NYSBA SPRING 2010 | VOL. 8 | NO. 2

New York Criminal Law Newsletter

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

Inside

Message from the Chair

The Executive Committee of the Criminal Justice Section has been unusually busy confronting a flurry of sensitive and pressing issues.

A spate of legislation has been proposed / pending on a number of topics. At our Annual Meeting in New York City on January 28, 2010, we discussed and made recommendations on a number of issues, including wrongful convictions, videotaping of confessions, amending existing laws regarding Brady material, creation of the Office of Indigent Services with the Division of Criminal Justice Services, and authorization for counties to create an office of conflict defender as part of a plan to provide representation for indigent defendants. A report has already been created and submitted to the Executive Committee of the New York State Bar Association regarding the first three topics mentioned. As the year progresses, we intend to more fully develop our positions on each already under consideration and to tackle other issues as they arise.

The Annual Meeting was truly a success, including our Awards Luncheon honoring a particularly worthy group of recipients for their service in the improvement of the criminal justice system. All officers elected in 2009 were re-elected to their respective offices commencing June 1, 2010 and running through May 31, 2011. District Representatives for each of the judicial districts were also elected.

As a final thought, it is important to note the passing of Section and Executive Committee member, Jack Litman. Jack, as you know, was an outstanding litigator and fully engaged in fully protecting the interests of all those he represented. His tireless devotion to the law and his innovative thinking not only produced outstanding results for his clients, but also established increased respect and understanding of the law and the legal profession. The Executive Committee has named a scholarship for him at the Young Lawyers Section Trial Academy, and is working with the New York State Bar Association Foundation to produce a suitable memorial to him. He will be truly missed and our thoughts go out to his family.

James P. Subjack

Message from the Editor

This issue provides details regarding the activities of our Section's Annual Meeting, which was held at the Hilton Hotel in New York City on January 28, 2010. Our annual luncheon was attended by approximately 100 members. As in the past, several awards were distributed to noteworthy recipients. The awards were presented to individuals who have contributed in some outstanding manner to the criminal justice system or the Criminal Justice Section. It was a pleasure to recognize those individuals for their outstanding work and service during the past year. The names of this year's award winners are published in our "About Our Section and Members" article. An interesting discussion was also presented at our luncheon by our featured speaker, Joseph Lentol, Chair of the Assembly Codes Committee, who commented upon pending legislation dealing with criminal law issues. A photo spread depicting events at our Annual Meeting is included in the centerfold of this issue. To provide a year-end review of the status of our Section, we also provide details regarding the number and composition of our membership and our financial status.

This issue also contains some interesting feature articles on the subject of the admissibility of expert testimony with respect to the reliability of identification evidence. One article is written by Peter Dunne, a regular contributor to our *Newsletter*, and the second is presented by Paul Shechtman, who has written widely on a variety of criminal law subjects. The New York Court of Appeals has recently rendered some new decisions in this area, and the two feature articles provide an update on the issue. The authors also present their various perspectives on this evolving development in the criminal law area. A third feature article discusses some recent trends relating to criminal appeals and is based upon discussions of the issue by former Appellate Division Justice Bentley Kassal and Supreme Court Justice Barry Kamins, a regular contributor to our *Newsletter*.

The United States Supreme Court, which opened its new term on October 5, 2009, has been quite active in the last several months in issuing decisions in the criminal law area. The New York Court of Appeals, which began hearing cases in early September, following its summer recess, also issued several decisions which should be of interest to criminal law practitioners. These new decisions are summarized in the appropriate sections within this *Newsletter*.

The "For Your Information" section contains a variety of interesting items for the benefit of our readers. Our "About Our Section and Members" portion also provides details regarding various activities of our Section and its members. As always, I appreciate the support and comments from our readers, and continue to urge members to contribute articles to our publication.

Spiros A. Tsimbinos

Request for Articles

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

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

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

www.nysba.org/CriminalLawNewsletter

Recent Developments in Eyewitness Identification Expert Testimony

By Peter Dunne

The recent cases of *People v. Abney*[1] and *People v. Allen* revisit the field of eyewitness identification expert testimony and begin to describe the types of cases where such testimony would be appropriate.

In 2001, the seminal case of *People v. Lee*[2] overruled a long line of cases[3] which stood for the proposition that expert testimony in the field eyewitness identification was inadmissible because it would infringe upon the jury's power to determine the reliability of the People's evidence. The Court in *Lee* held that expert testimony on the subject of eyewitness identification is not inadmissible per se, but the decision whether to admit it rests in the sound discretion of the trial court.

There were a number of questions which were unanswered by *Lee*. First was the question of corroboration. In *Lee*, the Court ruled that it was not an abuse of discretion to exclude expert testimony because the complainant's identification of the defendant was corroborated by other evidence. This other evidence consisted of the defendant's possession, two months after the robbery, of the car which was stolen in the robbery. However, the unanswered question was whether any piece of corroboration, however slight, would render expert testimony excludable.

Second was the question of the breadth of expert testimony. Experts assert that up to seventeen psychological factors of memory and perception affect the accuracy of eyewitness identifications.[4] Among these factors are concepts such as the correlation between confidence and accuracy, the effect of post-event information, confidence malleability, weapon focus, event stress, and cross-racial identification. The *Lee* decision left to subsequent litigation and *Frye*[5] hearings the determination as to which of these factors were generally accepted in the scientific community.

Following *Lee*, in *People v. Young*[6] the Court affirmed its commitment to admitting expert testimony in the appropriate case. It stated that the decision to admit expert testimony was within the bounds of the court's discretion and in the exercise of this discretion, the trial court should consider whether "the expert could tell the jury something significant that jurors would not ordinarily be expected to know already," including scientific studies of factors affecting the reliability of eyewitness identification.[7]

Finally, in *People v. LeGrand*[8] the Court held, "[W]here a case turns on the accuracy of eyewitness identification and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of the defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert, and (4) on a topic beyond the ken of the average juror."[9]

As to which psychological factors are the proper subject of expert testimony, the Court explicitly held that the following three factors were generally accepted by the scientific community: the correlation between confidence and accuracy, the effect of post-event information, and confidence malleability.[10]

"Experts assert that up to seventeen psychological factors of memory and perception affect the accuracy of eyewitness identifications."

People v. Abney involves two separate cases where an application by the defense to call an expert in the field of eyewitness identification was denied by the trial court. One of these cases was reversed and the other was affirmed. Because the decision to permit the calling of such an expert is so fact-driven, the facts of each case will be described in some detail.

In *People v. Abney*, a 13-year-old girl was on her way home from school. She descended a staircase into the subway where she was confronted by a man she did not know. The man asked her for some change. She stood face to face about two feet away from the man. She initially did not think that the man intended to harm her and was not immediately afraid. She looked him squarely in the face and told him she did not have any change. The stranger then put a knife to her throat. The girl described the knife as having a six inch blade. The man asked her to hand over her necklace. She refused, and the man ripped off the necklace and ran away. The girl immediately reported the robbery to the station attendant, and then went to the police station in Columbus Circle. She was interviewed by a detective and gave a description of the perpetrator.

Based upon the description given to him by the girl and by the circumstances of the robbery, the detective suspected that the perpetrator was the defendant, whom

he had previously arrested. The detective put together a photo array containing a picture of the defendant along with five other photos. The girl identified the defendant.

Twenty days later a lineup was conducted and the girl identified the defendant, saying that she was sure he was the man who robbed her.

At trial, the defense made an application to call an expert concerning "psychological factors of memory and perception that may affect the accuracy of witness identification."[11] This application was denied. The trial court stated that in its exercise of discretion, it did not consider the case an appropriate one for an expert witness for four reasons.

First, the application did not sufficiently "narrow the scope of the expert's proposed testimony." Second, testimony about how police techniques influence a lineup identification was irrelevant to the case. Third, two of proposed subjects had not "passed the *Frye* test" in other courts. Fourth, evidence about simultaneous versus sequential lineups was "unmanageable in a trial setting."[12]

In conclusion, the trial court stated that there was "nothing unique about the case…presenting issues that are beyond the ken of the ordinary juror." In its view, the relevant issues had been adequately explored during cross examination and could be argued in summation and covered in the jury charge. The defendant was convicted of robbery in the first degree.

In *People v. Allen*, two masked men barged into a busy barbershop in the Woodside neighborhood of Queens. The defendant Allen wore a mask which exposed the upper portion of his face, from his upper lip to his eyebrows. He was armed with a knife. An unapprehended accomplice displayed a gun, and announced, "This is a holdup." The gunman grabbed a barber, named Juan Almonte, pistol-whipped the owner, and dragged back a barber trying to escape. He put his gun into the mouth of a barber and went through his pants pockets. He demanded money from another barber, who emptied his pockets of money. The knife man asked Juan Almonte for money, checked his neck for a chain, looked around for money, and told the gunman, "It's time to go." The two ordered everyone to lie down on the floor, and the two fled the shop.

Gabriel Bierd, one of customers in the shop, recognized the knife-wielding robber as the defendant Gregory Allen. He had regularly encountered Allen in the neighborhood for a period of six months, recognized his voice, and recognized his "body type." He also provided to the investigating detective two nicknames which the defendant used.

Bierd looked through a mug shot book at the precinct and picked out a photograph of the defendant. A photo array was prepared and Bierd identified the defendant. This photo array was then taken to the shop and shown to Almonte, who also identified the defendant as the perpetrator armed with a knife.

At trial, the defense sought to introduce expert testimony regarding seventeen "psychological factors of memory and perception that may affect the accuracy of eyewitness identifications." The trial judge denied the application, finding that "this is not an area in which an expert is at all helpful" because the proposed expert testimony involved matters of "common sense and life experience."[13]

The defendant was convicted of robbery in the first degree as well as other charges.

As to the *Abney* conviction, the Court concluded that the trial court in *Abney* abused its discretion when it refused to permit the expert to testify on the subject of witness confidence. It was an abuse of discretion because it was clear that there was no evidence other than the girl's identification to connect the defendant to the crime.

On the other hand, in *Allen* the Court concluded that it was not an abuse of discretion when it refused to permit expert testimony. "Allen is not a 'case [that] turns on the accuracy of eyewitness identification [where] there is little or no corroborating evidence connecting the defendant to the crime.'"[14] Specifically, the Court pointed out that the existence of the second eyewitness was sufficient corroboration to exclude expert testimony.

These cases begin to resolve a number of questions left unanswered by *Lee*. First, on the question of how much corroboration is necessary to exclude eyewitness expert testimony, it firmly places emphasis on the existence of a second eyewitness identification. It can safely be said that where there is more than one eyewitness identification, it would not be an abuse of discretion to exclude expert testimony.

On the other end, not any piece of corroboration will suffice. In the *Abney* case, the defendant presented an alibi defense which indicated that the alibi witnesses sought to document the defendant's alibi well before the defendant was arrested. The Appellate Division, in affirming Abney's conviction, explicitly pointed to this as corroboration of the defendant's guilt.[15]

This was rejected by the Court of Appeals when it stated, "While defendant's muddled alibi defense was no doubt unhelpful to his cause with the jury, it is not overwhelmingly inculpatory either."[16] It is interesting to compare this statement with the fact that the Court found possession two months later of the stolen car in Lee as sufficient corroboration. Therefore, the Court cannot intend to mean that the corroboration must be "overwhelmingly inculpatory."

The fact remains that not any corroboration will do. However, the difference between the corroboration in *Lee* and the corroboration in *Abney* is minimal. Clearly, the difference can be explained on burden of proof grounds, i.e., the stolen car was part of the People's case in *Lee*, and the alibi was part of the defense case in *Abney*. Therefore, the decision whether to admit expert testimony must be made, at the latest, at the close of the People's case. It remains an interesting question if the result would have been different if the evidence of the defendant's attempt to document his alibi before his arrest had been introduced by the People during their direct case under a consciousness of guilt theory.

This question of the kind of corroboration necessary remains open. Trial courts are faced with myriad fact patterns in robbery cases, and whether a particular kind of corroboration meets the *Lee* standard will be a recurring one in the future.

"[T]he Court of Appeals has made it abundantly clear that expert testimony in the field of eyewitness identification is here to stay and must always be a part of a trial in appropriate circumstances."

Second, on the question of the scope of expert testimony, certain psychological factors have been settled and some have not. Clearly settled factors are correlation between confidence and accuracy, the effect of post-event information, and confidence malleability. Unsettled factors which might require a *Frye* hearing are effect of event stress, exposure time, event violence, weapon focus, and cross-racial identification. The only three reported cases which have held *Frye* hearings on these matters are *People v. Williams*,[17] on cross-racial identifications, exposure time, and weapon focus (allowing the testimony), *People v. Smith*,[18] on weapon focus (disallowing the testimony), and *People v. Radcliffe*,[19] on cross-racial identifications (allowing the testimony).

In conclusion, some questions still exist as to what constitutes "corroboration" of a single witness identification, and what is the proper scope of expert testimony. However, the Court of Appeals has made it abundantly clear that expert testimony in the field of eyewitness identification is here to stay and must always be a part of a trial in appropriate circumstances.

Endnotes

1. 13 N.Y.3d 251 (2009).
2. 96 N.Y.2d 157, 726 N.Y.S.2d 361, 750 N.E.2d 63.
3. *See, e.g.*, *People v. Valentine*, 53 A.D.2d 832, 385 N.Y.S.2d 545 (1976).
4. *Abney*, *supra*, at 7. For an excellent review of the social science literature, see, *People v. LeGrand*, 196 Misc.2d 179, 747 N.Y.S.2d 733.
5. *Frye v. United States*, 293 F. 1013 (1928).
6. 7 N.Y.3d 40, 817 N.Y.S.2d 576, 850 N.E.2d 623 (2006).
7. *Id.* at 45.
8. 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 574 (2007).
9. *Id.* at 452.
10. *Id.* at 458.
11. *Abney*, *supra*, at 4.
12. *Id.*
13. *Id.* at 8.
14. *Id.* at 11.
15. *People v. Abney*, 57 A.D.3d 35, 867 N.Y.S.2d 1.
16. *Abney*, *supra*, at 11.
17. 14 Misc. 3d 571, 830 N.Y.S.2d 452 (Nov. 29, 2006).
18. 2 Misc. 3d 1007A, 784 N.Y.S.2d 923 (Mar. 26, 2004).
19. 196 Misc. 2d 381, 764 N.Y.S.2d 923 (Apr. 8, 2003).

Peter Dunne is presently serving as the law secretary to Queens Supreme Court Justice Robert McGann. While at Boston University School of Law, he served as the Editor of the *Law Review*, and he has written several articles for our publication over the last few years. In fact, one of his earlier articles on the issue of expert identification testimony was cited in one of the New York Court of Appeals' decisions on the issue.

In the Area of Eyewitness Identification Expert Testimony, *LeGrand* Should Be Revisited

By Paul Shechtman

Earlier this term, the New York Court of Appeals considered the companion cases of *People v. Abney* and *People v. Allen*, which involved the admissibility of expert testimony on the reliability of eyewitness identifications.[1] In reversing Abney's conviction and affirming Allen's, the Court applied the rule it established in 2007 in *People v. LeGrand*: "Where [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witnesses's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert, and (4) on a topic beyond the ken of the average juror."[2] The Court's new decisions, however, expose the weakness of the *LeGrand* rule.

A.

Abney was indicted for the robbery of a 13-year-old girl, who was on her way home from school. At trial, the girl was the prosecution's principal witness. She identified Abney as the robber, emphasizing his "puppy dog eyes" and "pinkish-purplish lips." (She had previously selected him from a lineup held 20 days after the incident, which led to his arrest.) In his defense, Abney presented an alibi: his girlfriend and a teacher testified that at the time of the robbery, he was picking up the girlfriend's daughter at her pre-school. The alibi defense, however, proved suspect. The girlfriend testified that she had gone to the school the day after the robbery to obtain a photocopy of the prior day's sign-out sheet (which showed that the defendant had picked up her daughter), and the teacher confirmed that account. Their testimony enabled the prosecutor to argue that the girlfriend was seeking the log to establish an alibi for a crime with which Abney had not yet been charged.

The defense also sought to call an expert on eyewitness identification to "educate the jurors on many counterintuitive findings that bear directly on the reliability of the identification evidence in [the case]." The trial judge excluded the expert testimony, Abney was convicted, and a divided panel of the First Department upheld the conviction. The majority concluded that the defendant's "false alibi" witnesses corroborated the eyewitness testimony, and therefore that the trial court had not abused its discretion under *LeGrand*.

The facts in *Allen* were these: On March 10, 2004, two masked men barged into a barbershop in Queens. One of the men wielded a knife, and his mask let the top portion of his face exposed. The robbers made off with $30. As they fled the store, a customer apparently recognized the knife-wielding robber as Gregory Allen from his "body type" and voice.

At trial, the customer and a barber testified that Allen was the knife-wielding robber. Both had selected him from a court-ordered lineup held four months after the incident. That lineup followed an aborted attempt the day after the crime; it failed because Allen refused to cooperate: he pulled his shirt over his head, crawled into a fetal position, and refused to hold up a number unless all the men in the lineup wore masks.

As in *Abney*, the defense sought to rebut the People's proof by calling an expert on eyewitness identification. The trial judge excluded the testimony, Abney was convicted, and the Second Department affirmed the conviction.

B.

Writing for a unanimous Court of Appeals, Judge Susan Read concluded that under *LeGrand*, the trial court had abused its discretion in *Abney* when it refused to allow the defense expert to testify to principles related to witness confidence (which are generally accepted within the relevant scientific community) and when it refused to conduct a *Frye* hearing to determine if other aspects of the proposed testimony (the effect of event stress, exposure time, weapon focus and cross-racial identification) were scientifically accepted.[3] Nor was the error harmless. While Abney's "muddled alibi" was "unhelpful to his cause," it was not "overwhelmingly inculpatory," and he may not "have pursued an alibi defense in the first place if [his expert] had [been permitted to] testif[y]."

The result in *Allen* was different because the prosecution had elicited sufficient corroborative evidence. In Judge Read's words: "Critically, [the customer] independently identified defendant as the knife-wielding robber who searched him and stood nearby throughout the course of the robbery. And defendant was not a stranger to…[the customer]."

C.

Abney and *Allen* are faithful to *LeGrand* but raise several issues.

First, can the testimony of a second eyewitness supply the corroborative proof that *LeGrand* requires before a judge can exclude expert testimony? *LeGrand* itself suggests that the answer is "no." There, the defendant was charged with the stabbing murder of a livery cab driver. At trial, the People's proof consisted of the testimony

of three eyewitnesses, each of whom identified the defendant as the perpetrator. For the Court, the case was one that turned "solely on the accuracy of the witnesses' identification…there was no corroborating evidence connecting defendant to the crime." On that basis, the Court concluded that "the testimony of defendant's expert would have benefited the jury in evaluating the accuracy of the eyewitnesses' identifications." The Court's use of the plural confirms that it was well aware that more than one eyewitness had testified.

Allen, however, suggests a caveat. There, the fact that the customer-witness had "independently identified [the] defendant" was deemed "critical[]," but the Court quickly added that the defendant "was not a stranger" to the customer. Apparently, this means that the eyewitness testimony of a non-stranger—a person who is less susceptible to suggestive identification procedures—can corroborate the eyewitness testimony of a stranger for purposes of *LeGrand.* Notably, however, Allen was partially masked, and the expert was prepared to testify to "unconscious transference"—the notion that an "innocent person seen in some context can be mistakenly identified as having been seen at the crime." That is to say, the expert would have testified that the non-stranger's testimony was itself suspect.

Second, should the *LeGrand* rule apply if there is strong, but contested, corroborative proof? Consider this hypothetical: D is on trial for the robbery of V, and the prosecution's proof consists of V's eyewitness testimony and a fingerprint expert's testimony that D's print was found on V's purse. D claims that the fingerprint evidence was planted, and he seeks to call an expert on eyewitness identifications to cast doubt on V's testimony. If the judge excludes the expert's testimony, is it an abuse of discretion?

The hypothetical recalls the United States Supreme Court's 2006 decision in *Holmes v. South Carolina*.[4] There, the Court struck down a South Carolina evidence rule that prohibited a defendant from introducing proof of third-party guilt—i.e., evidence that another person had committed the crime—if the prosecution had introduced forensic evidence which, *if believed*, strongly supported a guilty verdict. Writing for the Court, Justice Samuel Alito found the rule "irrational": "Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third party guilt has only a weak logical connection to the central issues in the case." Presumably, the same principle should apply where expert testimony on eyewitness identification is at issue: Just because other evidence, if credited, would corroborate the eyewitness' testimony, it does not follow that the expert's testimony would not help the jury in assessing the defendant's guilt.

Third, can proof elicited in the defendant's case be used to corroborate the eyewitness' testimony? Consider a variant of *Abney*: The prosecution's case consists only of the testimony of A, an eyewitness. In his defense, D calls W, an alibi witness, who is discredited on cross-examination; indeed, W admits that D solicited him to provide a false alibi. Is W's testimony corroborative proof under *LeGrand*? *Abney* seems to suggest "no" ("it is possible [D] would not have pursued an alibi defense in the first place if [the expert] had testified"), but that answer seems problematic. At a retrial, the prosecution could call W in its case-in-chief, in which event the trial court would not abuse its discretion if it excluded the expert. If that is so, then it makes little sense to order a retrial in such circumstances.

Finally, there is the question of harmless error. In *Abney*, Judge Read found that the error was not harmless, suggesting that a *LeGrand* error can be harmless in certain cases. But can it? One can imagine cases in which the eyewitness viewed the perpetrator for an extended period or in which there were a large number of eyewitnesses (presumably more than the three in *LeGrand*), where the exclusion of the expert could be deemed inconsequential. But to recognize the existence of such cases is to acknowledge that not all eyewitness identification cases are alike—an acknowledgement that is at odds with the *LeGrand* rule.

D.

The *LeGrand* rule poses so many nettlesome questions because of its very structure. Nowhere else in New York evidence law does the admissibility of expert testimony depend upon the strength of a party's case. Typically, a judge asks only these questions: Is the proposed expert testimony relevant to a contested issue? Is the subject matter beyond the ken of lay jurors? Is the proffered witness a qualified expert? And if the expert intends to offer "novel scientific testimony," does it meet the *Frye* general acceptance standard? Or, to paraphrase Wigmore, on this subject would this jury receive appreciable help from this witness? Helpfulness, and not the extent of corroborative proof, should govern the admissibility of expert testimony on eyewitness identifications.

In sum, *Abney* and *Allen* apply *LeGrand* faithfully, but the Court of Appeals should revisit the *LeGrand* rule.

Endnotes

1. 13 N.Y.3d 251 (2009).
2. *People v. LeGrand*, 8 N.Y.3d 449 (2007).
3. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
4. 547 U.S. 319 (2006).

Paul Shechtman is a partner in the Manhattan firm of Stillman, Friedman & Shechtman, P.C. He is recognized as a leading criminal law practitioner and has contributed many articles to our *Newsletter*. He also serves as a professor of law at Columbia Law School. He previously served as Commissioner of the New York State Division of Criminal Justice Services.

New Trends in the Area of Criminal Appeals

By Spiros Tsimbinos

In a recent article by former Appellate Division Justice Bentley Kassal, which appeared in the New York State Bar Association *Journal* for November-December, 2009, Volume 81, Number 9, at page 35, a review of appellate statistics in the various state courts for the year 2008 was presented. In another article, which appeared in the *New York Law Journal* of December 7, 2009, at page 3, written by Supreme Court Justice Barry Kamins, the issue of criminal leave applications to the New York Court of Appeals was also discussed. The information provided in both of these articles indicates that defense lawyers who represent criminal defendants in the appellate process may finally be facing a better chance of success than was available in prior years. In Justice Kassal's article, for example, he cites statistics from the Appellate Divisions, which reveal that the number of reversals or modifications in criminal cases has slightly increased from past years. For example, in 2004, with respect to the First Department, only 2% of criminal cases were reversed and 5% were modified, with 93% being affirmed. In 2008, however, the reversal rate had increased to 5%, with another 5% being modified. Within the Second Department, 6% of the criminal appeals resulted in a reversal, with 5% being modified. In the Third Department, 10% of the criminal appeals were reversed, and 9% were modified. This was a substantial increase in reversals over 2004, where only 6% were reversed. Similarly, the Fourth Department had a 6% reversal rate, up from 3% in 2004, and a 10% modification rate, up from 8% in 2004.

With respect to the area of criminal leave applications to the New York Court of Appeals, during the last several years the number of leave applications granted has amounted to 2% or less. In the year 2008, a total of 2,637 criminal leave applications were decided, with only 53 being granted, or a rate of 2%. In 2007, the rate granted was 1.5%. The fact that only one or two criminal leave applications out of every 100 was granted in criminal cases has caused criminal law practitioners to question the leave application procedures, and the difficulty in obtaining Court of Appeals review of criminal matters. Shortly after Chief Judge Lippman assumed his position, he addressed the issue of criminal leave applications and indicated he would look into the matter. According to Mr. Kamins' article, and a further analysis which appeared in the *New York Law Journal* of November 27, 2009, at pages 1 and 5, it appears that Judge Lippman's review may have had some impact in increasing the number of leave applications which are being granted in criminal cases. The *New York Law Journal* article reported that through October of 2009, Judges on the Court of Appeals have granted leave in 68 criminal cases, which is already the most in any calendar year during the past decade. The percentage of criminal leave applications for the first ten months of 2009 has thus reached 3.3%. Chief Judge Lippman himself has granted leave in 6.9% of the applications presented to him. Judges Ciparick, Smith and Pigott have also granted leave in over 3% of the applications before them. The judge with the lowest percentage rate for the granting of leave applications for the year 2009 appears to be Judge Jones, who has a 1.9% rating.

Mr. Kamins, in his article, indicates that several bar groups have recently begun to address the criminal leave process with particular emphasis on the differences between civil and criminal cases. The argument being raised is that the current process promotes a perception of unfairness: the success or failure of the leave application depends upon the single judge to whom the application is randomly assigned. There is a disparity in the number of criminal leave applications granted each year by the individual judges on the Court.

In late December, the New York City Bar Association, in fact, issued several recommendations to modify the existing procedure for determining leave applications. The City Bar has recommended that each criminal leave application be assigned to a panel of three judges, with leave to be granted at the request of any one member. Information regarding the leave application should also be disseminated to all of the judges on the Court, so that the comments of any one judge can be received and considered by the judges on the decision- making panel.

In commenting upon the situation regarding criminal leave applications, Judge Lippman is quoted as stating, "What I am concerned about are not the numbers per se, but that there is a reality and a perception that everybody has their day in court." Judge Lippman also indicated that the additional grants which have been made during the last ten months have not placed any undue burden on the Court's calendar.

Although the rate of reversal of criminal convictions in the appellate courts is still extremely small, and the percentage of criminal leave applications to the New York Court of Appeals is also quite limited, it appears that at least in the last year, the odds in favor of criminal defense attorneys handling appellate matters have slightly increased, and the trend appears to be heading in a more positive direction. After years of facing frustrating odds, better times may be ahead for criminal defense attorneys in the appellate area.

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 October 15, 2009 to February 1, 2010.

Proof of Uncharged Crimes

People v. Arafet, decided October 22, 2009 (N.Y.L.J., October 23, 2009, pp. 1, 9 and 45)

In a 4-3 decision, the New York Court of Appeals upheld a Defendant's conviction and ruled that the Defendant was not denied a fair trial when the trial court allowed the prosecution to introduce evidence of four other criminal incidents which were not charged in the indictment. In the case at bar, the Defendant had been convicted of stealing a trailer containing $1 million worth of merchandise. During the trial, an FBI agent was allowed to testify that the Defendant had been convicted of four other incidents in the past which were of a similar nature. The majority of the Court found that because of the unique nature of the type of crime and the specialized and unusual skills it took to hook up a trailer and operate a big rig, the prior incidents in question did constitute a *Molineux* violation, but any error which occurred was harmless. The Court concluded that the evidence of the Defendant's guilt was extremely strong, including the fact that his fingerprint was found near the scene of the crime, and that therefore there was no likelihood that the Defendant would have been acquitted had the evidence linking him to past similar crimes not been admitted. The four-Judge majority consisted of Judges Smith, Graffeo, Read and Pigott, Jr.

A vigorous dissent was issued by Judge Ciparick, who called the admission of all of the evidence about the Defendant's past activities a flagrant *Molineux* violation which was highly prejudicial and which could have contributed to the outcome of the verdict. Judge Ciparick was joined in dissent by Chief Judge Lippman and Judge Jones, Jr.

Lack of Preservation

People v. McNair, decided October 22, 2009 (N.Y.L.J., October 23, 2009, p. 47)

In a unanimous decision, the Court of Appeals affirmed the Defendant's conviction of forgery in the second degree. The Defendant had claimed on appeal that the trial court had committed reversible error in accepting his plea because his statements to the Court negated the element of intent to defraud. The Court of Appeals found, however, that the Defendant had neither moved to withdraw his plea, nor to vacate the judgment of conviction. Instead, he challenged the sufficiency of the plea allocutions for the first time on direct appeal. While agreeing that the Defendant, during the plea colloquy, initially made remarks that cast significant doubt on his guilt concerning the element of intent to defraud, the plea minutes demonstrated that the trial court thereafter properly conducted an inquiry and found that the Defendant possessed the necessary criminal intent to defraud. Having failed to move thereafter to withdraw his plea, the Court of Appeals concluded that the Defendant had waived any further challenge to the allocution, and that therefore no issue was preserved for Court of Appeals review. The Court, in rendering its ruling, cited to its prior decision in *People v. Lopez*, 71 N.Y. 2d 662 (1988).

Expert Testimony on Issue of Identification

People v. Abney

People v. Allen, decided October 27, 2009 (N.Y.L.J., October 28, 2009), pp. 1, 10 and 39

In a pair of cases dealing with the issue of expert testimony on eyewitness identifications, the New York Court of Appeals attempted to expand upon some earlier rulings and to provide additional guidance for trial judges when dealing with this issue. In *People v. Abney*, the Court ruled, in a 6-0 decision, that the trial judge had abused his discretion in refusing to allow the Defendant's expert to testify on the subject of witness confidence in the identification which was made. In rendering its ruling, the Court of Appeals reversed a determination of the Appellate Division, First Department, which had upheld the exclusion of the expert testimony. The ruling in the *Abney* case involved a single witness identification, and the Court of Appeals determined that a hearing should have been held to determine if the scientific community had a generally accepted body of knowledge relating to the proffered expert testimony. The reliability of eyewitness testimony involving the effect of event stress, exposure time, event violence and weapon focus were proper subjects to be explored. Thus, in *Abney*, the Court found that a reversal was required and a new trial ordered.

In *People v. Allen*, however, the New York Court of Appeals determined, again by a 6-0 vote, that since two eyewitnesses, both of whom knew the suspect, independently identified him, the case was not one that turned on little or no corroborating evidence and thus the trial judge's ruling to reject expert testimony was not an abuse of discretion, and did not warrant a new trial. In issuing its rulings, the Court of Appeals relied upon its previous determination issued in 2007 in *People v. LeGrand*, 8 N.Y.3d 449. Justice Lippman took no part in either decision.

Presentation of New Arguments Requires Appellate Division Review

People v. D'Alessandro, decided October 27, 2009 (N.Y.L.J., October 28, 2009, p. 30)

In a unanimous decision, the New York Court of Appeals reversed an Order of the Appellate Division, First

Department, and remitted the matter back to that Court for further proceedings. The ruling by the New York Court of Appeals was based upon procedural grounds. The Appellate Division, First Department, had rejected the Defendant's initial claim on the grounds that it constituted a motion to re-argue, and had previously been determined. The Defendant's application to the Appellate Division had been based upon a writ of error *coram nobis*, claiming that appellate counsel had been ineffective for failing to raise a speedy trial argument on the original appeal.

The Court of Appeals concluded that the Defendant's application in fact raised new arguments which had not been raised in his previous application. The Appellate Division had thus erred in characterizing the second application as a motion to re-argue, and since it did not pass on the merits of the Defendant's new application, the matter had to be remitted to the Appellate Division for review by that Court.

Prosecutorial Misconduct

People v. Colon

People v. Ortiz, decided November 19, 2009 (N.Y.L.J., November 20, 2009, pp. 1, 7 and 45)

In a unanimous decision, the New York Court of Appeals reversed the conviction of two Defendants, and ordered a new trial on the grounds that the prosecutor had failed to correct false testimony provided by a key witness with respect to the benefits which had been received as a result of a plea agreement with the prosecutor's office. After providing damaging testimony against the Defendants regarding their alleged involvement in a 1993 murder, the witness stated that she had been allowed to enter a plea to disorderly conduct in order to avoid jail, as a result of a plea agreement with the prosecutor's office on a misdemeanor drug arrest. The witness further testified that this was the only benefit she had received, and specifically denied that she had an additional agreement with prosecutors on a pending felony drug charge.

In ordering a reversal, the Court of Appeals concluded that the prosecutor had failed to correct this false testimony, since the prosecutor in question had personally interceded with narcotics prosecutors in the felony drug case, and had been involved in arranging the relocation of the witness's grandparents in an effort to reduce safety concerns expressed by the witness. In addition to the prosecutor's failure to correct the erroneous testimony when provided, the prosecutor compounded the misconduct by repeating in summation the witness's testimony that she had only received a limited benefit in return for her testimony. The Court also found misconduct in the failure of the prosecutor to turn over certain notes to the defense prior to trial, with respect to an interview of witnesses which was held. In reversing the determination of the Appellate Division, First Department, which had upheld the conviction, the New York Court of Appeals, in a decision written by Judge Graffeo, concluded that "the prosecutor's errors could not be considered as harmless. Unlike the Appellate Division, we believe that there is a reasonable possibility that these errors affected the jury's verdict." Chief Judge Lippman, who was in the Appellate Division at the time when that Court issued its ruling, took no part in the Court of Appeals determination.

Crawford Issue

People v. Brown, decided November 19, 2009 (N.Y.L.J., November 20, 2009, pp. 1, 7 and 45)

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction and rejected the Defendant's claim that his Sixth Amendment rights were violated because his lawyer was not allowed to question in Court the laboratory technician who processed his DNA tests. Interpreting the United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004), in which the United States Supreme Court restricted the admission of hearsay statements in criminal cases, and also citing to the U.S. Supreme Court's most recent decision in *Melendez-Diaz v. Massachusetts* 557 U.S. __ (2009), the Court of Appeals ruled that the introduction of a DNA report prepared by a private subcontractor laboratory, where the technician who prepared the report did not testify, is not a *Crawford* violation. In issuing its decision, the Court noted that the type of technicians involved in the case can offer no testimony other than how they performed certain procedures. The Court also noted that even though the Defendant had raised the instant issue, defense counsel had not questioned the forensic biologist who did testify, and who linked the Defendant's DNA with samples from a rape case collected from a nine-year-old girl in Queens. Under these circumstances, the Court concluded that no constitutional violation had occurred, and that the Defendant's conviction should be affirmed.

Following the United States Supreme Court decision in *Melendez-Diaz*, there was considerable speculation as to what its effect would be on New York law, in particular on the Court of Appeals ruling in *People v. Meekens*, 10 N.Y.3d 136 (2008). This issue, in fact, was the subject of one of our feature articles in our Winter issue. In *People v. Brown*, the Court of Appeals has clearly indicated that it still continues to view *People v. Meekens* as good law. Since it cited that decision in its ruling, it thus appears that the Court of Appeals will continue to take a somewhat restricted view of the full reaches of the *Crawford* decision.

Criminal Possession as a Lesser Included Offense of Criminal Sale

People v. Davis, decided November 24, 2009 (N.Y.L.J., November 25, 2009, pp. 6 and 43)

In a 5-2 decision, the New York Court of Appeals determined that criminal possession of a controlled substance in the seventh degree is not a lesser included offense of criminal sale of a controlled substance in the third degree, and therefore, it was not error for the trial court to

refuse to provide that charge to the jury. The five-Judge majority, in an opinion written by Judge Ciparick, concluded that criminal possession and criminal sale can be separate crimes, and that a different ruling is not required simply because the Defendant has asserted an agency defense. The majority relied upon the decision of *People v. Glover*, 57 N.Y. 2d 61 (1982).

Judges Jones and Pigott dissented, arguing that the raising of the agency defense created an exception to the *Glover* ruling. The dissenting opinion stated that in a drug sale case such as the one at bar, not charging simple possession where the trial court properly submits the agency to the jury undermines the defense in question. Further, submitting the agency defense without simple possession may have had a coercive effect on the jury.

Post-Conviction Motion Regarding Juror Misconduct

People v. Samandarov, decided November 24, 2009 (N.Y.L.J., November 25, 2009, pp. 6 and 44)

In a 6-1 decision, the New York Court of Appeals upheld the denial, without a hearing, of a Defendant's request to set aside his guilty verdict for attempted murder and other charges, pursuant to CPL § 330.30 (2). The Defendant had argued that jury deliberations had been tainted on the basis of an unidentified juror's admission in a newspaper article that the dangers of organized Russian criminals were discussed by jurors throughout the Defendant's trial. In a majority opinion, written by Judge Robert J. Smith, the Court concluded that the evidence showed at best that jurors had speculated among themselves that the case had Russian mob connections. The Court found that the nature of the case almost invited this sort of speculation, and pointed out that even the Defendants chose to bring it up in *voire dire*. Under these circumstances, the majority concluded that there was no adequate record to provide grounds for believing that the jury's verdict was based upon improper outside influences. Chief Judge Lippman and Judge Pigott dissented, finding that a hearing should have been held to explore some possible *Rosario* violations, which were also raised by the defense.

Sex Offender Registration Act

People v. Alemany, decided November 23, 2009 (N.Y.L.J., November 24, 2009, pp. 6 and 48)

In a unanimous decision, the New York Court of Appeals determined that homelessness can be considered as a risk factor in determining points for the purposes of determining the proper risk level under the Sex Offender Registration Act. The Court found that when there is clear and convincing evidence that a defendant is undomiciled and lacks community ties, the determining court can utilize these factors in setting the appropriate risk level. The Court found that it was a valid exercise of discretion to weigh whether a homeless offender might be more dangerous because he had fewer ties to the community and could avoid detection more easily than someone with a permanent residence. The decision was written by Judge Read. Chief Judge Lippman took no part in the decision, since the case involved an earlier determination by the Appellate Division, First Department, where he previously served.

Molineux Ruling and Harmless Error

People v. Gillyard, decided November 23, 2009 (N.Y.L.J., November 24, 2009, pp. 6 and 49)

In a unanimous decision, the New York Court of Appeals determined that it was error for the trial court to admit into evidence testimony that the Defendant was caught with a universal handcuff key while jailed at Riker's Island. The Defendant was on trial for charges of impersonating a police officer while waiving a badge and pulling over two vehicles. The Court's opinion, which was written by Justice Pigott, found that the evidence regarding the Defendant's familiarity with using handcuff keys had little relevance to his case and should not have been admitted. The Court of Appeals, however, then determined that the error which occurred was harmless, because there was overwhelming evidence in the case against the Defendant, including the eyewitness testimony of two police officers who witnessed his acts of impersonating an officer. The Defendant's conviction was therefore affirmed. Chief Judge Lippman once again took no part in the decision, since the matter involved a First Department case.

Prosecutor's Cross Examination

People v. Henderson, decided November 23, 2009 (N.Y.L.J., November 24, 2009, p. 50)

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for attempted assault in the first degree and other crimes, and the sentence imposed thereon. The Defendant had claimed that the prosecutor, in cross-examination and in summation, had committed reversible error by engaging in improper tactics. The case involved a fight at a correctional facility. The Court found that the prosecutor's questions on cross examination reasonably attacked the witness's truthfulness, and explored motives for the testimony which was provided. Further, the prosecutor's comments during summation were a fair response to defense counsel's closing argument. Under these circumstances, the Defendant was not denied a fair trial, and the conviction in question was properly upheld.

Gang Assault

People v. Mynin

People v. Sanchez, decided December 1, 2009 (N.Y.L.J., December 2, 2009, pp. 6 and 45)

In a decision involving two separate Defendants, the New York Court of Appeals, in a 4-3 split, determined

that in cases involving the Gang Assault Statute, the two or more persons who provide aid do not have to share the criminal intent of the Defendant. The Gang Assault Statute applies when a person who intends to cause physical injury to another causes that person or a third person serious physical injury, and is aided by two or more other persons actually present. See Penal Law §§ 120.06 and 120.07. In the case at bar, the trial court had provided the jury with instructions that stated, "Even if you find an individual defendant not guilty of this crime because the People have not proven beyond a reasonable doubt that he had the intent required for the commission of the crime, you can still find another defendant or defendants guilty if you find that the not guilty defendant was actually present."

The defense had argued in the case that for the Gang Assault Statute to apply, at least three persons involved in an attack must share the same intent to cause physical injury. Thus, if any of the three were acquitted, none of the three could be found guilty. The majority's ruling, to the effect that the statute does not require that two or more persons who aid a defendant who intends to injure another person must share the defendant's intent, in effect allows prosecutors to seek much different penalties, even if only one person is apprehended in a chaotic mob-type situation. The majority ruling was joined in by Judges Pigott, Graffeo, Read and Smith. Judges Jones, Lippman and Ciparick dissented. The dissenting opinion argued that the Penal Law Statute in question requires that all members involved in the assault have the specific intent to cause physical injury. The sharp split within the Court makes this case one of the most controversial to have been issued during the Court's current term.

Prosecutorial Misconduct

People v. Riback, decided December 1, 2009 (N.Y.L.J., December 2, 2009, pp. 6 and 45)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction because the prosecutor's summation went beyond the evidence presented, and the bounds of fair comment. The case involved the conviction of a doctor, who was a pediatric neurologist, and who was accused of molesting young boys he had treated. The indictment had charged the Defendant with molesting 14 boys, but during the trial, the prosecution elicited from a witness that 49 of the doctor's young patients had been interviewed by police, raising the inference that other children had also been molested. The prosecutor, in summation, then suggested during summation that "dozens of additional victims had been molested." The Court of Appeals found the prosecutor's tactics and remarks to be of such an egregious nature as to require a new trial. The Court therefore reversed the conviction, and remitted the matter back to the Albany County Court for retrial.

Failure to Accept Clear Verdict from Juror

People v. Simms, decided December 1, 2009 (N.Y.L.J., December 2, 2009, p. 46)

In a unanimous decision, the New York Court of Appeals ordered the holding of a new trial because one of the jurors, when polled with respect to the unanimity of the verdict, told the Court, "Well, it is my verdict, although I feel like I was pressured to make that decision." The trial court then simply interjected, "That is your verdict, is that correct?" To which the juror answered, "Yes." Defense counsel then sought a conference, and moved for a mistrial on the basis of the juror's remarks. The trial judge subsequently conducted a further inquiry of the juror in question. The Court of Appeals determined, however, that the Court's inquiry did not clear up the reasons why the juror felt duress or pressure, and had not been able, through his questioning, to insure that the verdict was not the product of actual or threatened physical harm. Under these circumstances, a reversal was required, and a new trial was ordered.

Video Testimony of Witness

People v. Wrotten, decided December 15, 2009 (N.Y.L.J., December 16, 2009, pp. 1, 2 and 38)

In a 4-2 decision, the New York Court of Appeals held that a trial court properly allowed an elderly man who was too ill to travel to testify against his alleged attacker via a two-way video conference hookup from California. The majority opinion, written by Judge Ciparick, determined that Judiciary Law § 2-B, gives judges the authority to use innovative procedures where necessary, to carry into effect the powers and jurisdiction possessed by the Court. The majority found that there was nothing in the state statutes that expressly prohibited the use of the televised testimony. The majority also found that there was no violation of the right of confrontation, since the witness testified under oath, the Defendant had the right of cross-examination, and the Judge, the jurors, and the Defendant all had the opportunity to view the demeanor of the witness. Judge Ciparick was joined in the majority opinion by Judges Graffeo, Read and Pigott. Judges Jones and Smith dissented, arguing that in the absence of any express legislative authorization, the trial court lacked the inherent authority to permit the procedure in question. Chief Judge Lippman took no part, since the matter involved a First Department case.

Statute of Limitations

People v. Ramos, decided December 15, 2009 (N.Y.L.J., December 16, 2009, p. 39)

In a unanimous decision, the Court of Appeals determined that the prosecution, in bringing the instant indictment, was not barred by the five-year Statute of Limitations, pursuant to CPL § 30.10(2) (b). The Court determined that although the indictment occurred nearly 10 years after the incident, Defendant's whereabouts were

continuously unknown, and continuously unascertainable, despite the reasonable diligence of the detectives assigned to the case. The Court further noted that the police could not have proceeded until the Defendant's DNA profile from the rape kit taken from the victim was matched to DNA evidence taken from the Defendant pursuant to a subsequent incarceration.

Admission of Past Testimony

People v. Hilts, decided December 17, 2009 (N.Y.L.J., December 18, 2009, p. 42)

In a unanimous decision, the Court of Appeals upheld the admissibility of the testimony of a police informant given at an earlier trial. The Court of Appeals held that such testimony was allowable under CPL § 670.10, and that in the case at bar, the Defendant had a full and fair opportunity to cross-examine the informant at the first trial, and the People had established that they could not locate the informant after due diligence efforts had been exhausted.

Claim of Ineffective Assistance of Counsel

People v. Konstantinides, decided December 17, 2009 (N.Y.L.J., December 18, 2009, p. 40)

In a 4-3 decision, the New York Court of Appeals upheld a Defendant's conviction and denied his claim that because his attorney had a potential conflict of interest, he was denied the effective assistance of counsel. In an opinion written by Judge Read, the majority found that the prosecution had raised the issue, and that the Defendant had been fully informed of the potential conflict, and chose to proceed with the counsel in question. The majority also determined that the Defendant had failed to show that the alleged potential conflict had affected the outcome of the proceedings. With respect to a secondary issue raised by the Defendant, the majority also determined that a hearing was not required to determine the constitutionality of a prior felony conviction which was considered by the Court in imposing sentence. The Court found that Defendant's allegations in his motion papers were not sufficiently supported by additional facts which would have required the Court to hold a hearing on the issue. Accordingly the Defendant's conviction was upheld.

In a dissenting opinion, which was joined in by Judges Smith, Chief Judge Lippman and Judge Ciparick, the dissenters argued that the trial record revealed a conflict of interest, and an error by the trial court in dealing with it. Since one of the accusations in question was that one of the lawyers was accused in open court of joining with a defendant in an attempt to suborn perjury and to bribe a potential witness, the accusations required a more thorough inquiry to insure that any waiver was knowingly and intelligently made. A post-trial hearing should therefore have been held.

Admissibility of Hearsay Evidence

People v. Ramos, decided January 12, 2010 (N.Y.L.J., January 13, 2010, p. 38)

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial on the grounds that the trial court had committed reversible error when it admitted hearsay evidence without a proper foundation being established on CPLR 4518(a). The Court concluded that even though some documents may be admitted as business records without foundation testimony in the case at bar, the document in question did not fall in this category. Nothing on its face indicated that it was made in the regular course of business, and that is was the regular course of business to make it. Since the document in question was an important part of the people's evidence with respect to the charges of a scheme to defraud, the error which occurred could not be deemed harmless, and a new trial was required.

Extradition

People ex rel. Blake v. Pataki, decided January 12, 2010 (N.Y.L.J., January 13, 2010, pp. 1 and 38)

In a case which had previously divided the Appellate Division, the New York Court of Appeals unanimously upheld a refusal to grant a writ of habeas corpus in the Defendant's favor. The Defendant, who had resided in Long Island for many years, had escaped from a South Carolina prison in 1976. During previous extradition proceedings, the Governor of South Carolina, in 1993, wrote a letter to the New York State Commissioner of Corrections, declining to support the Defendant's extradition to that State. The State of Carolina thereafter took no further steps until 2002, when it resumed its efforts to have the Defendant extradited from New York to South Carolina. The Defendant had argued that the previous actions of South Carolina officials, and the long delay which had occurred herein, required that he could not be legally extradited to South Carolina. The New York Court of Appeals, however, determined that the Defendant's equitable arguments are more appropriately raised in South Carolina, and that under New York law, New York courts could not arbitrarily bar an extradition request.

Risk Level Determination for Sex Offenders

People v. Leopold, decided January 14, 2010 (N.Y.L.J., January 15, 2010, p. 40)

In a unanimous decision, the Court found that no adequate record regarding findings of fact and conclusions of law were made by the lower courts with regard to the risk assessment determination assigned to the Defendant. The matter was thus remitted to the Supreme Court to specify its findings and conclusions of law.

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

The United States Supreme Court opened its new term on Monday, October 5, with newly appointed Justice Sonia Sotomayor sitting on her first set of major cases. Since the opening of the term, the Court has rendered some significant decisions in the area of criminal law. These cases are summarized below.

In re Davis, 130 S. Ct. 1 (August 17, 2009)

In a 6-2 decision, the United States Supreme Court directed the District Court to consider a habeas corpus application and to hear evidence of the Defendant's innocence. The majority opinion stated that the District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly established the Petitioner's innocence. Justices Scalia and Thomas dissented, and Justice Sotomayor took no part in the decision.

Bobby v. Van Hook, 130 S. Ct. 13 (November 9, 2009)

In a unanimous decision, the United States Supreme Court held that it was inappropriate for the Court of Appeals to rely on the American Bar Association guidelines for the appointment and performance of defense counsel in death penalty cases which were announced 18 years after the Petitioner's trial. The Court further found that defense counsel did not perform deficiently in representing the Defendant. The Court concluded that given all the evidence unearthed by counsel from the individuals closest to the Defendant's upbringing, and the experts who reviewed his history, it was not unreasonable for counsel not to identify and interview every other living family member or every therapist who had once treated the Defendant's parents. The defense counsel's representation in investigating penalty-phase mitigation evidence regarding Petitioner's background was therefore not ineffective, and the Defendant had no claim under the Sixth Amendment of the United States Constitution.

Wong v. Belmontes, 130 S. Ct. 383 (November 16, 2009)

In a unanimous decision, the United States Supreme Court determined that a Defendant was not deprived of the effective assistance of counsel during the penalty phase of his capital murder trial. The Defendant had claimed that his attorney had failed to introduce additional mitigation evidence regarding abuse suffered as a child, and a non-violent character. The Supreme Court pointed out that counsel had produced substantial mitigating evidence including testimony from nine witnesses, and that if the issue of a prior non-violent character was raised, the prosecution would have been allowed to admit evidence that the Defendant committed a prior brutal murder which defense counsel had successfully blocked during the trial. Under these circumstances, the Defendant's arguments were without merit, and his Petition for Writ of Habeas Corpus was denied.

Porter v. McCollum, 130 S. Ct. 447 (November 30, 2009)

In a unanimous decision, the United States Supreme Court held that defense counsel had rendered ineffective assistance of counsel during the penalty phase of the Defendant's murder trial. The Court pointed out that counsel had failed to uncover and present any mitigating evidence regarding Defendant's mental health, family background, or military service. The Court noted, in particular, that the Defendant had served heroically during traumatic battles in the Korean War, and that he suffered brain damage, relevant factors which should have been brought to the jury's attention. Under these circumstances, the prior ruling of the Florida Supreme Court that the Defendant was not prejudiced by defense counsel's failure was an unreasonable application of federal law. The Writ of Habeas Corpus should therefore have been granted, and the matter remitted to the Florida courts for further proceedings.

Michigan v. Fisher, 130 S. Ct. 546 (December 7, 2009)

In a 7-2 decision, the United States Supreme Court upheld a warrantless entry and search into the Defendant's residence. In the case at bar, police officers responded to a complaint of a disturbance. As they approached, a couple pointed to the Defendant's residence and stated that there was a man inside going crazy. The officers then observed that a pickup truck in the driveway was smashed, windows were broken, and there was glass all over the premises. Through a window, the officers could also see the Defendant screaming and throwing things. When the officers knocked and attempted to gain entry, the Defendant ignored their questions and began yelling profanities. The officers finally pushed the front door open and went into the house. They subsequently discovered two weapons on the premises.

The Michigan trial court had concluded that the officers had violated the Defendant's Fourth Amendment rights. The United States Supreme Court, however, held that under the emergency aid exception to the warrant requirement, the officers were justified to enter the De-

fendant's premises. The majority stated that the ultimate touchstone of the Fourth Amendment is reasonableness, and that under the circumstances herein, the officers were justified in their actions, based upon the stated facts. Suppression of the evidence should not have been granted, and the matter was remitted to the Michigan courts for further proceedings.

The seven-judge majority consisted of Chief Justice Roberts and Justices Alito, Scalia, Thomas, Ginsburg, Breyer and Kennedy. Justices Stevens and Sotomayor dissented. The dissent argued that the trial judge, who heard the police officer's testimony, was not persuaded that they had an objectively reasonable basis for believing that entry into the Defendant's home was necessary, and the Court should not usurp the role of the fact finder when faced with the close question of the reasonableness of the officer's actions.

Beard v. Kindler, 130 S. Ct. 612 (December 8, 2009)

In a unanimous decision, with Justice Alito taking no part, the United States Supreme Court held that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas corpus review. The Court determined that a discretionary state procedural rule can be firmly established and regularly followed so as to bar federal habeas review, even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.

Abu-Jamal v. Pennsylvania, 130 S. Ct. __ (January 19, 2010)

In a 7-2 decision, the United States Supreme Court upheld a death sentence which had been imposed upon a Defendant, and rejected a lower court ruling that a new sentencing hearing was required because of flawed jury instructions in the 1982 trial. The majority opinion was issued by Justice Sotomayor. Justices Stevens and Ginsburg dissented.

Presley v. Georgia, 130 S. Ct. 721 (January 19, 2010)

In a 7-2 decision, the United States Supreme Court held that a defendant's right to a public trial in a criminal matter encompasses the process of jury selection. Under the constitutional Sixth Amendment right to a public trial, it was therefore improper for the trial court to have excluded the Defendant's uncle from the courtroom during the period of jury selection. The seven-judge majority stressed that it was clear from prior court precedence that the process of jury selection is a matter of great importance, not only to the adversaries, but also to the criminal justice system, and that therefore, the right to open proceedings must be preserved wherever possible. Justices Thomas and Scalia dissented.

Briscoe v. Virginia, 130 S. Ct. __ (January 25, 2010)

Refusing to reconsider their decision in *Melendez-Diaz*, the Supreme Court remanded the instant matter to the Virginia courts to reconsider whether forensic evidence had to be presented in person rather than through an affidavit in order to satisfy the confrontation clause of the U.S. Constitution. Because the Court had held oral arguments in this case, there was some speculation that with the new appointment of Justice Sotomayor, there might be some reconsideration of the *Melendez* decision. The Court, however, after some strenuous remarks from Justice Scalia during oral argument, left its earlier decision intact, and simply remitted the matter back to the lower courts.

New Treatise on Life and Judicial Philosophy of Justice Scalia

Reviews of a new book on the life and judicial philosophy of Supreme Court Justice Antonin Scalia have recently appeared in several national newspapers. The new publication is written by Joan Biskupic. The biography is 448 pages long, and the retail price is listed at $28. The book is published by Sarah Crichton Books. The new biography outlines the history of Justice Scalia's life and his judicial philosophy, which basically advocates a legal theory known as "originalism." This theory advances the idea that the words and intentions of the framers should strictly limit constitutional decision-making. Justice Scalia, who has now been on the Court for just over 23 years, is characterized as one of the leading members of the so-called conservative bloc in the Court. In recent years, however, he has been the architect of several decisions in the area of criminal law which have basically benefited defendants. Among these are the *Crawford* decision and the *Apprendi* ruling. Justice Scalia has been a major figure in the United States Supreme Court, and the new treatise sheds some additional light on his background and views.

U.S. Supreme Court Announces Assignment of Justices During the October 2009 Term

With the opening of the Court's new term, Chief Justice Roberts announced the allotment of the Justices to the various federal circuits throughout the nation. The new allotment includes the assignment of Justice Sotomayor, who recently replaced Justice Souter.

DISTRICT OF COLUMBIA AND FEDERAL CIRCUIT

Chief Justice JOHN G. ROBERTS, JR., of Washington, D.C.
Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIRST CIRCUIT

Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico

Justice STEPHEN BREYER, of Massachusetts
Appointed by President Clinton August 2, 1994; took office September 30, 1994

SECOND CIRCUIT

Connecticut, New York, and Vermont

Justice RUTH BADER GINSBURG, of New York
Appointed by President Clinton August 3, 1993; took office August 10, 1993

THIRD CIRCUIT

Delaware, New Jersey, Pennsylvania, and Virgin Islands

Justice SAMUEL A. ALITO, JR., of New Jersey
Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

FOURTH CIRCUIT

Maryland, North Carolina, South Carolina, Virginia, and West Virginia

Chief Justice JOHN G. ROBERTS, of Washington, D.C.
Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005

FIFTH CIRCUIT

Louisiana, Mississippi, and Texas

Justice ANTONIN SCALIA, of Washington, D.C.
Appointed by President Reagan September 25, 1986; took office September 26, 1986

SIXTH CIRCUIT

Kentucky, Michigan, Ohio, and Tennessee

Justice JOHN PAUL STEVENS, of Illinois
Appointed by President Ford December 17, 1975; took office December 19, 1975

SEVENTH CIRCUIT

Illinois, Indiana, and Wisconsin

Justice JOHN PAUL STEVENS, of Illinois
Appointed by President Ford December 17, 1975; took office December 19, 1975

EIGHTH CIRCUIT

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota

Justice SAMUEL A. ALITO, JR., of New Jersey
Appointed by President George W. Bush January 31, 2006; took office January 31, 2006

NINTH CIRCUIT
Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Northern Mariana Islands

Justice ANTHONY M. KENNEDY, of California
Appointed by President Reagan February 11, 1988; took office February 18, 1988

TENTH CIRCUIT
Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming

Justice SONIA SOTOMAYOR, of New York
Appointed by President Obama May 26, 2009; took office August 8, 2009

ELEVENTH CIRCUIT
Alabama, Florida, and Georgia

Justice CLARENCE THOMAS, of Georgia
Appointed by President Bush October 16, 1991; took office October 23, 1991

Scenes from the
Criminal Justice Section

Annual Meeting and Luncheon

Thursday, January 28, 2010

Hilton New York

Section Chair Jim Subjack and Newsletter Editor Spiros Tsimbinos greet award winner Senior Associate Judge of the New York Court of Appeals Carmen Beauchamp Ciparick

Award winner Sullivan County D.A. Stephen E. Lungen with Bronx D.A. Robert Johnson and colleagues

Guest speaker at Luncheon, Joseph S. Lentol, Chair Assembly Codes Committee

Claudia S. Schultz award from

Moderator Marvin E. Schechter and panelists at CLE program

Bronx D.A. Robert Johnson chats with fellow prosecutors Mark Dwyer and John Castellano

NYSBA President-Elect Stephen P. Younger presents Section's award to Judge Ciparick

Norman P. Effman presents award to John M. Caher

Vincent Doyle with award winner Erin P. Gall

receives public defense Norman P. Effman

Chief Judge Jonathan Lippman joins in applause for the award winners

Award winner Barbara Underwood with Jim Subjack, Jean Walsh and Judge Barry Kamins

New York Court of Appeals Judges Smith and Read with award winner Theodore V. Wells Jr.

Attendees applaud speaker at luncheon

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 15, 2009 to February 1, 2010.

People v. Rodriguez (N.Y.L.J., October 16, 2009, pp. 1 and 5)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction for first-degree manslaughter and criminally negligent homicide. The appellate panel concluded that the two counts constituted contrary findings regarding the Defendant's mental state, and therefore necessitated the holding of a new trial. The unanimous decision, which was written by Justice Covello, concluded, "In convicting the Defendant of manslaughter in the first degree, the jury necessarily found that the Defendant recklessly engaged in conduct causing the death of her baby." Yet in convicting the Defendant of criminally negligent homicide, the jury necessarily found that the Defendant acted "with criminal negligence." Therefore, since the jury verdict reflects that the jury assigned different culpable mental states to the Defendant with respect to a particular result of a particular act or omission, its verdict was inconsistent and a new trial is required. The Court's decision was also joined in by Justices Mastro, Balkin and Austin.

In re Dylan C. (N.Y.L.J., October 20, 2009, pp. 1, 2 and 38)

In a unanimous decision, the Appellate Division, Second Department, concluded that a 15-year-old juvenile Defendant who tried to run away from a non-secure Brooklyn detention facility did not commit the crime of escape as specified under Penal Law § 205.10. The Court found that the legislative intent in passing the 1965 statute was that it apply only to secured detention facilities which were the norm in the 1960s, and not to non-secured facilities for adjudicated juvenile defendants which have basically been established in more recent years. As a result of the Court's decision, the delinquency petition filed in the Family Court was properly dismissed. The Court's opinion was written by Justice Eng and was joined in by Presiding Justice Prudenti and Justices Miller and Belen.

People v. Lewie (N.Y.L.J., November 9, 2009, pp. 17 and 37)

In a unanimous decision, the Appellate Division, Third Department, dismissed a charge of manslaughter in the second degree while affirming the other counts of the indictment for which the Defendant had been convicted. The Defendant had been charged with the death of her child, who had fallen while the Defendant was holding the infant in a shower. The Defendant had waited a substantial period of time before seeking medical attention for the infant involved. The Appellate Division, after reviewing the trial record, concluded that the evidence at trial failed to establish that the Defendant was aware that her infant son had been gravely injured as a result of the fall in the shower, or that the injuries that he incurred as a result of the fall could ultimately cause his death. The Defendant, however, was properly convicted of the other charges in the indictment, which involved the element of reckless conduct. As a result of the Appellate Division's dismissal of the manslaughter account, the Court further found that the sentences imposed on the other counts, of five to 15 years, and which both involved the element of recklessness, had to run concurrently. As so modified, the remainder of the Defendant's conviction was affirmed.

People v. Charles (N.Y.L.J., November 9, 2009, pp. 1 and 2, and November 10, 2009, p. 18)

In a unanimous decision, the Appellate Division, Second Department, vacated a ten-year sentence which had been imposed upon a Defendant for the commission of a burglary. The Appellate Court found that the trial judge had imposed a ten-year sentence on the mistaken belief that such a term was mandated under the law. The trial judge had specifically stated at the sentencing that the ten-year sentence was "mandatory under the law, and there is nothing under the law that I can do other than to give you ten years." In fact, the Penal Law Section involving the crime for which the Defendant was convicted authorized a minimum sentence of five years. Under these circumstances, the Appellate Division unanimously concluded that the matter should be remitted for resentencing, and that the Defendant's waiver of his right to appeal did not foreclose the Appellate Division from acting in this matter. The matter was thus remitted to the Nassau County Court for resentencing.

People v. Fisher (N.Y.L.J., November 25, 2009, pp. 1, 2 and 40)

In a 3-1 vote, the Appellate Division, First Department, vacated a Defendant's plea conviction and remitted the matter back to the trial court for further proceedings. In the case at bar, a Judge had warned a Defendant that he would not emerge from prison until he was a very old man if he was convicted at trial and refused to take a plea agreement. In a plea bargain involving convictions for first degree attempted rape and first degree burglary, the Defendant had received a sentence of 17 years in prison. Just prior to his agreement, the Defendant had been warned that he would receive "whatever is the maximum sentence allowable by law if he rejected the plea bargain and was unsuccessful in swaying the jury." Under these circumstances, the majority in the Appellate Division found the plea in question to have been coerced, and had to be vacated. The majority stated that a Defendant's exercise of his right to a trial is wrongly burdened when a court expresses its intent to impose the maximum sentence after trial, but a significantly shorter sentence if

he accepts a plea. The majority opinion was joined in by Justices Catterson, Friedman and Leland-Degrasse. Justice Nardelli dissented, arguing that the Defendant had in fact received a good bargain and his plea was motivated by the recognition that he would be convicted. Under these circumstances, a reversal was not required.

People v. Cooper (N.Y.L.J., December 1, 2009, pp. 1, 2 and 37)

In a unanimous decision, the Appellate Division, Third Department, held that possession of a little more than one ounce of marijuana by a prison inmate can constitute a felony rather than a misdemeanor. In the case at bar, the authorities believed that the Defendant's wife had smuggled the drugs into the prison. Money transfers had also been made into the wife's account by other inmates, apparently for the purpose of purchasing drugs. Under these circumstances, the Appellate Division, Third Department, concluded that the possession and distribution of drugs, even of small amounts, within a maximum security prison can clearly lead to dangerous confrontations in which both inmates and staff can be injured. Under the circumstances in question, the weight of evidence supported the Defendant's conviction of promoting prison contraband in the first degree.

A decision by the New York Court of Appeals in *People v. Finley*, 10 N.Y.3d 658 (2008), placed some doubt on whether illegal quantities of marijuana could be considered dangerous contraband. The Appellate Division, Third Department, however, under the circumstances herein, determined that the *Finley* ruling did not prohibit the conviction in question, and that an affirmance was therefore warranted.

People v. Lerow (N.Y.L.J., December 1, 2009, p. 37)

In a unanimous decision, the Appellate Division, Fourth Department, reversed the granting of a suppression motion, and upheld the use of a chemical blood alcohol test. The Appellate Division, Fourth Department, concluded that a New York State police officer had the authority, pursuant to Vehicle and Traffic Law § 1194 (2)(a), to direct the withdrawal of blood from a suspect who was physically located outside of the State. In the case at bar, the Defendant had been involved in a motorcycle accident within New York State, but had been transported to a hospital in Erie, Pennsylvania. A member of the New York State's Sheriff's Department had traveled to the hospital and had asked the registered nurse to obtain a blood sample form the Defendant, who was unconscious. A subsequent blood test performed in New York revealed that the Defendant had a 12% blood alcohol content.

The Appellate Division, in upholding the procedure in question, noted that under New York's Implied Consent Law, any person who operates a motor vehicle within the state is deemed to have consented to a chemical blood alcohol test conducted at the direction of a police officer having reasonable grounds to believe that such person has operated a motor vehicle in violation of Vehicle and Traffic Law § 1192. Under this implied consent, the blood sample was properly taken, even though the Defendant at the time was outside the State of New York.

People v. Roblee (N.Y.L.J., December 7, 2009, pp. 1, 8 and 420)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial because the trial court had committed reversible error during the selection of the jury. The judge had asked potential jurors to step aside after they indicated by a show of hands that they thought they had conflicts that would disqualify them from serving. The Appellate Court concluded that the trial judge should have immediately conducted further inquiries about the specifics of those alleged conflicts and should not have merely allowed the jurors to step aside. The court concluded that the jury selection method which was utilized by the judge had effectively excluded potential jurors without determining if they were unqualified or biased, and without permitting the Defendant to question them concerning their fitness to serve. Under these circumstances, the jury was not chosen at random from a fair cross-section of the community, as is required by the judiciary law. The Defendant was thus denied a fair trial and a reversal was required.

People v. McDermott (N.Y.L.J., December 29, 2009, pp. 1 and 40)

In a unanimous decision, the Appellate Division, Third Department, vacated an enhanced prison term for a Defendant who was alleged to have violated a term of his plea agreement. The Defendant had pleaded guilty to possession marijuana in exchange for a one-year sentence. The 12-page plea agreement which he entered into contained a provision that the Court would not be bound by the arrangement if the Defendant was re-arrested prior to sentencing. During the plea colloquy, the trial court did not review the no-arrest condition with the Defendant or inquire on other major portions of the agreement. In fact, the Appellate Division found that the Court did not discuss anything specific about the document in question. After the Defendant was in fact re-arrested, the judge sentenced him to 2½ years. The appellate panel vacated this enhanced sentence, finding that the trial court had provided insufficient information and warnings regarding the contents of the Defendant's plea agreement. The appellate panel concluded, "These weighty matters should not be merely relegated to a lengthy written document, but must be developed in an appropriate manner on the record."

People v. Mendez (N.Y.L.J., December 31, 2009, pp. 1 and 33)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction and ordered the suppression of a gravity knife which was found

on the Defendant. The Appellate Panel ruled that the arresting officer violated the Defendant's Fourth Amendment rights when he searched the Defendant for the gravity knife. When the officer first observed the Defendant, the Defendant was not engaged in any suspicious behavior. Although the officer observed part of a knife handle, he could not detect whether the knife was an illegal one. The panel concluded that based upon the testimony which was provided in the suppression hearing, the officer lacked reasonable suspicion to seize the knife. Instead, the Court observed that the officer could have asked further questions regarding his observations before the seizure in question. The five-judge panel who issued the unanimous decision consisted of Justices Mazzarelli, Catterson, Moskowitz, Richter and Manzanet-Daniels.

People v. Marone (N.Y.L.J., January 4, 2010, pp. 17 and 33)

In a unanimous decision, the Appellate Division, Third Department, upheld the imposition of restitution against a Defendant, even though he had subsequently entered into a settlement agreement with the victims for a lesser amount as a result of a civil suit. As a result of the settlement, the County Court had reduced the original restitution amount by the settlement amount, but still ordered that restitution was required for the balance due. The appellate panel stated that in New York, the purpose of imposing restitution in criminal cases is broader than compensating the victim for a loss. It also serves a public policy purpose of making the offender pay for his debt to society. Thus, a victim's willingness to settle a civil action cannot operate to foreclose the State's interest in restitution in a criminal matter.

People v. Tafari (N.Y.L.J., January 5, 2010, pp. 1, 6 and 37)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial, because the Defendant had been denied the right to proceed *pro se*. The appellate panel found that the trial court had displayed paternalistic concerns which were misplaced when he insisted on appointing an attorney to represent the Defendant, even though he wanted to defend himself. The Third Department panel found that the Defendant displayed sufficient competency to act as his own counsel, and by refusing to allow him to proceed *pro se*, his constitutional rights were violated, and a new trial was required.

People v. Davis (N.Y.L.J., January 6, 2010, pp. 1, 2 and 34)

In a 3-2 decision, the Appellate Division, First Department, reversed a Defendant's conviction on the grounds that prosecutors should have secured court permission before re-presenting a case to a grand jury. The three-judge majority ruled that a court's permission was necessary to insure that the prosecution does not withdraw a case in order to get another opportunity to persuade a different and perhaps more amenable grand jury that it should indict. The three-judge majority constituted of Justices Renwick, Sweeny and Freedman. Justices Catterson and Friedman dissented. The sharp division in this case makes it likely that the matter may eventually have to be decided by the New York Court of Appeals.

People v. Ortiz (N.Y.L.J., January 22, 2010, pp. 1, 4 and January 25, 2010, p. 25)

In a unanimous decision, the Appellate Division, First Department, reversed a burglary conviction and ordered a new trial on the grounds that the prosecution had committed several acts of misconduct, including improper cross-examination of the Defendant and improper remarks and references during the summation to the jury. The panel found that the prosecution's actions amounted to an impermissibly prejudicial pattern of conduct which denied the Defendant a fair trial.

Letter to the Editor from Professor Monroe H. Freedman, With Response from Paul Shechtman

Our *Newsletter* recently received a letter to the Editor from Professor Monroe H. Freedman regarding the article on *Corley v. United States*, which was written by Paul Shechtman, and which appeared in our Winter 2010 issue. The letter is reproduced below, and is followed by a responding comment from Mr. Shechtman. One of the aims of our publication is to present a variety of viewpoints, and to stimulate discussion on criminal law issues. We thank both gentlemen for presenting their views on this matter.

Dear Mr. Tsimbinos,

I disagree with Paul Shechtman's benign analysis of Justice Rehnquist's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). *Dickerson* is the case in which the Supreme Court incorporated the *Miranda* rule into the Fifth Amendment. According to Mr. Shechtman, Rehnquist "rescued *Miranda*," suggesting that the decision was a positive one for those accused of crimes.

In fact, by the time Rehnquist decided *Dickerson*, the Burger and Rehnquist Courts had succeeded in getting *Miranda* through a series of decisions, which, in Rehnquist's words, had "reduced the impact of the Miranda rule," 530 U.S. at 443. For example, in *Harris v. New York*, 401 U.S. 222 (1971), in an opinion by Chief Justice Warren Burger, the Court had held that a defendant can be impeached with a confession obtained in violation of *Miranda*. That effectively prevents a defendant from testifying in his own behalf. Among other decisions that vitiated *Miranda* is Rehnquist's own decision in *Michigan v. Tucker*, 417 U.S. 433 (1974), which allows testimony by a witness despite the fact that the witness's identity is the fruit of a *Miranda* violation.

Little was gained, therefore, by "rescuing" *Miranda*. At the same time, there is a significant risk that *Dickerson* will now be used to corrupt the Fifth Amendment, by incorporating the *Miranda* exceptions into it. Moreover, Rehnquist was shrewd enough to have foreseen that possibility. In that view, Rehnquist didn't rescue *Miranda*. Rather, he purposefully injected a slow-acting poison into the Fifth Amendment.

Response by Mr. Shechtman

I have great respect for Professor Freedman, but his letter is puzzling. If Chief Justice Rehnquist's true purpose in writing *Dickerson* was to "purposely inject a slow acting poison into the Fifth Amendment," he seems to have fooled not only me, but the six Justices (all but Justices Scalia and Thomas), who joined his opinion.

For Your Information

Judges to Receive Allowance Increase

While still pushing the issue of pay increases for judges, Chief Judge Lippman took it on his own in late October to announce that he was doubling from $5,000 to $10,000 the annual allowance that is allowed to judges in order to cover miscellaneous expenses when they incur. He stated that due to budgetary constraints, the additional $5,000 allowance would begin to be paid as of April 15, 2010. The judicial allowance is utilized to cover such expenses as commuting, purchase and cleaning of judicial robes, and the purchase of specialized furnishings and equipment.

Judge Denny Chin Appointed to U.S. Court of Appeals for the Second Circuit

In late September, President Obama announced that he intended to nominate Judge Denny Chin, who had been sitting in the Southern District of New York, to a position on the United States Court of Appeals for the Second Circuit. Judge Chin's nomination was taken up by the Senate Judiciary Committee, and the Senate voted on his confirmation in late March. Judge Chin is 55 years of age and is a graduate of Fordham University School of Law. Judge Chin's nomination was supported by Senator Schumer and fills one of the existing vacancies on the Second Circuit Court of Appeals. Other vacancies still exist on the Second Circuit Appellate Court, and the announcement of additional nominations is expected in the near future.

Key District Attorney Races Decided by Voters at November Election

Two hotly contested races for the office of District Attorney in two of the largest counties in the state were decided by the voters at the November election. In Nassau County, where incumbent District Attorney Katherine Rice was opposed by Republican candidate Joy Watson, the voters selected the incumbent Rice by a significant margin. Kathleen Rice is 44 years of age, and became District Attorney of Nassau County four years ago when she defeated long-time incumbent Denis Dillon. Ms. Rice is a graduate of the Touro Law Center, and she previously served as an Assistant U.S. Attorney for the Eastern District of Pennsylvania, and had been an Assistant District Attorney in the King's County Office from 1992 to 1999. With her most recent election, Ms. Rice begins her second term as Nassau County District Attorney. Joy Watson, the Republican candidate, had served as a prosecutor for nearly 20 years under Denis Dillon, and had launched a grassroots effort to recapture the position for the Republican Party. Following a hotly contested election, the Nassau County voters have now spoken.

The voters in Westchester County were also faced with a hotly contested election for the office of District Attorney. Janet DiFiore, who had been elected four years ago as a Republican candidate, recently switched parties and ran in the November election as the Democratic candidate after she had defeated Tony Castro in the September primary. The Republican Party had selected Daniel Schorr to oppose Ms. DiFiore in the election. Mr. Castro continued to remain on the ballot for the general election, as the candidate of the Independence and Working Families parties. After all the ballots were counted in Westchester County, Janet DiFiore emerged as the winner and will continue to occupy the position of Westchester County District Attorney. Janet DiFiore is 54 years of age and has served as an acting Supreme Court Justice and a County Judge in Westchester County. She also previously served as the Chief Narcotics Counsel for the Westchester County District Attorney's Office from 1994 to 1998. She is married with three children, and is a graduate of St. John's University School of Law.

Legal Positions Experience Sharp Decline

The *National Law Journal* recently reported in one of its surveys that the biggest drop ever in total employment has occurred at the Nation's 250 largest law firms. The total number of attorneys for the group declined by 4%, dropping from 131,928 in 2008 to 126,669 in 2009. Some of New York's largest firms were specifically listed as losing a large number of their legal staff; for example, the New York firm of Fried, Frank, Harris, Shriver and Jacobson had a loss of 26% of its attorneys, losing 168 lawyers between October 2008 and October 2009. Greenberg, Traurig also was noted as having lost 56 lawyers during the year. It is clear that the economic recession has substantially impacted the legal profession. Let's hope there are better days ahead.

Some Workers Face Reduction in Minimum Wage

Due to the economic recession, and the fact that inflation has remained low, some workers are facing reduction in salaries, or even a decrease in the minimum wage. The Bureau of Labor Statistics recently reported that the salaries of American workers actually fell during the first

six months of the year. Further, a number of states have tied the minimum wage requirements to inflation, so that since prices have actually fallen in some states, the required minimum wage may actually be facing a reduction. For example, this appears to be the case in Colorado, which has announced that its minimum wage will be decreased by approximately three cents. In addition to Colorado, nine other states have their minimum wage tied to inflation. Whether any of these states will also move to lower the minimum wage required remains to be seen. The current economic recession has also caused some economists to question whether a high minimum wage may actually result in increased unemployment among low-skilled workers.

Is It Time to Raise School Time for the Nation's Students?

In an effort to increase student performance in the areas of reading, math and science, some educators are raising the issue of reducing the summer vacation period for the nation's students, and requiring that more time be spent in school. Supporters of the expanded school year argue that the three-month summer break is no longer necessary since it was devised at a time when the U.S. was largely an agricultural nation, and children had to be home to help work in the fields. They also argue that many students, especially those in low-income districts, regress during the long summer break, and would particularly benefit from an increase in the number of school days. In a recent study reported in *Parade* magazine, it was revealed that the U.S. ranked substantially below many other countries in the number of required school days. Listed below are the findings of the *Parade* survey.

How U.S. Schools Stack Up

Rank	Country	Days in School
1.	Finland	187
2.	South Korea	204
3.	New Zealand	194
4.	Australia	198
5.	Japan	210
6.	Germany	193
7.	Czech Republic	194
8.	U.S.	180

Many educators have concluded that extra time in school could potentially boost student performance, and President Barack Obama has indicated that the issue of more hours in the classroom should be closely examined. Whether any actual changes in the school year are actually adopted remains to be seen.

Governor Paterson Signs Legislative Bill to Close Sentencing Loophole

At the behest of Denise E. O'Donnell, former Deputy Secretary for Public Safety and Commissioner of the Division of Criminal Justice Services, Governor Paterson had submitted a bill to the New York State Legislature to specifically require that offenders who commit A-1 felonies while on parole be sentenced to a term consecutive to, and not concurrent with, any uncompleted sentence on another charge. It appears that under current law, when a judge fails to specifically state on the record that a sentence is to run consecutively to a prior sentence, many violent criminals have been able to come up for parole after serving only a minimal portion of their sentence. In a letter to the editor which appeared in the *New York Law Journal*, former Commissioner O'Donnell urged the legislature "to enact the Governor's simple and common sense remedy to correct this injustice once and for all." In early November, the legislature did approve the sentencing changes which had been requested, and the Governor signed the measure shortly thereafter. In signing the new legislation, Governor Paterson stated that those convicted will serve out the sentence intended by the Court and give peace of mind to the victims and their families. The sentencing loophole, which is now closed by the new legislation, had not shortened the actual second sentences that defendants received, but it had distorted how many years they had to serve before becoming parole eligible.

Increase in Drunk Driving Penalty

On November 18, 2009, Governor Paterson signed a legislative bill which makes it a felony to drive while drunk with a child 15 or under in a car. The legislation also requires ignition locks for any convicted drunken driver. The legislation had initially been stalled in both houses of the state legislature, with disputes over the exact scope and application of the proposed legislation. In early November, a resolution in both houses was reached, and the law was quickly passed and submitted to the Governor for signature.

Illegal Immigration Undergoes Sharp Decline

The U.S. Customs and Border Protection Service recently reported that there has been a 25% decline in the number of illegal immigrants apprehended along the California-Mexico border. Officials reported that the trend is evident across the Southwest as arrests fell to levels not seen since the early 1970s. Illegal immigration arrests hit their peak in 2000, when 1.6 million arrests took place. Since that time, there has been a steady decline, and for the year 2009; as of September 30, arrests totaled just over half a million. The decline is attributed largely to increased enforcement procedures and the severe economic recession which has limited the number of available jobs.

New York Law Firms Experience Profit Decline

A recent study by the Wachovia Legal Specialty Group revealed that New York firms have experienced a 9% drop in revenues as of the end of the third quarter of 2009. Net income has declined by 4.9%. It was also reported that the total number of hours worked by attorneys in New York law firms fell 10% as of the end of the third quarter 2009, compared with the same period in 2008. The situation in New York is similar to that faced by attorneys throughout the country as a result of the economic recession.

Economic Decline Increases Food Stamp Recipients

Because of the economic recession and the high unemployment rate in the United States, the number of persons receiving food stamps has reached a record high and is climbing each month. It was recently estimated that one of every eight Americans is now receiving some sort of food stamp assistance, with the total number now reaching 36 million. In recent months, the daily increase in food stamp applications has reached 20,000, and there are currently 239 counties in the nation where at least a quarter of the population is receiving food stamp assistance. The rate of increase has been especially high with respect to seniors living alone, and among children. It is currently estimated that one in four children in the nation is now receiving food stamp assistance, and that the number of seniors also receiving such assistance is nearly one million.

Value of Homes Has Experienced Significant Decline

As a result of the housing downturn and the economic recession, many homeowners are now living in properties where the amount of their mortgage exceeds the value of the property. A report by First American Corelogic, a real estate information company, indicates, for example, that about 45% of the homes in Florida, or approximately 2 million, are facing a situation where they currently have absolutely no equity in their home. A study by the *Wall Street Journal* reviewing the national situation also found that there are many areas in the country where the borrower owes more than the home is worth. The situation is the most critical in Nevada, Arizona and Florida, where over 40% of the properties are in this situation. With respect to New York, almost 10% of the homeowners are in this unfortunate situation.

Isolationism Increases in U.S.

Recent Gallup and Pew Center polls revealed that 49% of Americans currently favor minding our own business in international affairs, and not becoming involved with, or worrying about, other countries. This percentage is the highest in 45 years, and apparently reflects a frustration and impatience with American involvement in Iraq and Afghanistan. The polls found that the bad economic situation has turned the attention of many Americans away from foreign affairs, and more toward domestic concerns. The polls also revealed that a majority, or 50%, of Americans, now view China as an emerging economic threat to the United States. Sixty-three percent of Americans still believe, however, that the United States is still the leading military power.

OCA Chief Counsel Michael Colodner Retires

It was announced in early November that Michael Colodner, who had served as Chief Counsel, and had been with the Office of Court Administration for 26 years, has retired. Mister Colodner headed an office of 15 attorneys who handled the legal affairs for the court system. John W. McConnell, who has served as the Chief Clerk of the Appellate Division, First Department, will succeed Mr. Colodner as Chief Counsel. Mr. McConnell, who is 50 years of age, has been with the Appellate Division since 2007. In his new position Mr. McConnell will receive an annual salary of $136,500. Following Mr. McConnell's appointment, Chief Judge Gonzalez stated that he will seek to replace Mr. McConnell and fill the position of Chief Clerk from within the current staff of the Appellate Division, First Department.

Minority Representation Continues to Rise in New York Law Firms

A recent report issued by the New York City Bar Association indicated that diversity within New York's large law firms is continuing to increase. It was revealed that in the year 2009, the number of minority attorneys in New York's large law firms was 18.1%, an increase from 16.5% in 2007. The report covered 108 firms in New York City. The report further detailed that the number of minority partners within the firms rose to 6.6% from 4.7% in 2007. The number of minority attorneys who were listed as associates increased to 25% in 2009, from 22.8% in 2007. The study also found that women comprised 45.2% of attorneys within the firms, and that the number of women partners had risen to 17.8% in 2009, from 16.6% in 2007.

Americans Recouping Their Net Worth

As a result of some recent improvements in the economic situation in the country and the rise in the stock market, a recent report indicated that Americans are slowly recovering some of the lost wealth which occurred during the last few years as a result of the severe economic downturn. It was estimated that the average net worth of Americans constituting such assets as homes, bank accounts, and investments, minus debts like mortgages and credit cards, rose 5% during the last quarter, to approxi-

mately $53.4 trillion. Stock investments were responsible for the largest boost in net worth, with the value of stocks increasing during a three-month period by about 17%. The report also indicated that Americans are making efforts to pay off existing debt and to save more money. It is hoped that the New Year will bring improved economic times, and that Americans can once again enjoy economic well-being.

China Assumes World Leadership in Automobile Sales

What had been predicted for the last several months has actually come to fruition with the conclusion of the year 2009. China has now overtaken the United States as the world's biggest market for automobiles, with 13.6. million cars and trucks sold in China during the year 2009. That was an increase of 45% from 2008. In the United States, auto sales for 2009 amounted to 10.4 million, or a decrease of 21% from 2008. Since China has a population of 1.3 billion people, more than four times that of the United States, it is expected that as long as it continues to thrive economically, China will maintain its lead in automobile sales for the predictable future, causing the United States to stay in second place. The growing economic power of China was also evident by the fact that at the end of 2009, it had surpassed Germany and had become the third largest exporter of goods in the world. It is currently ranked as the third largest economy in the world, and is expected to overtake Japan in the near future, to become the world's second economic power, after the United States.

U.S. Prison Population Continues to Rise, but at a Slower Rate

Despite the recent economic downturn and the efforts by some states to reduce their prison expenditures, a recent report by the U.S. Justice Department indicated that the overall prison population in the U.S. continued to rise during the year 2009. The Justice Department figures show that the overall state and prison population for those actually convicted is at an all-time high of 1.6 million. If people in jail waiting trial are also added to the figure, the number of people behind bars amounted to 2.3 million. This averages out to one of every 133 residents in the United States. Although the prison population grew by just under 1% in 2009 from the previous years, the increase was significantly less than the average increase during the previous decade, which was about 6%. The small percentage increase was attributed to the aggressive efforts of some states to reduce their prison population and to reduce the cost of correctional services. The study found that 20 states had actually reduced their prison population in 2009. Fortunately, New York State was one of these, reducing its number by 2,273. This leaves New York's prison population at approximately 60,000. The states with the largest prison populations continue to be Florida, Texas, and Pennsylvania, where the number of incarcerated inmates either exceeds or approaches 100,000.

Some concern has been expressed that the effort to reduce prison populations may also cause the release of violent inmates who may again, once released into the general population, continue to commit crimes and violent offenses. This concern was recently expressed in the State of Illinois, where it was revealed that some 1,700 inmates had been arbitrarily released by the Department of Corrections in violation of established procedures, and that many of these prisoners committed new offenses, including assault and weapons charges. As a result, Illinois' Governor has stopped the early release program and is now requiring that prosecutors be advised in advance of an inmate's release. The Governor has also requested a legislative review of the policies regarding good time and merit credits, which in effect reduce the length of an inmate's sentence.

Number of Foreign-Born Workers in U.S. Continues to Grow

A recent report by the U.S. Census Bureau indicates that nearly one in six American workers is foreign born. This is the highest proportion since the 1920s. In 1970, the number of immigrant workers amounted to just 5%, and the percentage has steadily increased since that time to its current record number. The report also indicated that the medium income for immigrant families has continued to rise, and that the proportion of immigrant families living below the government's official poverty level has declined.

Office of Court Administration Requests Increase in Its Judicial Budget

The Office of Court Administration recently submitted a request to the Governor and legislature for a 7.4% increase in the judiciary's budget for the fiscal year beginning April 1, 2010. The increase was sought on the basis of a rise in court filings and mandatory increases in pension, wage and benefit payments for employees. With respect to court filings, New York State Courts ended the year 2009 with a record 4.7 million cases. A huge increase in cases has come as a result of foreclosure filings and an increase in misdemeanor and violation cases in the City of New York. The proposed budget request asks for $2.44 billion, approximately $168 million more than the request for the current year. The judicial budget for the year 2004 to 2005 was $1.39 billion, and has increased substantially during the last five years. Due to the serious economic downturn faced by the state, it appears that any increase in the judicial budget will face increased scrutiny and the possible rejection by the Governor and legislature. Gov-

ernor Paterson has repeatedly called for the necessity to reduce expenditures, and several members of the state legislature have already indicated serious reservations about granting any increase in this year's judicial budget. Governor Paterson, in fact, stated in late January that he preferred only an .06 % increase in the judiciary's budget, rather than the request which was filed by OCA. We will report on developments in this matter as they occur.

Drunken Driving Fatalities Decrease

The National Highway Traffic Safety Administration recently reported that the number of driving while intoxicated fatalities has declined in recent years, and that this has been a result of a national crackdown on impaired driving and an aggressive educational program to alert individuals to the dangers of drunken driving. The report indicated that the rate of U.S. traffic deaths and accidents involving drunken drivers declined 7% in 2008 from the previous year. Forty states experienced a reduction, while fatalities rose in seven states and the District of Columbia, and in three states the level remained the same. The State of New York experienced a decline of approximately 15%. The report also expressed the hope that as the year 2009 ended, a similar reduction will have occurred for that year.

Despite Recession, Crime Rates Drop

It was anticipated last year that because of the economic downturn, crime rates in the United States would increase. Recent statistics from the FBI reveal, however, that for the first six months of the year 2009, the overall crime rate in the United States actually declined in several categories. Overall, violent crimes fell by 4.4%, and property crimes dropped by 6.1%. The murder rate dropped by nearly 4%, rape fell by 3.3% and robbery declined by 6.5%. The report also showed a significant drop in automobile thefts, with a nearly 19% drop from the same period last year. In a further breakdown of urban and rural centers, the FBI figures also reported that in cities with 1 million or more people, violent crime fell by almost 7%. In towns with populations of between 10,000 to 25,000, violent crime rose by 1.7%, a slight increase. The number of crimes in the United States reached a peak period in the early 1990s, and during the current decade have undergone a continual decline.

With respect to New York City, the New York City Police Department reported that for the year 2009 there were 461 homicides, a reduction of about 10%, as compared with 2008. The Department also reported that overall, crime in New York City dropped by 11% in 2009 from the prior year. It appears that efforts to reduce serious and violent crime in the city have been successful. However, the number of misdemeanor and quality of life violations was slightly up from last year.

Bar Pass Rates at New York Law Schools Experience Slight Decline

In reviewing the July 2009 bar pass results for first-time candidates, it appears that the passing rates at some of the law schools in New York State have undergone a slight decline from previous years. The law schools with the sharpest drop were Hofstra, which had a 79% pass rate, compared with 88% in July of 2008, and New York Law School, which had an 84% pass rate compared with 94% in July of 2008. Cornell Law School also experienced a five-point drop, going from 99% in July 2008 to 94% in July 2009. Syracuse Law School bucked the downward trend, and experienced a five-point increase in its passing rate, going from 82% in July 2008 to 87% in July 2009. The overall state average for all law schools fell from 90% in July 2008 to 88% in July 2009. Columbia Law School and NYU Law School continue to be the leaders in the pass rate, with rates of 97% in both July 2009 and July 2008.

New York Ranks Last in Happiness Study

A recent study released by the Centers for Disease Control and Prevention revealed that Americans were the happiest in the States of Louisiana, Hawaii and Florida. The happiness study asked 1.3 million people across the country to consider factors such as climate, crime rates, air quality and schools. Data were collected over a four-year period, and the people surveyed were specifically asked how satisfied or happy they were with their current living situation. Unfortunately, New York ranked last on the list, apparently making it the unhappiest place in the country. The top 10 were listed as follows: Louisiana, Hawaii, Florida, Tennessee, Arizona, South Carolina, Mississippi, Montana, Alabama and Maine. The position of Louisiana as number one may be somewhat in doubt at the present time, since the survey was begun before Hurricane Katrina hit that state, causing many people to flee from New Orleans and surrounding areas. A review of the top ten appears to indicate that those living in warm areas with limited population may be much happier than those residing in the large urban states with colder climates. This appears evident from the fact that joining New York at the bottom of the list were Michigan, New Jersey and California. One bright spot for the State of New York regarding the quality of life was that a recent study issued by *Education Week*, a highly regarded national education newspaper, recently ranked New York schools as number two in the country.

Census Bureau Revises Future Population Projections

The Census Bureau recently issued a revised projection of population demographics in the United States. Last year, the Census Bureau predicted that white children would become a minority in 2023, and the overall white population would become a minority in 2042. This

year, the Census Bureau revised its figures, and has estimated that the white population will no longer make up a majority of Americans by the year 2050. The Census Bureau reported that the recession and stricter immigration policies have slowed the flow of foreign immigrants into the United States. At the present time, the United States has a population of 308 million people, two-thirds of which are non-Hispanic whites. It is estimated that the total population will climb to 399 million by 2050, with whites at that time making up 49.9% of the population. Blacks will remain at roughly 12.2%, but Hispanics, which currently comprise 15% of the population, will rise to 28% in 2050.

As Overall Employment Drops, Government Employment Rises

The United States Bureau of Labor Statistics recently reported that the number of government jobs increased by 261,000 in the three-month period from September 2009 to the end of November 2009. The Bureau estimates that thus there are currently 21.3 million persons employed in various government jobs, at either the federal, state or local level. Further, while overall unemployment is now over 10%, unemployment among those on the public payroll was listed at 3.4%. In addition, the study found that a significant number of government employees are now making over $100,000, and that government pay has generally risen, while salaries in the non-public sector have generally declined.

Population Growth in South and West Substantially Slows, and Youth Population Shifts

A recent Census Bureau report indicated that states in the South and West that grew at a record rate during the last ten years are now experiencing sharply lower growth in population. According to the report, growth has slowed substantially in Arizona, Georgia, and North Carolina. In Florida, Nevada and California, which experienced huge population gains in the past few years, the total population has in fact declined. Florida, for example, which used to average an increase of 400,000 people per year, this year saw a drop in its population of almost 50,000. Since the 2010 census is scheduled to begin in April of this year, the eventual population figures in the various states will have important political consequences involving the allocation of seats in the House of Representatives. Based upon present projections, it appears that the State of Texas, which is still gaining almost 200,000 people per year, will gain three seats in Congress. The addition of one seat is also expected for each of the States of Arizona, Florida, Georgia, Nevada, South Carolina, Utah and Washington. The most recent figures also indicate that the State of New York is actually experiencing a slight increase in population, and may be able to avoid any loss of congressional seats. The final outcome of the ongoing census will ultimately determine the composition of the House of Representatives for the next ten years.

The Census Bureau also reported that states in the Northeast and Midwest have seen a population drop with respect to younger persons. These regions, during the period from 2000 to 2009, lost approximately 1.2 million people who were in the age category of under 18. The youth population appears to have been lost to states in the South and West, with Nevada having the largest growth in its under-18 population, with a 33% increase during the last decade. Arizona experienced a 25% increase, and the State of Texas, a 17% increase. Overall, the youth population in the United States during the last decade increased by approximately 3%.

Not Unexpectedly, New York State Ranks as a High Property Tax State

A recent study evaluating the median property tax in the various states reveals that New York is at the top of the list with respect to high property taxes. The report found that the median home value in New York State is $311,000, with a median property tax of $3,486. The property tax constitutes 1.12% of the home value. The State of Florida, for example, has a median home value of $230,400, with a median property tax of $1,851. The property tax in Florida constitutes only 0.08% of the median home value. The good news for homeowners in New York State is that property values have remained fairly stable and have not fallen as rapidly as in other states, such as Florida. The bad news is that New York property owners continue to pay one of the highest rates of property taxes in the country.

Part-Time Lawyers

A recent report from the National Association for Law Placement reveals that the percentage of attorneys working part-time throughout the United States in the year 2009 rose slightly, from 5.6% in 2008, to 5.9% in 2009. The small increase in the percentage of part-time attorneys was attributed to an increase in female attorneys, who prefer part-time schedules so they can attend to family obligations while still being able to pursue legal careers. The economic recession has also caused more law firms to shift to part-time employees, which usually saves firms money on salaries and benefits. The percentage of attorneys working part-time has grown steadily during the last ten years, going from 3.2% in 2000, to 5.9% at the end of 2009.

Court of Appeals Hears Cases Regarding Judicial Pay Increases

The New York Court of Appeals heard oral argument on January 12, 2010, on three separate cases involving the issue of judicial pay increases. Even on the eve of oral argument, Governor Paterson was seeking to arrange

a resolution of the issue by suggesting the creation of a commission to review judicial pay levels. Since it appeared unlikely that any amicable solution with the legislative body could be reached on this matter, the New York Court of Appeals, invoking the doctrine of judicial necessity, voted in a 5-1 decision that the legislature's initial action was unconstitutional and it had to reconsider the issue. Further details regarding the decision will appear in our Summer issue.

Misdemeanor Backlog Continues to Grow in New York City Criminal Courts

A recent report from the New York State Division of Criminal Justice Services indicates that misdemeanor arrests have risen sharply in the City of New York, and that a huge backlog in handling these cases currently exists in the New York City Criminal Court. It was stated that as of November 8, 2000, there were a total of just over 44,000 pending cases in the New York City Criminal Court. The largest backlog appears to be within New York and Kings counties. It appears that in an effort to reduce the backlog, prosecutors are increasingly reducing matters to a B misdemeanor level, so as to obtain bench trials rather than jury trials. This has already resulted in a huge backlog of ready trial cases without a sufficient number of judges to handle the matters. It was reported, for example, that in the Borough of Staten Island, there is a background of 329 trial-ready cases, with only two Criminal Court judges available to try these matters. It was estimated that at the rate of one trial per judge per week, it would take more than three years just to hear the current number of cases. The Office of Court Administration recently indicated that it is reviewing the situation, and it is finalizing a uniform plan to address the backlog.

Governor Paterson Names New Appellate Division Justice

In early January 2010, Governor Paterson announced that he has selected Stephen K. Lindley to fill a vacancy on the Appellate Division, Fourth Department. Justice Lindley is 46 years old and has been serving in the Supreme Court in Monroe County since 2007. He also previously served as a County Court Judge, and was the Deputy Chief in the Appeals Bureau of the Monroe County District Attorney's Office. He is a graduate of Buffalo Law School. With Justice Lindley's appointment, the Appellate Division, Fourth Department, will be operating with twelve justices. An additional vacancy exists in that Court due to a recent retirement. An additional position is also open in the Appellate Division, Third Department. Governor Paterson is expected to fill those vacancies within the next few months.

About Our Section and Members

Winter Annual Meeting

The Section's Annual Meeting, luncheon and CLE Program was held on Thursday, January 28, 2010 at the Hilton New York at 1335 Avenue of the Americas (6th Avenue at 55th Street) in New York City. The luncheon was attended by approximately 100 attorneys and judges. Our guest speaker was Joseph Lentol, Chair of the Assembly Codes Committee, who commented upon pending legislation on Criminal Law matters. During the luncheon, awards were also presented to outstanding practitioners and governmental officials for exemplary service during the past year. The awards were as follows:

The Michele S. Maxian Award for Outstanding Public Defense Practitioner
Claudia S. Schultz, Esq.
Erie County Bar Association
Buffalo

Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner
Theodore V. Wells, Jr., Esq.
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York City

Outstanding Contribution for Public Information
John M. Caher
New York State Division of Criminal Justice Services
Albany

The Vincent E. Doyle, Jr. Award for Outstanding Jurist
Honorable Carmen Beauchamp Ciparick
Senior Associate Judge of the Court of Appeals
Office of Court Administration
New York City

David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System
Erin P. Gall, Esq.
Oneida County Court
Honorable Barry M. Donalty Chambers
Utica

Outstanding Appellate Practitioner
Barbara D. Underwood, Esq.
Solicitor General
Department of Law
New York City

Outstanding Prosecutor
Stephen F. Lungren, Esq.
Sullivan County District Attorney's Office
Monticello

This year's luncheon was well attended and was both an enjoyable and informative event. We were pleased that many governmental officials and several district attorneys from throughout the state attended. We were also pleased that five members of the New York Court of Appeals were present (Chief Judge Lippman, and Judges Ciparick, Smith, Read and Jones).

Following the luncheon, our CLE program was held, which involved a discussion of the "Future of Forensics in the Courtroom." Participating speakers at the CLE program were James P. Subjack, Esq., Linda B. Kenney Baden, Dr. Lawrence Koblinsky and Marvin E. Schechter, Esq. The CLE Program discussed the National Academy of Sciences Report on Forensics, and focused on emerging trends in the admission and evaluation of forensic evidence.

At our Annual Meeting, officers and district representatives of the Criminal Justice Section were also elected as follows:

Position	Individual	Venue
Chair	Jim Subjack	Fredonia
Vice-Chair	Marvin Schechter	Manhattan
Secretary	Mark Dwyer	Manhattan
Treasurer	Sherry Levin Wallach	Mt. Kisco

Representatives

1.	Guy Mitchell	Manhattan
2.	David Schwartz	Brooklyn
3.	Dennis Schlenker	Albany
4.	Donald T. Kinsella	Schenectady
5.	Nicholas J. DeMartino	Syracuse
6.	Kevin Kelly	Ithaca
7.	Betsy Sterling	Auburn
8.	Paul T. Cambria	Erie
9.	Gerard M. Damiani	Rockland
10.	Marc Gann	Nassau
11.	Spiros Tsimbinos	Queens
12.	Hon. Michael Sonberg	Bronx

Vincent E. Doyle, III, Nominated as New York State Bar Association's President-Elect; Seymour W. James, Jr. Selected as Treasurer

It was announced on December 7 that the nominating committee of the New York State Bar Association had selected Vincent E. Doyle, III, from Buffalo, New York, for the position of President-Elect. Mr. Doyle has had a distinguished career of service to the New York State Bar Association, having served on a variety of task forces, and in several committee positions. Vince, in fact, served several years ago as Chair of our Criminal Justice Section. The Nominating Committee also selected Seymour

W. James, Jr. to serve as Treasurer. Mr. James is the head of the Criminal Division of the New York City Legal Aid Society, and is also an active member of our Criminal Justice Section, serving on the Executive Committee. We congratulate both Vincent Doyle and Seymour James on their nominations, and look forward to their continued service to both our Section and the Bar Association.

Membership Composition and Financial Status

As of January 27, 2010, our Criminal Justice Section had 1,544 members. This constitutes a slight loss of 22 members from a similar period last year. With respect to gender, the Section consists of 76% male and 24% female. There has been a slight increase in the number of female members over last year. Forty-nine percent of the Section's members are in some type of private practice. This is a slight decline from last year, when 51% of the membership composition was in private practice. Within the private practice group, the largest composition continues to be solo practitioners, who make up 25% of the Section. This is almost identical to last year's situation. The members of the judiciary continue to comprise only 2% of the Section, the same figure as last year.

In terms of age groupings, 25% of the Section is between 56 and 65, again similar to last year. The number of younger attorneys joining the Section appears to be slowly increasing, with the number of members under 35 now comprising 18% of the Section. In terms of years of practice, slightly over 48% of the members have been in practice for 20 or more years, and 11.5% have been in practice for 3 years or less. These figures again are similar to those of last year.

The Criminal Justice Section is one of 25 Sections in the New York State Bar Association. As of January 27, 2010, the total membership for the State Bar Association had topped 77,000, representing an increase of more than 1,000 over the same period of last year. We regularly provide a welcome to those members who have recently joined, and a list of our new Section members who have joined during the last few months appears on the following page of this issue.

With respect to the financial status of our Section, our Treasurer, Sherri Levin Wallach, recently reported at our Annual Meeting that as of November 30, 2009, the Section has received overall income of $54,602.51. Total expenses amounted to $46,050.68, leaving a net profit of $8,551.85. It is expected that when the total income and expenses for the full year are tabulated, our Section should still have a slight profit of approximately $3,000.

The Criminal Justice Section Welcomes New Members

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

Rahul Agarwal
Anthony Agolia
Bruce Alderman
Lauren Janel Altdoerffer
Timothy J. Altieri
James Stuart Andes
Peter W. Avery
Christopher Barnett
Stephen M. Behar
Adler Charles Bernard
Russell D. Blair
Frank M. Bogulski
Barry A. Bohrer
Lara Jacqueline Brody
Marva Claudette Brown
Richard P. Bunyan
Donna M. Cathy
Amanda Chafee
Rose Myrlande Jacque Charles
Tin Nai Anne Cheng
Louis F. Chisari
Peter Citrin
David M. Colgan
Marisol Cordero
Elizabeth M. Corrado
Mariel Crippen
James Croteau
Ellen Margaret Crowley
Margaret M. Crowley
Brooke Elizabeth Cucinella
Eileen Daly
Thomas Dell Aquila
Sarah Deri Oshiro
Stephen D. Donohue
Kirsten D. Downer
William Edwards
Yusuf A. El Ashmawy
Victoria Esposito
Sarah Fauer
Linda C. Fentiman
Roxanna Francis
Monroe H. Freedman
Marie Anne Freret
William E. Garnett
Melissa S. Geller
Peter Gemellaro
Christopher Gilroy
Joshua Aaron Goldberg
Stefani Goldin
Tomer Y. Goldstein
Naima Estelle Gregory
Dana Rose Gremaux
Joseph Hamel
Joseph Wolfgang Hammer
Jillian B. Harrington
Hiroki Hayabuchi
Jason Carter Henskee
Sarah Spain Holt
Suzanne Jennifer Hoyes
Hayes Andrew Hunt
Berit Hayes Huseby
Arienne J. Irving
Laura Jereski
Jared Mark Kneitel
Timothy Koller
Francesca Susan Laguardia
Paul A. Lahey
Frank Lanza
Hoonpyo Lee
Jared M. Lefkowitz
Roy G. Locke
Edward P. Lombardo
Obiamaka P. Madubuko
Patrick Joseph Manning
Alain V. Massena
John H. McDonald
Alan B. McGeorge
Norma Iris Melendez
Marilyn Miller
Michelle Minarcik
Tony Mirvis
Marcus Monteiro
Mark Montour
Julian J. Moore
Stacey R. Moore
Sara Muckenhaupt
Lauren Brenna Muldoon
Melanie Johnson Murphy
Leonard E. Noisette
Lawrence A. Omansky
Ellen K. Pachnanda
Keri L. Pankow
Steven K. Patterson
Rosemary R. Philips
Maurice S. Pianko
Salvatore J. Piemonte
Troy G. Pieper
Kathleen Frances Pirozzolo
Cynthia Wai-san Pong
Madison Porzio
Peter Preiser
Felicia S. Raphael
Jeffrey B. Rednick
Jacqueline Ricciani
Ernest Richards
James Michael Roberts
Scott Ian Roche
James F. Roman
Vito A. Roman
Daniel Sanchez
Eric K. Schillinger
Andrew M. Schnier
Lisa Schreibersdorf
Paul A. Serritella
Khardeen I. Shillingford
Amy Shinn
Walter Signorelli
Debra Silber
Elizabeth Silva
Damani Christopher Sims
Randi-Lynn Smallheer
Matthew Paul Smith
Yaw-Ming Song
Miriam J. Soto-Contreras
David Spiegelman
Todd A. Spodek
Thomas P. Spollen
David Storobin
Allen F. Sullivan
Yanina Tabachnikova
Thomas Thornhill
Rachel Trauner
John R. Trice
Gerald J. Van Buskirk
Serena Joyce White
Karen M. Wilutis
Paul B. Wojtaszek
Taylor York
Kimberly Mary Zimmer

Section Committees and Chairs

Appellate Practice
Mark M. Baker
Brafman & Associates, PC
767 Third Avenue, 26th Floor
New York, NY 10017
mmbcrimlaw@aol.com

Mark R. Dwyer
35 Prospect Park West
Brooklyn, NY 11215
mrdwyer@courts.state.ny.us

Awards
Norman P. Effman
Wyoming County Public Defender
Wyoming Cty Attica Legal Aid Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

Capital Crimes
Barry I. Slotnick
Buchanan Ingersoll & Rooney PC
620 8th Avenue, 23rd Floor
New York, NY 10018
barry.slotnick@bipc.com

Comparative Law
Renee Feldman Singer
211-53 18th Avenue
Bayside, NY 11360
rfsinger@aol.com

Continuing Legal Education
Paul J. Cambria Jr.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, NY 14202-3901
pcambria@lglaw.com

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

Norman P. Effman
Wyoming County Public Defender
Wyoming Cty Attica Legal Aid Bureau Inc.
18 Linwood Avenue
Warsaw, NY 14569
attlegal@yahoo.com

Defense
Jack S. Hoffinger
Hoffinger Stern & Ross LLP
150 East 58th Street, 19th Floor
New York, NY 10155
sburris@hsrlaw.com

Drug Law and Policy
Malvina Nathanson
30 Vesey Street, 2nd Floor
New York, NY 10007
malvinanathanson@nysbar.com

Barry A. Weinstein
Goldstein & Weinstein
888 Grand Concourse
Bronx, NY 10451
bweinstein2248@gmail.com

Ethics and Professional Responsibility
Lawrence S. Goldman
Law Offices of Lawrence S. Goldman
500 5th Avenue, 29th Floor
New York, NY 10110
lsg@lsgoldmanlaw.com

Leon B. Polsky
667 Madison Avenue
New York, NY 10021
anopac1@aol.com

James H. Mellion
Rockland Co. District Attorney's Office
1 South Main Street, Suite 500
New City, NY 10956-3559
mellionj@co.rockland.ny.us

Evidence
Edward M. Davidowitz
Supreme Court Bronx County
Criminal Bureau
265 East 161st Street
Bronx, NY 10451
edavidow@courts.state.ny.us

John M. Castellano
Queens Cty. DA's Office
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmcastellano@queensda.org

Judiciary
Cheryl E. Chambers
State of New York Appellate Division
2nd Judicial District
320 Jay Street, Room 2549
Brooklyn, NY 11201
cchamber@courts.state.ny.us

Juvenile and Family Justice
Eric Warner
Metropolitan Transportation Authority Inspector General's Office
Two Penn Plaza, 5th Floor
New York, NY 10121
ewarner@mtaig.org

Legal Representation of Indigents in the Criminal Process
Malvina Nathanson
30 Vesey Street, 2nd Floor
New York, NY 10007
malvinanathanson@nysbar.com

David Werber
The Legal Aid Society
85 First Place
Brooklyn, NY 11231
dwerber@legal-aid.org

Legislation
Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201
hillelhoffman@verizon.net

Membership
Marvin E. Schechter
Marvin E. Schechter Attorney At Law
1790 Broadway, Suite 710
New York, NY 10019
marvin@schelaw.com

Erin P. Gall
Oneida County Court, Hon. Barry M. Donalty Chambers
200 Elizabeth Street
Utica, NY 13501
egall@courts.state.ny.us

Newsletter
Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698-6102

Nominating
Roger B. Adler
233 Broadway, Suite 1800
New York, NY 10279
rbalaw1@verizon.net

Michael T. Kelly
Law Office of Michael T. Kelly, Esq.
207 Admirals Walk
Buffalo, NY 14202
mkelly1005@aol.com

Prosecution
John M. Ryan
Queens District Attorney
125-01 Queens Blvd.
Kew Gardens, NY 11415
jmryan@queensda.org

Sentencing and Sentencing Alternatives
Ira D. London
Law Offices of Ira D. London
245 Fifth Avenue, Suite 1900
New York, NY 10016
iradlondon@aol.com

Susan M. Betzjitomir
Betzjitomir & Baxter, LLP
50 Liberty Street
Bath, NY 14810
lawyer@betzjitomir.com

Traffic Safety
Peter Gerstenzang
Gerstenzang, O'Hern, Hickey & Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203
pgerstenz@aol.com

Rachel M. Kranitz
LoTempio & Brown, P.C.
181 Franklin Street
Buffalo, NY 14202
rkranitz@lotempioandbrown.com

Transition from Prison to Community
Arnold N. Kriss
Law Offices of Arnold N. Kriss
123 Williams Street, 22nd Floor
New York, NY 10038
lawkriss@aol.com

Victims' Rights
James P. Subjack
2 West Main Street
Fredonia, NY 14063
jsubjack@netsync.net

NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

I wish to become a member of the committee(s) checked below:

Name:_____

Daytime phone: _____Fax: _____

E-mail: _____

Select up to three and rank them by placing the appropriate number by each.

____ Appellate Practice
____ Awards
____ Capital Crimes
____ Comparative Law
____ Continuing Legal Education
____ Correctional System
____ Defense
____ Drug Law and Policy
____ Ethics and Professional Responsibility
____ Evidence
____ Judiciary
____ Juvenile and Family Justice
____ Legal Representation of Indigents in the Criminal Process
____ Legislation
____ Membership
____ Nominating
____ Prosecution
____ Sentencing and Sentencing Alternatives
____ Traffic Safety
____ Transition from Prison to Community
____ Victims' Rights

Please return this application to:
Membership Department, New York State Bar Association,
One Elk Street, Albany, New York 12207
Telephone: (518) 487-5577 • Fax: (518) 487-5579 • www.nysba.org

NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

Publication and Editorial Policy

Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

Publication Policy: All articles should be submitted to:

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

Submitted articles must include a cover letter giving permission for publication in this *Newsletter.* We will assume your submission is for the exclusive use of this *Newsletter* unless you advise to the contrary in your letter. Authors will be notified only if articles are rejected. Authors are encouraged to include a brief biography with their submissions.

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

Editorial Policy: The articles in this *Newsletter* represent the authors' viewpoints and research and not that of the *Newsletter* Editor or Section Officers. The accuracy of the sources used and the cases cited in submissions is the responsibility of the author.

NEW YORK CRIMINAL LAW NEWSLETTER

ISSN 1549-4063 (print) ISSN 1933-8600 (online)