was instructed that they must determine whether or not the aggravated murder occurred while the defendant was committing aggravated robbery. Further, Esparza presented no arguments that he was not the principal offender or that he was not the only defendant in the crime. Based on these facts, the Court held that the state court's decision of his conviction for a capital offense was not objectively unreasonable. The case was remanded for further proceeding consistent with this opinion.

By Mohammed Ali

SIXTH AMENDMENT—Right to effective assistance of counsel.

Yarborough v. Gentry, 124 S. Ct. 1 (2003)

Respondent Lionel Gentry, who claimed that he accidentally stabbed his girlfriend, Handy, during a dispute with a drug dealer, was convicted in California state court of assault with a deadly weapon. On appeal to the United States Supreme Court, Gentry argued that he was deprived of his Sixth Amendment rights to the effective assistance of counsel.

Gentry contended that his attorney did not highlight various potentially exculpatory pieces of evidence in his summation, including: that Gentry's girlfriend had used drugs on the day she was stabbed and in the morning on the day of her preliminary hearing; that the main prosecution witness, Albert Williams, a security guard from a neighboring building, was unable to see the stabbing clearly; "that Gentry's testimony was consistent with Williams's in some respects"; that the government failed to call the other witness to the stabbing; and "that the stab wound was only one inch deep, suggesting it may have been accidental." *Id*. at 5. The California Court of Appeal rejected Gentry's Sixth Amendment claim and the California Supreme Court denied review. Gentry's petition for federal habeas relief was denied by the District Court, but the Court of Appeals for the Ninth Circuit reversed. The U. S. Supreme Court granted a writ of certiorari and subsequently reversed the Ninth Circuit's decision.

The Court first looked to the rights afforded individuals under the Sixth Amendment—the right to the effective assistance of counsel. In *Wiggins v. Smith,* 123 S. Ct. 2527, this Court held: "[t]hat right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Id*. at 2529. Where, as here, the state court's application of governing federal law was challenged, "it must be shown to be not only erroneous, but objectively unreasonable." *Id*.

The Supreme Court held that the California Court of Appeal's rejection of Gentry's ineffective-assistance claim under the Sixth Amendment was not unreasonable because the performance of Gentry's attorney did not fall below the Sixth Amendment's standard of reasonableness. The availability of other potential arguments did not establish that counsel's performance was ineffective. Notably, some of the omitted arguments may have undoubtedly aided the defense but it does not follow that the defense counsel should be deemed incompetent for choosing not to include them in his summation. The Court noted that some of the omitted

items were ambiguous, such as Gentry's reaction to Williams, whereas others may have backfired. By highlighting specific arguments in his summation, defense counsel presented the case in such a way as to show the jury how the prosecution had not proven their case beyond a reasonable doubt. The arguments made for summation are "a core exercise of defense counsel's discretion." *Gentry* at 5. As the Court stressed, "the Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id*. at 6.

By Dante Apuzzo

SEARCH AND SEIZURE—A police information-gathering checkpoint that stopped motorists for investigatory purposes is not a violation of the Fourth Amendment's prohibition against unreasonable search and seizure.

***Illinois v. Lidster*, 124 S. Ct. 885 (2004)**

On August 30, 1997, Lombard, Illinois, police attempted to gather information on a fatal motor vehicle hit-and-run accident that occurred one week earlier, by establishing a highway checkpoint. The checkpoint was set up at the same location where the accident had occurred and at a time that would coincide with the "motorists routinely leaving work after night shifts at nearby industrial complexes." *Id*. at 891. The officers at the checkpoint handed out flyers about the accident in the hope of soliciting assistance in locating the driver involved in the accident. Officers stopped the vehicles for approximately 10 to 15 seconds and, as such, the drivers' limited contact with the police provided little reason for anxiety or alarm. As the defendant approached the checkpoint in his minivan, he was swerving and nearly hit one of the officers. When the police stopped the defendant, they smelled alcohol on his breath. The police administered a sobriety test that the defendant failed, resulting in the defendant's arrest and subsequent conviction for driving under the influence of alcohol.

On appeal, the defendant sought the suppression of evidence obtained during the checkpoint stop, arguing that such evidence was obtained in violation of the Fourth Amendment. Following the Supreme Court's reasoning in *Indianapolis v. Edmond*, 531 U.S. 32 (2000), both the Appellate Court and Supreme Court of Illinois agreed with defendant and held the checkpoint in question unconstitutional. The Supreme Court of the United States granted certiorari and subsequently, reversed the state Supreme Court's ruling.

By a 6 to 3 vote, the Court held that an information-gathering checkpoint did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Justice Breyer, writing for the majority, explained that the checkpoint in *Edmond* was implemented to uncover general criminal activity by motorists, and that in the absence of "individualized suspicion," such searches were presumptively unconstitutional. *See Lidster*, 124 S. Ct. at 886–87. By contrast, the purpose of the checkpoint that snared the defendant "was not to determine whether a vehicle's occupants were committing a crime, but to ask [the] vehicle's occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id*. at 889.

Additionally, special law enforcement concerns will often justify highway stops without any individualized suspicion. *Id*. at 889. In turn, the Court held that the *Edmond* bright-line rule was neither applicable nor dispositive based on the factual dissimilarities existing in this case. Thus, the appropriate test was one of "reasonableness," determined on an individual basis.

In deciding Fourth Amendment issues, the Court must apply a balancing test that weighs public concerns against private intrusion. The Court found that the checkpoint here was reasonable because "[t]he relevant public concern was grave." *Id*. at 891. The police were attempting to obtain information from the public about someone who killed an individual and who then, with wanton disregard for human life, fled the accident scene. Such information gathering was necessary and proper as "the . . . objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort. The stop advanced this grave public concern." *Id*.

The Fourth Amendment requires no more.

By Jacqueline Doody

SIXTH AMENDMENT RIGHT TO COUNSEL—A deliberate post-indictment police inquiry in the absence of counsel or waiver of counsel violates defendant's Sixth Amendment right to counsel.

***Fellers v. U.S.*, 124 S. Ct. 1019 (2004)**

Police officers went to the home of the petitioner, John Fellers, with a warrant for his arrest for his involvement in a drug distribution conspiracy. After Fellers allowed the police officers entry into his home, he was informed that they wanted to ask him questions about his involvement with the distribution of the drug methamphetamine. The officers informed Fellers that he had been indicted on drug conspiracy charges. The officers did not read him his *Miranda* rights. During the

conversation, Fellers told the officers that he had been associated with the individuals named in the indictment and that he had used methamphetamine. Fellers was taken to jail, where he was read his *Miranda* rights. Fellers waived his rights, and then proceeded to repeat the incriminating statements made at his home confirming his involvement in the conspiracy.

At trial, Fellers moved to suppress his statements made at his home and the county jail. He argued that the statements made at his home could not be used because he had not been read his *Miranda* rights, nor had he been given the opportunity to exercise his Sixth Amendment right to counsel. The District Court suppressed the statements made at his home but admitted those made at jail, finding that Fellers voluntarily waived his *Miranda* rights before making them. Fellers was convicted of conspiring to possess with intent to distribute methamphetamine. On appeal, the Eighth Circuit Court of Appeals affirmed the conviction. The Supreme Court granted a writ of certiorari.

The Supreme Court found that the Court of Appeals erred in deciding that the defendant was not interrogated at his home. This Court has held that a defendant is denied his Sixth Amendment rights "when there [is] used against him at his trial evidence of his own incriminating words, . . . deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206. Based on the circumstances here, the Court reasoned that the officers "deliberately elicited" incriminating information from Fellers specifically after telling him that the purpose of their visit was to discuss his involvement in the distribution of methamphetamine. Therefore, because of the nature of the circumstances surrounding this interrogation, which was conducted outside the presence of counsel and in the absence of any waiver of the right to counsel, the Court of Appeals erred in holding that the officers' actions were constitutional.

Regarding the statements made by Fellers at the jailhouse, the Court held that the lower court improperly analyzed those statements under the Fifth Amendment. In *Oregon v. Elstad*, 470 U.S. 298, the admissibility of jailhouse statements is determined solely on the basis of whether the statements were "knowingly and voluntarily made." *Id*. at 309. However in this case, the lower court failed to consider whether these statements would be suppressed because they were "fruits" of a previous interrogation that violated the "deliberate elicitation" standard of the Sixth Amendment. As a result, the issue of the admissibility of the jailhouse statements was remanded to the lower court.

By Natalia Teper

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various appellate divisions, which were decided between January and May of 2004.

People v. Doyle, (N.Y.L.J., January 14, 2004, p. 18)

In a unanimous decision, the Appellate Division, First Department, upheld the defendant's conviction of manslaughter in the first degree. The Court held that although the trial court had failed to submit to the jury the charge of manslaughter in the second degree as a lesser included offense under the intentional murder count, it had submitted such a charge under the depraved indifference murder count.

The Appellate Court found that under these circumstances any failure to submit the lesser included offense was harmless as a matter of law. The Court concluded:

> The question that emerges on this appeal is whether the erroneous failure to submit second degree manslaughter under the intentional murder count was rendered harmless by the submission of the very same charge under the depraved indifference murder count. We conclude that the error, if any, was harmless under these circumstances, and therefore affirm.

The Court relied upon its prior decision in *People v. Gillette*, 254 A.D.2d 121, in which leave to appeal to the Court of Appeals was denied. *See* 93 N.Y.2d 873 (2000).

People v. Vega, (N.Y.L.J., February 2, 2004, p. 18)

In a unanimous decision, the Appellate Division, First Department, upheld a murder conviction where the defendant had raised an issue that his trial had been prejudiced by the introduction of evidence of prior uncharged crimes consisting of testimony regarding prior instances of spousal abuse. The Court indicated that under the *Molineux* principles, the evidence was properly admitted on the issue of motive and identification and that thus, the probative value outweighed any prejudicial affect. The Court, in summarizing the reasons for its ruling, stated:

> "While this evidence undoubtedly had a prejudicial effect, as does all evidence introduced against a criminal defendant, it was not unduly prejudicial, especially when weighed against its significant probative value in a case devoid of clearcut clues as to the identity of the killer and the reason for the killing."

People v. Baker, (N.Y.L.J., February 13, 2004, pp. 1–2)

In a unanimous decision, the Appellate Division, Third Department, reduced a babysitter's conviction from depraved indifference murder to criminally negligent homicide. The case arose out of an incident where the defendant, a woman of marginal intelligence, with an IQ of 73, was babysitting a 3-year-old baby girl. The defendant left the child in the bedroom, latching a hook and eye so the child could not escape. It became extremely hot during the night by virtue of the fact that the furnace malfunctioned, and the child died of hyperthermia. The Third Department concluded that the jury could not reasonably infer a culpable mental state greater than criminal negligence.

People v. Woodruff, (N.Y.L.J., February 17, 2004, pp. 2 and 7)

In a 4-1 decision, the Appellate Division, Fourth Department, reinstated a second-degree manslaughter charge against a defendant who, while hunting in Chemung County, fired his 20-gauge shotgun at a doe running at the crest of a hill. The shot actually hit a person who was coming up the other side of the hill. The defendant, who had heard the victim screaming, drove away from the scene and did not report the incident. The majority opinion in the Appellate Division concluded that, contrary to the determination of the trial judge, the grand jury could infer that before leaving the scene, the defendant was personally aware that the shooting had occurred and that such a shooting created a risk that the victim would die without prompt medical treatment.

People v. Brown, (N.Y.L.J., February 17, 2004, pp. 2 and 7)

In a unanimous decision, the Fourth Department affirmed the murder conviction of a defendant who claimed he suffered from multiple personality disorder. The Appellate Court concluded that the trial judge had promptly determined that the defendant was compe-

tent to stand trial and that the trial court's denial of the defendant's request to present a notice of intent to present psychiatric evidence in mid-trial was a proper exercise of the court's discretion.

People v. Marshall, (N.Y.L.J., March 10, 2004, pp. 1–2)

The Appellate Division, Third Department, unanimously upheld a search where a police officer lacking probable cause entered a college residence hall, knocked on the door of a student's room, and inquired about criminal activity. The officer had acted after previously pulling over a vehicle and obtaining information that drug activity had been occurring at the residence hall. The Appellate Court determined that the officer's action in this case was a level 2 intrusion under *People v. Debour*, 40 N.Y.2d 210 (1976), involving a founded suspicion of criminal activity and that the officer met the standard for a common law right to inquire. The Appellate Court also relied upon the fact that once the inquiry was initiated, one of the residents voluntarily invited the officer into the premises.

People v. Cohen, (N.Y.L.J., March 18, 2004, p. 20)

In a unanimous decision, the Appellate Division, First Department, affirmed perjury charges against security brokers and held that lying under oath to the National Association of Security Dealers could be prosecuted in the state criminal courts and was not the exclusive domain of the federal authorities. Justice Tom, writing for the Court, stated that the agency had long been construed as a private self-regulatory body rather than a federal entity and was not an exclusively federal tribunal. The state of New York therefore had jurisdiction to prosecute the crime of perjury committed within the state of New York even though the testimony was given before the NASD.

People v. Schachter, (N.Y.L.J., March 24, 2004, p. 18)

The First Department, in a unanimous decision, upheld a conviction of a defendant where the evidence was entirely circumstantial and the trial court refused to give a full circumstantial charge. The Appellate Court concluded that given the strength of the People's evidence and the fact that the charge, viewed in its entirety, conveyed the essential principles applicable to a circumstantial case, a reversal was not required.

People v. Glanda, (N.Y.L.J., March 29, 2004, p. 1)

In a unanimous decision, the Appellate Division, Third Department, reduced a first-degree murder conviction to second-degree murder. The Court stated that the recent Court of Appeals decision in *People v. Cahill*, __ N.Y.3d __; 2003 N.Y. Slip Op. 18881, mandated its determination. *Cahill* had concluded that an aggravating felony must involve a separate *mens rea*, or mindset. The Third Department concluded that the same factors which were present in *Cahill* mandated its determination in the instant matter.

People v. Gracius, (N.Y.L.J., April 14, 2004, pp. 1 and 4, April 15, 2004, p. 18)

A unanimous panel of the Appellate Division, First Department, held that a trial court had improperly barred evidence that the defendant had a history of mental illness. Although under CPL section 250.10, a criminal defendant has 30 days from the time they enter a plea of not guilty to notify that they will rely on psychiatric evidence, the Appellate Division found that the trial court in the instant case should have allowed an extension of that time period since the prosecutors would not have suffered any prejudice and it was clear that the issue of mental illness would play a significant role in the trial.

For Your Information

U.S. Supreme Court Hears Patriot Act Cases

As predicted in our Spring issue, the United States Supreme Court granted cert in several cases which involve determinations regarding various provisions of the Patriot Act. Two cases relate to the indefinite detention of non-U.S. citizens at the naval base at Guantanamo and two other cases test the power of the President to seize and detain U.S. citizens as enemy combatants. The Court, in hearing these historic cases, will define the authority of the executive branch in times of war and will also be reviewing its own power and the authority of other federal courts to review presidential actions. The stage has been set for another historic decision regarding an attempt to carefully balance concerns of civil liberties versus those of national and individual security. The Court heard oral arguments in these matters in late April and is expected to render decisions toward the end of June at the conclusion of its current term. Thus, when you receive copies of this issue, the Court may have already rendered its determination.

We urge our readers to watch for these important decisions and we will report on the actions taken by the Court in our Fall issue.

New Proposals to Deal with Misdemeanor Caseloads

The rising level of misdemeanor cases as police and prosecutors begin to focus on "quality of life crimes" has led to several recent proposals to radically change the procedures by which misdemeanor cases are handled. First of all, following up on a proposal that has been discussed over the last few years, the state Senate passed a bill to provide additional punishment for repeat misdemeanor offenders. Under the proposal, a person who has been charged with a misdemeanor after being convicted of three misdemeanors within a three-year period, would be sentenced as a felon and would face at least 1-1/3 years in state prison. The state Assembly is also considering the bill and whether any action would be forthcoming prior to the adjournment of the state legislature is yet to be determined.

In another development, Chief Judge Judith Kaye has initiated a new program in the Bronx, where the Bronx Criminal Court judges are automatically being elevated to "Acting Supreme Court Judge" status. The literal merging of the Criminal Court and the Supreme Court by this administrative fiat is supposed to allow judges from both courts to more expeditiously handle misdemeanor cases, which have dramatically risen in the Bronx. Thus, according to Judge Kaye, the Bronx Criminal Court, with 18 sitting judges has a backlog of 11,000 cases, while the Supreme Court, Criminal Term, with 33 sitting judges, has a backlog of only 2,800 cases.

Although the administrative merger of the two courts appears to be a way of bypassing the inability of the state legislature to act on a court unification program, this drastic use of administrative authority has raised questions of its constitutionality and whether the Office of Court Administration has begun to overstep the bounds of its prerogative.

Critics of Chief Judge Kaye's proposal argue that the drastic restructuring which she is, in fact, creating requires legislative action and that the number of pending misdemeanor cases can more easily and less expensively be handled by returning the large number of acting Supreme Court judges to their original Criminal Court status.

Legislative leaders from both political parties and in both legislative chambers have raised concerns regarding Judge Kaye's proposal; whether legislation will be sought to halt or modify the proposed program is uncertain at the present time. The program in the Bronx is presently scheduled to begin in the Fall and we will continue to report on developments regarding this growing controversy.

2003 Report of Lawyer's Fund for Client Protection

In its report for the year 2003, the Lawyer's Fund for Client Protection reported that the number of awards for trust and estate thefts tripled from the level in 2002 and that the dollar payments for those losses increased from $382,000 to $1.9 million. Overall, the fund reported a decline of 12 percent in the number of reimbursements to 165, but a growth of about 2 percent in the amount distributed to $5.8 million. The highest losses were experienced in the Second Department, principally in the counties of Nassau and Suffolk. During the 21 years of the fund's operation, the Second Department has accounted for 3,329 of the 5,593 awards distributed. The First Department has been responsible

for 1,171 awards and the Third and Fourth Departments 477 and 616, respectively.

Timothy J. O'Sullivan, the Executive Director of the fund, attributed the large number of awards in the Second Department to the size of the department and the fact that it has many solo practitioners who appear to more often experience financial problems. The client fund can reimburse up to $300,000 of a loss and is funded by money collected from attorney registration fees. The fund's unpaid Board of Trustees consists of five lawyers and two business and civic leaders.

New York State Bar Association Opposes Reduction In Peremptory Challenges

Chief Judge Kaye and several other members of the New York Court of Appeals have at one time or another called upon the state legislature to consider limiting or eliminating peremptory challenges. Legislation has also been proposed by the Office of Court Administration to reduce the number of peremptory challenges to 15 for Class A felonies, 10 for Class B and C felonies, and 7 for other felony matters. In April, the New York State Bar Association formally voted to oppose any reduction in peremptory challenges. The 242-member House of Delegates reiterated at its quarterly meeting that peremptory challenges should not be reduced further. The House of Delegates decision reflects the feeling of many practicing attorneys that peremptory challenges are the only way lawyers have of excluding those jurors they suspect but cannot prove are dishonest or otherwise inappropriate.

Mandatory Videotaping of Confessions

A current topic of interest in the criminal law area is whether the videotaping of confessions should be mandated. Some jurisdictions have been moving in that direction and various bar associations have concluded that such a rule would be a desirable outcome. The American Bar Association, the New York County Lawyer's Association, and the New York State Defender's Association have all issued reports on the matter. The issue was recently discussed by the Executive Committee of our Criminal Justice Section and further review is contemplated. Those in favor of the proposal argue that mandating videotaping would be helpful in determining whether any irregularities exist in the interrogation process and would provide a clear record of what occurs during questioning. Various law enforcement officials in New York have argued, however, that mandating videotaping would be a too costly and burdensome process.

An Assembly bill has been introduced to amend the Criminal Procedure Law so as to mandate the electronic recording of custodial interrogations. We will continue to report on the outcome of the proposed legislation and any official position taken by the Bar Association's House of Delegates.

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

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