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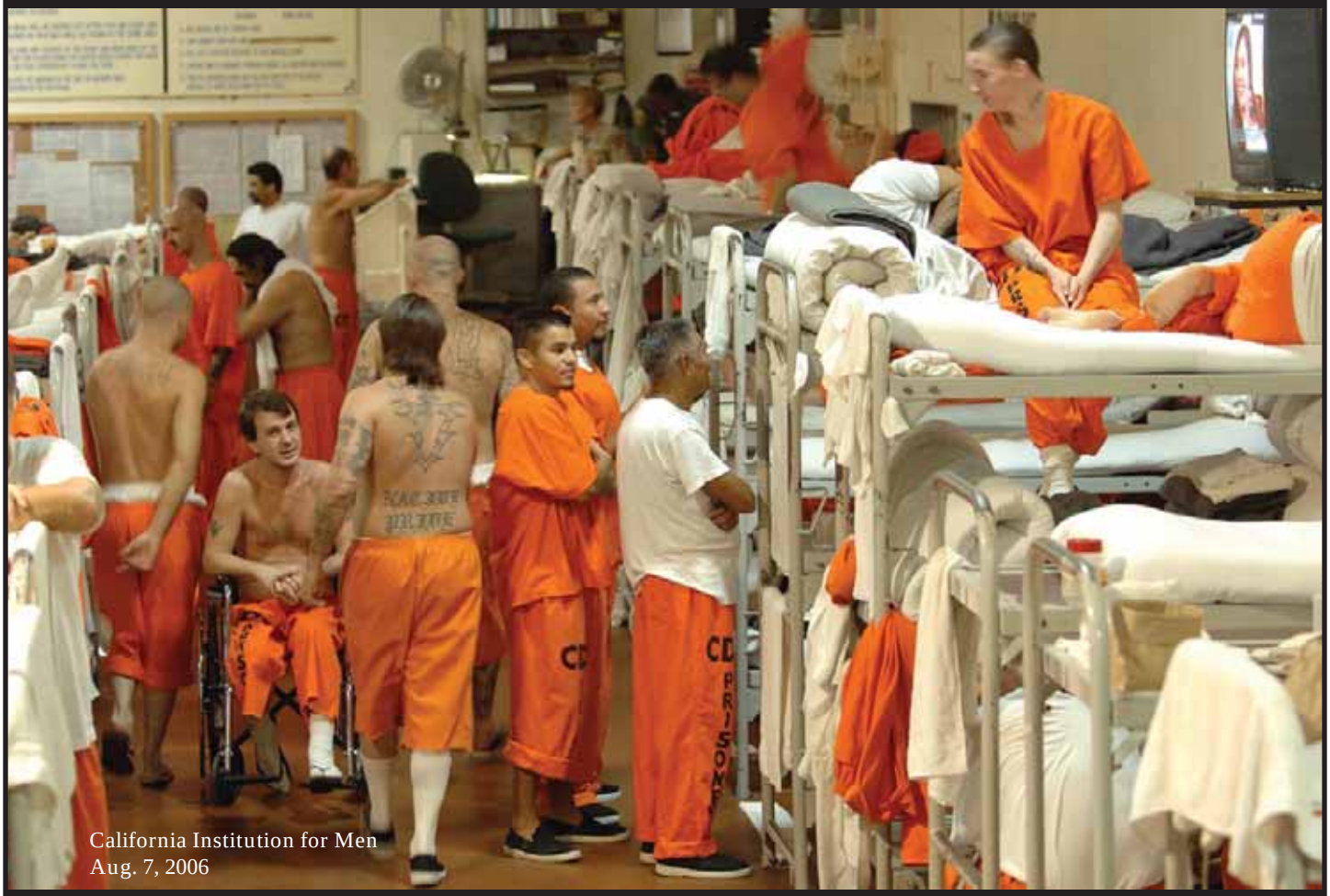
New York Criminal Law Newsletter

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

U.S. Supreme Court Condemns California Prison System, Orders End to Overcrowding



California Institution for Men
Aug. 7, 2006

***Brown v. Plata*, 131 S. Ct. 1910 (May 23, 2011)**

(See page 18 for details)

NYSBA

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Message from the Chair

This summer has been punctuated by three major controversial issues. First the CJS Executive Committee debated the merits of whether the Unauthorized Practice of Law Statute should make masquerading (translation: unlicensed) as lawyers a felony instead of the current misdemeanor. Unlike Congress, prosecutors and defense attorneys crossed party lines in a series of two votes to decide the issue, at least internally (the second vote ended in a tie so the motion failed—no increase this time around but we learned that practicing as an unlicensed landscape architect has felony status). That we were able to vote in the summer doldrums and had so many participating is a tribute to the Executive Committee's enthusiasm or possibly just the good old fashioned desire to have one's say.

Expressing an opinion is the American Way. It is what free speech is all about. There is no requirement that the opinion be grounded in data, knowledge or even—Heaven forbid!)—facts. So it was that the public expressed its fury and outrage at the Casey Anthony trial verdict which quickly morphed into unbridled anger at Ms. Anthony and then the jurors and then the defense attorneys. In endless, post-trial interviews, people averred that "she was guilty." That many never were in the courtroom, did not follow the television coverage or know much more than the fact that a small, innocent child was dead hardly seemed to matter. There was an expected outcome, in part spurred by the media and one commentator in particular who has evolved the concept of judge/jury/executioner into an electronic lynching worthy of admiration but for the dire consequences this type of "reportage" portends for those of us saddled with the mundane, though terribly complicated, task of choosing future juries. Bias is not the province of character flaws but rather is grounded in the unconscious cues we derive from our environment factored into our mental analyses. Sometimes unwarranted assumptions and overconfidence replace analytical thinking. An eyewitness presented with a pool of faces in one batch of photos might assume that the suspect is among them. You get the idea.

What to make of the summer's third controversial highly charged case—the DSK sexual abuse contretemps and/or crime. It is interesting that the case has been branded—DSK, like a handbag—a favorite media technique which uncannily squishes a complicated fact pattern into three initials. Surely the legal profession needs to consult with our Fourth Estate colleagues to understand this communication methodology so that we can improve the efficacy of our opening and closing statements.

DSK has several similarities to the Anthony case. First, there is the rush to judgment, and I do not mean the police pulling DSK off the plane (that action was correct given the current advanced state of U.S.-French Extradition Law, otherwise known as the Polanski Effect) but rather the widespread belief that the accusation was tantamount to "he did it." Then came the media barrage resplendent in leaked investigation information (hopefully we will discover that this did not derive from hacked cell phones) in which the accuser finds herself doubted and vilified. As this column is written we observe the nightly news in which a sexual abuse victim holds a news conference to get her version of the events before the public. Outcome bias can have an insidious effect upon due process, for the victim and the accused, turning the entire orderly (or so we thought) process on its head.

We have to think long and hard about getting the CJS activities out to the public. Maybe a reality show where each week unlicensed lawyers try to fool contestants but are done in by the Real Lawyers of Franklin County….

I hope you have enjoyed the summer.

Marvin Schechter

Message from the Editor

In this issue, we present our annual review of developments in the United States Supreme Court. This topic is discussed in some detail in our first feature article. As in the past, we also present a summary of the most recent annual report from the Clerk of the New York Court of Appeals regarding the productivity of that Court. We are also pleased to present an article from a first-time contributor to our *Newsletter*, who provides an important cautionary reminder regarding guilty pleas in the New York City Criminal Court. This article is written by Judge Seth L. Marvin, and it highlights recent rulings from the Appellate Division and the Appellate Term. We also initiate our forensic page by presenting an article on access to information in DNA databases. This article is written by Professor Glenn A. Garber, with the assistance of Patricia Choi, a law student at the University of North Carolina Law School.

Our New York Court of Appeals Section contains summaries of some thirty cases which were decided by our State's highest Court during the period April 28 to September 1, 2011. The fact that the New York Court of Appeals, in recent years, has been granting leave to appeal in a greater number of criminal cases has resulted in more criminal law decisions being issued. The New York Court of Appeals is now issuing decisions in nearly 100 criminal law cases. As a result, the New York Court of Appeals Review Section has grown, and now comprises a significant portion of our *Newsletter*.

The United States Supreme Court ended its 2010-2011 term on June 28, and in the last few weeks of its term issued several important decisions in the field of criminal law, including a 5-4 decision declaring that conditions in California's prison system violated the Eighth Amendment, relating to cruel and unusual punishment. The Court also issued a significant decision having to do with a Defendant's right of confrontation. These and other decisions are covered in detail in our Supreme Court Section.

As in the past, we also present several cases of significance from the various Appellate Divisions. Our For Your Information Section reports on the status of litigation commenced by 18-B attorneys against the City of New York, as well as the budget for the various prosecutors' offices, which has been adopted for the coming year by the City of New York. Other issues covered include the closing of certain prisons in New York State and the decision by the U.S. Sentencing Commission to apply reductions of sentences for crack-related offenses retroactively to include defendants who were already incarcerated prior to the reduction in penalties for those crimes.

Finally, with respect to news regarding our Section and membership, we salute the appointment of Vincent E. Doyle, III as President of the New York State Bar Association, and of Seymour W. James, Jr. as President-Elect. Both of these individuals have been active leaders of our Criminal Justice Section, and our Section is pleased and honored that they have now risen to the top leadership positions in the New York State Bar. As in the past, I thank our members for their continued support and I request that I continue to receive articles for publication and comments regarding our publication.

Spiros A. Tsimbinos

A Review of the 2010-2011 Term of the United States Supreme Court

By Spiros A. Tsimbinos

The United States Supreme Court concluded its October 2010 term on June 28, 2011. It is commencing its new term on October 3, 2011. It is thus a good time to review developments in the Court which occurred in the past year, and to highlight some of the major issues which the Court will be addressing in its new term.

The Court's Volume

The Court, during its past term, handled approximately 80 cases in which full decisions and significant issues were discussed. Civil matters made up approximately 75% of the Court's volume and criminal cases comprised about 25%. This was approximately the same situation which existed in the 2009-2010 term.

The 5-4 Decisions

Although Chief Justice Roberts has continued to make an effort to achieve greater consensus among the Court on many major issues, the Court continued to split in a 5-4 manner. Roughly 20% of the cases resulted in a 5-4 split, with members of the so-called conservative bloc on one side, and members of the liberal grouping on the other. As in the past, Justice Kennedy often provided the critical fifth swing vote. Probably the most significant criminal law case during the past term in which Justice Kennedy provided the critical swing vote was the decision in *Brown v. Plata*, 131 S. Ct. 1910 (May 23, 2011), in which the California prison system was ordered to relieve overcrowded prison conditions. On the civil side, he also provided the critical swing vote in the *Wal-mart* case, where the Court rejected a class action suit commenced by female workers at Wal-mart. Using his position as the critical swing vote, Justice Kennedy, during the past term, was in the majority 94% of the time, regaining his leading position from Justice Roberts, who this year was in the majority 91% of the time.

The Various Groupings

A review of this year's past term also clearly reveals the continued grouping of certain Judges who almost always vote together. Thus Justice Kagan and Justice Sotomayor voted together 94% of the time. Justice Alito and Justice Roberts voted together 96% of the time, and Justice Thomas and Justice Scalia voted together 86% of the time.

Justice Kagan's First Year on the Court

Due to the fact that she had previously served as U.S. Solicitor General, Justice Kagan found that she had to recuse herself in approximately one-third of the Court's cases. When she did vote, she was almost invariably in the liberal bloc of the Court, and appears to have found a soul-mate in Justice Sotomayor, with whom she voted together 94% of the time. In the area of criminal law, she consistently voted on the side of the defense in most of the significant criminal law decisions issued during the term.

Justice Scalia for the Defense

Although Justice Scalia has been traditionally viewed as a member of the conservative bloc and basically pro-prosecution, he has, in the last few years, led the Court in two major directions which have proven favorable to the defense. One area was the *Apprendi* rulings which limited the ability of a sentencing court to enhance punishment based upon factors not considered by the jury. The second area involves the issue of the right of confrontation, where Justice Scalia was instrumental through the *Crawford* line of decisions to provide a greater right of confrontation for defendants. This year, in the case of *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (June 27, 2011), the Court, by a 5-4 decision, upheld the necessity of having the analyst who actually conducted the test testify at trial, and not a substitute. In an interesting development in that case, Justices Scalia and Thomas banded together with Justices Ginsburg, Kagan and Sotomayor to provide the necessary five-Judge majority.

First Amendment Issues

The Court continued to defend the concept of free speech, even in circumstances which are detestable to most citizens. Thus, it upheld the right of individuals to stage a protest near the funeral of a military service member in the case of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) and also held that a state law restricting the sale of violent video games to minors was unconstitutional. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (June 27, 2011).

A Look Toward Next Term

Although the Court did address some significant issues in its past term, it is expected that some blockbuster matters may be decided during its upcoming term. Challenges to the new health care law are already finding their way to the Supreme Court, as are cases involving same-sex marriage, immigration and affirmative action. It appears likely that on the major controversial issues, the two traditional voting blocs will continue to oppose each other, and Justice Kennedy will continue to provide the key swing vote. We await some interesting developments.

The Appellate Division, First Department, Sends a Cautionary Reminder to Judges Who Accept Guilty Pleas in Criminal Court

By Hon. Seth L. Marvin

The Annual Report of the Criminal Court of the City of New York for the year 2008 reported, at page 19, that some 142,359 guilty pleas were accepted for that year in the Criminal Court. Similar numbers were reported for the years 2009 and 2010. The Office of Court Administration in fact recently reported that some 373,000 cases were filed in the New York City Criminal Court for the year 2010.

The large calendars often present in criminal court can occasionally tend to mask the individual attention required to be given to each case. On May 24, 2011, the Appellate Division, First Department, decided *People v. Vickers*, 2011WL1990640, and on February 16, 2011, the Appellate Term for the 2nd, 11th and13th Judicial Districts, decided *People v. Facey*, 30 Misc. 3d 138(A). These cases restated the standards for a valid guilty plea and may well have a significant impact on the day-to-day functioning of many lower criminal courts.

In *Vickers*, a 20-year-old Defendant with no prior record pleaded guilty in 2008 in the Bronx to loitering for the purpose of engaging in a prostitution offense (Penal Law Section 240.37). The First Department laid out the entire allocution:

> The Court: Ms. Vickers, your Attorney tells me that you wish to plead guilty to section 240.37, is that what you wish to do?
>
> The Defendant: Yes, sir.
>
> The Court: Is anyone forcing you to plead guilty?
>
> The Defendant: No.
>
> The Court: Plea acceptable to the People?
>
> Mr. [Adam R.] Dolan [A.D.A.]: Yes, Your Honor.
>
> The Court: Waive prosecution by information?
>
> Mr. [Stephen H.] Sturman: Yes, Your Honor.

The Defendant was then sentenced to a conditional discharge. Counsel was instructed to advise his client of her right to appeal.

On appeal, Defendant claimed that her "plea should be vacated since she was never informed of any of her rights under *Boykin v. Alabama* (395 U.S. 238 [1969]).

In vacating the guilty plea, in the interest of justice, the First Department noted that:

> A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, "has a full understanding of what the plea connotes and of its consequence"…
> Although the court is not required to engage in any particular litany when allocating the defendant, due process, requires that the record must be clear that "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant" (citations omitted).

Thus, the First Department found that, even in Criminal Court, a judge is required to

> …conduct an allocution that is adequate to ensure that the defendant is guilty of the crime charged and understands the constitutional rights…she would be waiving by pleading guilty[.]…While the court need not "thoroughly advise[]" the defendant of the rights being waived… no waiver of these constitutional rights may be presumed from a silent record… Among the factors to be considered in determining whether a defendant understands the nature of…her proffered guilty plea are the "age, experience and background of the accused" (citations omitted).

In rejecting the plea of guilty, the First Department held unanimously that "The abbreviated plea allocutions are utterly bereft of any indication that this inexperienced Defendant was made aware of the constitutional rights she was giving up as a result of her misdemeanor guilty plea…." Characterizing the allocution as "woefully deficient," the First Department concluded that "…the record fails to establish that Defendant knowingly, intelligently and voluntarily entered her plea[/]" (citations omitted)

In *Facey*, the Defendant pleaded guilty to disorderly conduct, a violation, without an adequate allocution. On

appeal, the Appellate Term found "… that the Criminal Court failed to conduct a proper plea allocution." Further, it held that the trial court "… neither advised Defendant of any of the constitutional rights he was waiving nor inquired whether he understood those rights." The Appellate Term noted that, "Although there is no requirement for a 'uniform mandatory catechism of pleading defendant[,]' a record that is silent will not overcome the presumption against waiver by a defendant of a constitutionally guaranteed protection…'"(citations omitted). In rejecting the guilty plea, the Appellate Term stated that "…the record must show an intentional relinquishment or abandonment of a known right or privilege[,]" before concluding that "…the record does not demonstrate that the plea was knowing and voluntary[.]" (citations omitted).

Conclusion

Vickers and *Facey* reemphasize that judges in Criminal Courts must allocate a defendant rather thoroughly as to the rights they are forfeiting and / or waiving by their pleas of guilty, even if the case involves a low-level offense.

The Honorable Seth L. Marvin is an Acting Supreme Court Justice in the Criminal Division of Bronx Supreme Court.

The Forensic Page—Providing Criminal Defendants Access to Information in DNA Databases to Prove Innocence and Present a Defense

By Glenn A. Garber and Patricia Choi

The introduction of DNA as a forensic tool revolutionized the process by which law enforcement conducts criminal investigations. DNA has also led to the exoneration of 272 persons, many of whom were convicted of serious crimes and faced lengthy prison sentences. The ever-growing databases of DNA profiles from convicted persons, together with advancements in science that enable testing of microscopic quantities of biological evidence, have created tremendous opportunities for investigating crime and exonerating the wrongfully convicted. However, for criminal defendants, the ability to access and use this potentially exculpatory information is limited because the DNA databases are controlled by law enforcement, and a web of rules and regulations limit the disclosure and use of the information contained in these databases. Not only are these restrictions at odds with the criminal justice system's objective of solving crimes and prosecuting the right perpetrators, but they can also curtail the defendant's right to investigate and present a defense, in derogation of state and federal constitutional rights to due process of law.

People v. Selwyn Days

Take, for example, the recent case of *People v. Selwyn Days*. Archie Harris and his health care aide Betty Ramcharan were brutally murdered in Harris's Eastchester home in 1996. Harris was bludgeoned to death with a bat and Ramcharan's throat was cut. The case went cold until Mr. Days was arrested in 2001 on a minor, unrelated offense. Despite an abundance of forensic evidence—none of which linked Days to the crime—the police came to suspect Days as a result of a tip from his former girlfriend, who told the police that Days had boasted to her that he had committed the crimes. After sixteen hours in custody and more than seven hours of interrogation, only the last hour of which was videotaped, Mr. Days provided a dubious confession to the murders. The admissions were riddled with inaccuracies about how the crime occurred, and contained a factually impossible post-confession narrative describing Days's supposed activities after the murders.

The Court's Refusal to Permit the Defense to Use New York's DNA Database to Find the Real Perpetrators

DNA evidence pointing to other perpetrators became a central focus of Days's defense at a retrial in early 2011. This trial, Days's third, ended in a mistrial after the jury deadlocked nine to three in favor of acquittal.

Prior to the 2011 retrial, Days had discovered exculpatory DNA evidence in the process of litigating a post-conviction motion to vacate his earlier conviction. Days requested retesting of the knife that was used to kill one of the victims. The Westchester County Department of Laboratories and Research (WCDLR) conducted YSTER analysis, a technique that was unavailable during the initial investigation in 1996 and is capable of isolating small quantities of male DNA in mixed samples that contain predominantly female DNA. Using this technique, WCDLR discovered partial DNA profiles of two unknown males on the murder weapon. These partial profiles only contained four and five of the fifteen standard DNA markers known as loci—too few to upload to New York State's DNA Index System (SDIS) to compare with known profiles in the database. However, WCDLR sought and obtained necessary authorization from the Division of Criminal Justice Services (DCJS) to conduct what is known as a "key board override," which allowed the partial profiles to be compared to the more than 370,000 known profiles in SDIS. This procedure identified 270 people in the state database as possible matches to the partial profiles on the murder weapon. Through further analysis of the known SDIS profiles and the samples recovered from the weapon, WCLRD was able to narrow this number to 64 possible matches.

In order to further refine the subset identified in the database, Days sought to "data mine" for exculpatory information in SDIS, going beyond the identification numbers assigned to the DNA profiles. Without revealing to the defense the identifies of the persons in the database, Days asked the Court to direct DCJS to exclude persons who were incarcerated at the time of the Eastchester murders or were under fourteen years of age when the crime occurred. Days next proposed the appointment of a special master to review information in the possession of law enforcement about the remaining possible matches to see who had contacts to the Eastchester area and had committed burglaries in other violent crimes. Finally, Days requested disclosure of the identities of the remaining potential suspects on the pared down list, so the defense could investigate and identify the real perpetrators.

The Court determined that Days's request was a "fishing expedition" and that his right to investigate and present a defense was inferior to the interest in maintaining the privacy of the individuals in the DNA database, and the motion was denied.

Access by the Defense to Information in DNA Databases That Can Exonerate the Innocent and Assist in the Investigation and Presentation of a Defense

SDIS works in conjunction with the national Combined DNA Index System, CODIS, operated by the FBI. Disclosure of DNA information is subject to criteria outlined in multiple state and federal laws, rules, and regulations, including Executive Law Article 49-B Statute 995; 9 N.Y. ADC 6192.3; interagency agreements between the DCJS, the FBI and the New York State Police; the federal Privacy Act (5 U.S.C Statute 552 (a); and other federal laws. See 42 U.S.C. Statute 14132. Importantly, under DCJS's Use and Dissemination Agreement, failure to comply with the law could cause New York to lose its connection with CODIS and access to the national database.

At first blush, the Court's ruling against *Days* makes sense, as Days could not state with certainty that the true perpetrator is one of the 64 possible matches discovered by WCDLR. See *People v. Gissendanner*, 48 N.Y.2d 543 (1979) (requires a showing that the material sought by subpoena is likely to exist).

However, the DNA databases are not exclusive for law enforcement's use. David H. Kaye, *Trawling DNA Databases for Partial Matches: What Is the FBI Afraid of*? 19 Cornell J.L. & Pub. Pol'y 145, 147 (2009). New York and many other states carve out exceptions to the confidentiality provisions to give access of information to the defense. N.Y. Exec. L Statute 995-c[6][b]; *see also* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721, fn. 297 (2007). Moreover, the right to present a defense may lie at the heart of a defendant's request for DNA database information, as was the case in *Days*. Therefore, even if federal andstate laws limit access to the databases, a defendant's right to due process should supersede these statutory restrictions. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *People v. Vilardi*, 76 N.Y.2d 67 (1990).

In addition, New York State, like several other states, has authorized partial match "familial searching." *See* December 13, 2009, DCJS Press Release, "Forensic Science Commission Approves Regulations Governing 'Partial-Match' DNA;" *see also* David R. Paoletti, Travis E. Doom, Michael L. Raymer & Dan E. Krane, *Assessing the Implications for Close Relatives in the Event of Similar but Non-matching DNA Profiles*, 46 Jurimetrics 161, 163 (2006). Familial searching is the "deliberate search…to identify close biological relatives of the perpetrator in the known offender database," and may be pursued if routine uploads fail to yield a DNA profile match. Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 Harv. J.L. & Tech, 309, 324 (2010). Thus, privacy rights have already yielded to law enforcement's interest in solving crime, a trend that will likely continue as advancements in DNA collection and testing, and the expansion of DNA databases, create increasingly powerful crime-solving opportunities.

Conclusion

The over-restriction of access to DNA databases for criminal defendants seeking to prove their innocence, or investigate and present a defense, runs counter to the goals of criminal justice and due process of law. When access to and use of information in the databases become critical to proving innocence or advancing a defense, criminal defense practitioners should frame their arguments for disclosure in state and federal constitutional terms. Moving forward, perhaps courts will start to level the playing field and make DNA and the growing wealth of information in the databases forensic tools that serve the interests of justice, and not merely the needs of law enforcement.

Glenn A. Garber is the Director of the Exoneration Initiative, a not-for-profit that handles post-conviction innocence claims, an Adjunct Professor of Law at Brooklyn Law School, and a practicing criminal defense attorney in New York City. Patricia Choi is a law student at the University of North Carolina Law School.

A Summary of the 2010 Annual Report of the Clerk of the New York Court of Appeals

By Spiros A. Tsimbinos

In late April 2011, Andrew W. Klein, Clerk of the New York Court of Appeals, issued the Annual Report for the year 2010. This was the first report prepared by Mr. Klein, who assumed the position of Clerk of the Court following the retirement of Stuart M. Cohen, who served as the Clerk for 14 years. Fittingly, Mr. Klein, in his opening remarks, paid tribute to Mr. Cohen and the other members of the Court of Appeals staff who recently retired. In this regard, Mr. Klein stated, "I think it particularly appropriate at this time to quote Stuart's remarks from the 2005 annual report: Our retired colleagues exemplified the core mission of the Court of Appeals staff: to support the Judges in their work and to serve litigants, counsel and members of the public with the utmost courtesy, skill and efficiency.'"

Continuing our long tradition of summarizing the Annual Report of the Clerk of the Court, we thank Mr. Klein and the staff of the New York Court of Appeals for providing us with a complete copy of the Report, so that we can summarize its highlights for our members.

The Report indicates that in the year 2010, the New York Court of Appeals decided 236 appeals, up from 212 in 2009. Of the 236 appeals decided, 137 were civil appeals, which was less than the 146 civil appeals decided in 2009. Ninety-nine were criminal appeals, which represented a substantial increase from the 66 criminal appeals which were decided in 2009. A striking statistic from the 2010 Report is the dramatic increase in the number of criminal appeals which the Court appears to be accepting and deciding. The Report stated that in 2010, the Court granted leave to appeal in criminal cases in 4.9% of the requests made. This was up from 3.4% in 2009, and was 2½ times the number granted in 2008, when only 2% of criminal leave applications were granted. In 2010, a total of 2,220 applications for leave to appeal in criminal matters were decided by the Court. Motions for leave to appeal in civil cases were granted in 6% of the matters, down from 7.2% in 2009. Overall, the Court decided 1,384 motions in 2010, 14 more than in 2009.

Of the 236 appeals decided in 2010, 159 were determined by unanimous vote. In some cases, however, a sharp difference of opinion was exhibited with a few cases being determined by a 4-3 split. In 2010, a total of 74 dissenting opinions were issued. Chief Judge Lippman and Judge Jones were the two members of the Court who saw fit to issue dissenting opinions in several matters.

The Court of Appeals continues to maintain a prompt and efficient method of handling its caseload. In 2010, the average time from argument or submission to disposition of an appeal decided in the normal course was 38 days, two days longer than in 2009. The average period from filing a notice of appeal, or an order granting leave to appeal, to calendaring for oral argument was approximately 9 months, about a month longer than in 2009. The average period from readiness (all papers served and filed to calendaring for oral argument) was approximately 4 months, almost a month longer than in 2009.

In his introduction, Mr. Klein has reported a significant change in the Court's procedures. Effective December 8, 2010, the Court amended its Rules of Practice to provide for the submission of briefs and records in digital format. This is the first step that the Court has taken toward digital filing, and the Court hopes to continue moving forward electronically in the future.

With respect to budget matters, the Court, evidently responding to the current fiscal crisis, reported that its total budget request for the fiscal year 2011-2012 is $15,652,618, a decrease of approximately $500,000 from last year's budget.

The 2010 Annual Report is divided into four parts. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes various functions of the Clerk's Office and summarizes administrative accomplishments in 2010. The third section highlights selected decisions of 2010. The fourth part consists of appendices with detailed statistics and other information.

The 2010 Report also includes a foreword by Judge Theodore T. Jones. Judge Jones concludes his message with the following statement: "While the scope of our effort is aptly detailed in this Annual Report, the passion and dedication of the Chief Judge, my judicial colleagues and our wonderful support staff has been remarkable. I am sure I represent the sentiments of all as I applaud the accomplishments of this year and look forward to the challenges of 2011."

The Annual Report issued by the Clerk of Court of Appeals provides a wealth of information regarding the activity of the New York Court of Appeals. It provides valuable and interesting reading, and criminal law practitioners should be aware of its highlights.

New York Court of Appeals Review

The New York Court of Appeals issued several important rulings in the field of criminal law in the last few months. Summarized below are the significant decisions issued by the New York Court of Appeals from April 28, 2011 to September 1, 2011.

Post-Release Supervision

People v. Lingle

People v. Parisi

People v. Murrell

People v. Prendergast

People v. Rodriguez

***People v. Sharlow*, all decided April 28, 2011 (N.Y.L.J., April 29, 2011, pp. 9 and 26)**

In a series of cases, the New York Court of Appeals affirmed Appellate Division determinations upholding the resentencing of offenders to post-release supervision, even when their original sentences were not imposed by trial court judges. The Defendants had argued that the sentences imposed at their trials should have the element of finality, and that the post-release supervision terms could not be fairly applied as they neared the end of their prison terms. The Court of Appeals concluded that the re-sentencing did not violate the prohibition against double jeopardy. The Court found that the re-sentencings merely imposed statutorily required sentences. It further stated that the State was not acting out of malice, but out of a desire to see that legislatively determined mandatory sentences were actually served.

Brady Violation

***People v. Alonso*, decided May 3, 2011 (N.Y.L.J., May 4, 2011, p. 26)**

In a 5-2 decision, the New York Court of Appeals reversed an Appellate Division ruling, dismissing the People's appeal, and ordered that Court to hear the merits of the case. In the case at bar, the Defendant had claimed that a serious *Brady* violation had occurred, and the trial court found that the constitutional violation was of such a magnitude that the indictments had to be dismissed. The People brought an appeal to the Appellate Division, but that Court dismissed the appeal without passing on the merits. The Appellate Division had concluded that the People lacked the statutory right to bring an appeal from a dismissal of an indictment, in response to a discovery violation. The Court of Appeals concluded that it agreed with the People that the Supreme Court's power to dismiss an indictment emanates from CPL 210.20. Thus, the People had the right to appeal the Supreme Court's order dismissing the indictments in question.

Judges Jones and Smith dissented, finding that the Supreme Court had dismissed the indictments pursuant to CPL 240.70, which penalized the People for a discovery violation. The dissenters argued that 240.70 is not specifically enumerated in CPL Section 450.20, which authorizes the People to take an appeal as a matter of right. Thus, because there was no express statutory authority for the People's appeal in the case at bar, the dissenters would have affirmed the Appellate Division ruling.

Showup Identifications

***People v. Gilford*, decided May 3, 2011 (N.Y.L.J., May 4, 2011, p. 29)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's first degree manslaughter conviction, and refused to order the suppression of an alleged improper showup identification. The Court concluded that whether a showup is reasonable under the circumstances, or is unduly suggestive, are mixed questions of law and fact. The determination of the hearing court and the decision of the Appellate Division were aptly supported by evidence in the record and were beyond any further review by the New York Court of Appeals.

Alibi Defense

***People v. Melendez*, decided May 3, 2011 (N.Y.L.J., May 4, 2011, p. 29)**

In a unanimous decision, the New York Court of Appeals concluded that the Defendant's claim that the trial court erred in not unequivocally conveying to the jury that the People were required to disprove the Defendant's alibi defense beyond a reasonable doubt was unpreserved, and that therefore the Court could not consider the issue. The Court noted that although a charge conference was held, and the issue was discussed, defense counsel neither objected to the Court's proposed charge, nor voiced an objection after it was given.

Driving Without a License

***People v. Rivera*, decided May 3, 2011 (N.Y.L.J., May 4, 2011, p. 27)**

In a 5-2 decision, the New York Court of Appeals held that a driver whose license has been revoked, but who had received a conditional license and failed to comply with its conditions, may be prosecuted only for the traffic infraction of driving for a use not authorized by his license, not for the crime of driving while his license is revoked. The Court of Appeals concluded that a review of the statutory history of the relevant legislation indicated that the above result was in keeping with the proper legislative intent. It noted that in the future, the legislature could address the problem if it disagreed with the Court's determination. Judges Graffeo and Pigott dissented.

Evidence of Victim's Sexual Conduct

***People v. Scott*, decided May 3, 2011 (N.Y.L.J., May 4, 2011, p. 28)**

In a unanimous decision, the New York Court of Appeals held that a trial judge was within his discretion to preclude evidence of a victim's sexual conduct around the time of the incident for which the Defendant was charged. The Defendant was charged with rape in the first degree with regard to an incident that took place at a party. The Defendant was a 23-year-old man, and he moved, prior to trial, to introduce evidence of the Complainant's sexual conduct at the party, specifically her involvement with a 16-year-old friend. The trial court ruled that the defense was prohibited form eliciting testimony relevant to any prior sexual conduct of the victim, with any of the other individuals who were present, unless the People introduced evidence attributing the Complainant's bruises to sexual activity. The People did not offer any such testimony, and the Court of Appeals' majority concluded that under these circumstances, the trial court did not abuse its discretion in making its ruling, pursuant to the Rape Shield Law.

Ineffective Assistance of Counsel

***People v. Feliciano*, decided May 5, 2011 (N.Y.L.J., May 6, 2011, p. 26)**

In a unanimous decision, the New York Court of Appeals denied a Defendant's claim that his appellate Attorney had rendered ineffective assistance of counsel because of the failure of defense counsel to argue at a violation of probation hearing that a 6-year delay by the prosecution in moving to adjudicate the VOP amounted to a loss of jurisdiction, so that the violation should have been dismissed. In the case at bar, the Defendant's VOP hearing had been postponed until the Defendant was released from prison in Pennsylvania where he had been incarcerated on another matter.

After reviewing the full facts in the case, the Court concluded that the argument the Defendant asserted was not so strong that "no reasonable defense attorney could have found them to be worth raising." They were instead novel and called for an extension or change in the existing law. As a result it could not be concluded that appellate counsel was ineffective.

Stop and Frisk

People v. Brannan

People v. Fernandez

***People v. Herrera*, decided May 5, 2011 (N.Y.L.J. , May 6, 2011, pp. 28 and 29)**

In these cases, the Court decided the issue of what level of knowledge must a police officer possess before he or she has reasonable suspicion to believe that an individual possesses a gravity knife as opposed to other similar knives such as a pocket knife, and therefore is authorized to conduct a stop and frisk. In *Brannan*, the Court unanimously found the facts insufficient to support the stop and frisk and reversed the Defendant's conviction.

In *Fernandez* and *Herrera*, the Court by a 6-1 vote found that the officers had acted properly and had the required information to justify a reasonable suspicion. Judge Jones dissented in both of these cases.

In rendering its decision the Court issued the following guidelines based upon the *DeBour* principles:

> We hold that the detaining officers must have reason to believe that the object observed is indeed a gravity knife, based on his or her experience and training, and / or observable identifiable characteristics of the knife. An individual may not be detained merely because he or she is seen in possession of an object that appears to be a similar but legal object such as a pocket knife.

Right to a Public Trial

***People v. Martin*, decided May 10, 2011 (N.Y.L.J., May 11, 2011, p. 26)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial. In the case at bar, the trial judge, sua sponte, closed the courtroom, specifically ejecting the Defendant's father during the voir dire, and without considering any alternative accommodations. Defense counsel had objected to the Court's actions, and the New York Court of Appeals found that since in all criminal prosecutions the accused is entitled to enjoy the rights to a public trial, the trial court had acted precipitously and had not stated its specific reasons for taking the action in question. The Court concluded that trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Further, there was nothing in the record that indicated that the Court could not have accommodated the Defendant's father without ejecting him totally from the courtroom.

Legally Sufficient Evidence

***People v. Franov*, decided May 10, 2011 (N.Y.L.J., May 11, 2011, p. 26)**

In a 5-2 decision, the New York Court of Appeals reversed an Appellate Division determination and reinstated the Defendant's conviction for unauthorized use of a vehicle in the second degree. Police officers patrolling an area in Queens had observed the Defendant exit the driver's side of a Lincoln Town Car holding a small black box. When the Defendant saw the officers, he dropped the box to the ground and continued to walk. After the officers stopped the Defendant and recovered the discarded item, they found that it possessed a computerized

automobile control module. When they examined the vehicle they noticed that the driver's side door lock was broken, and the dashboard had been ripped, exposing the internal wiring. It was later discovered that the Defendant neither owned nor had permission or authority to use the car. The Appellate Division had dismissed the conviction of unauthorized use of a vehicle, on the grounds that the Defendant's momentary presence in the vehicle was insufficient for a finding that he exercised dominion and control over the car. The Court of Appeals majority, however, found that when considering the evidence in the light most favorable to the People, a rational jury could have found that the Defendant broke into the Town Car by popping out the driver's side door lock and entered the car without consent. The Defendant's actions thus constituted a temporary use of the car, and a rational jury could draw permissible inferences to sustain a conviction for unauthorized use. Judges Jones and Pigott dissented, stating that the majority had read the unauthorized use of a vehicle statute too broadly, and that the Defendant's momentary presence in the vehicle was insufficient to sustain an unauthorized use conviction.

Brady Violations

People v. Hayes, decided May 10, 2011 (N.Y.L.J., May 11, 2011, p. 28)

In a 6-1 decision, the New York Court of Appeals determined that no Brady violation occurred from the failure of the police to interview witnesses after overhearing two potentially exculpatory statements. The Court found that there was no duty by the police to obtain the identities or contact information of the bystanders in question. The Court drew a specific distinction between preserving evidence already in the possession of the prosecution and affirmatively obtaining evidence for the benefit of a criminal defendant. With respect to the related issue of whether the Defendant was improperly precluded from cross-examining on the adequacy of the police investigation, the Court found that the Defendant did not have an unfettered right to challenge the police investigation, and that the trial court did not abuse its discretion in concluding that the use of the anonymous hearsay would have created an unacceptable risk that the jury would consider the statements for their truth. Chief Judge Lippman issued a dissenting opinion, arguing that the Defendant was improperly precluded from using the statements overheard by the police to question the adequacy of the investigation, and that a due process violation had occurred with respect to the restrictions placed upon cross-examination.

Testimony Regarding Bad Reputation

People v. Fernandez, decided June 2, 2011 (N.Y.L.J., June 3, 2011, p. 26)

In a 5-2 decision, the New York Court of Appeals held that a trial court had committed abuse of discretion as a matter of law when the Defendant was improperly deprived of his right to present testimony that the Complainant had a bad reputation in the community for truth and veracity. The Defendant was accused of improperly engaging in sexual contact when he was 17 years old with his 8-year old niece. At the trial, conflicting testimony regarding the events in question was presented.

When defense counsel attempted to obtain from a witness whether the Complainant had a bad reputation in the community for truth and veracity, the trial judge prevented such testimony. The Appellate Division reversed the Defendant's conviction in a 3-2 decision, and the New York Court of Appeals concurred with the Appellate Division finding. The Court of Appeals majority determined that the trial court's decision to exclude the testimony was error, since credibility was the central issue before the jury to resolve, and the County Court's failure to admit evidence related to the Complainant's bad reputation for truth and veracity could not be considered harmless. Therefore the Defendant was entitled to a new trial. The majority opinion was written by Judge Ciparick, and was joined in by Judges Read, Smith, Pigott and Jones. Judges Graffeo and Lippman dissented.

Search and Seizure

People v. Hunter, decided June 2, 2011 (N.Y.L.J., June 3, 2011, p. 29)

In a unanimous decision, the New York Court of Appeals reversed an Appellate Division order and remitted the matter back to that Court for consideration of issues which were raised but not determined on the appeal to that Court. The issue in the case at bar was whether the People must timely object to a Defendant's failure to prove standing in order to preserve that issue for appellate review. The Court of Appeals answered the question in the affirmative, reiterating its prior holding in *People v. Stith*, 69 NY 2d 313 (1987). In the case at bar, the People did not challenge the Defendant's claim that he possessed a legitimate expectation of privacy in his mother's apartment and therefore did not assert a claim that the Defendant lacked standing. The Court of Appeals stated that the preservation requirement serves the added purpose of alerting the adverse party of the need to develop a record for appeal. Thus, because the People failed to preserve the issue, the Appellate Division erred in entertaining it and the matter must be remitted back to that Court.

Time Limits for Voir Dire

People v. Steward, decided June 7, 2011 (N.Y.L.J., June 8, 2011, pp. 1, 2 and 18)

In a 5-2 decision, the New York Court of Appeals held that a trial Judge had abused her discretion by restricting lawyers to 5 minutes of juror questioning in a criminal case, and not allowing sufficient time for defense attorneys to explore potential bias. The Court thus vacated the Defendant's conviction and ordered a new trial. The ma-

jority noted that the case was complex and a significant number of the potential jury panel had revealed that they or someone close to them had been a victim of a crime or were familiar with the victim. Under such circumstances, the imposition of a strict 5-minute rule was unwarranted and violated the Defendant's rights to a fair trial.

In the majority opinion written by Judge Graffeo the court stated that although trial judges have discretion to impose reasonable time limits, the allotment should be appropriate to the circumstances of the case. Judge Graffeo was joined in the majority opinion by Judges Ciparick Pigott, Jones and Chief Judge Lippman. Justice Robert A. Smith issued a dissenting opinion which was joined in by Justice Read. The dissenters argued that the majority had overlooked the fact that defense counsel had not made an appropriate record of how the time limit had hampered his questioning. Judge Smith argued that the burden should be on the defense to inform Judges that a limit is compromising their voir dire so the court can remedy the problem.

Intoxication Charge

People v. Sirico, decided June 7, 2011 (N.Y.L.J., June 8, 2011, pp. 2 and 21)

In a 6-1 decision, the Court held that there was insufficient evidence in the record to support an inference that the Defendant was so intoxicated as to be unable to form the requisite criminal intent with respect to the crime of murder in the second degree for which he was convicted. Accordingly, the Defendant was not entitled to an intoxication charge. Judge Jones issued a dissenting opinion, in which he held that the uncontroverted facts indicated that on the day of the criminal incident the Defendant had consumed two large glasses of Southern Comfort whisky and had ingested a Xanax pill. He pointed out that in *People v. Gaines*, 83 NY 2d, 925 (1994), the Court had indicated that a relatively low threshold is required to demonstrate entitlement to an intoxication charge. Based on these factors and other Court of Appeals decisions, Judge Jones argued that it was error for the trial court to deny Defendant's request for a charge on intoxication.

Right to Counsel

People v. Pacquette, decided June 7, 2011 (N.Y.L.J., June 8, 2011, pp. 2 and 20)

In a 5-2 decision, the New York Court of Appeals held that a statement made by a Defendant to police officers, after an 18-B lawyer had advised them that he was representing the Defendant on another matter, was admissible and did not violate the Defendant's right to counsel. The Court noted that the Attorney had been appointed to represent the Defendant in the Manhattan case. At that point, no one had been appointed to represent him in connection with the homicide which was being investigated in Brooklyn. Judge Read, writing for the majority, concluded that Mr. Scott's unilateral assertion that the Defendant was represented in the Brooklyn case without his specifying that the attorney was handling the murder investigation was inadequate to trigger the Defendant's right to counsel and to shield him from any questioning without his lawyer being present. Joining Judge Read in the majority were Judges Ciparick, Graffeo, Smith and Pigott.

Chief Judge Lippman and Judge Jones dissented. They indicated that no competent defense attorney would simply abandon a client about to be interrogated by the police on a different matter, and it was appropriate for defense counsel in the situation herein to temporarily interpose himself between the officers and his client. The area of right to counsel continues to be a subject of controversy within the Court of Appeals, with apparent sharp splits among the Judges.

Reckless Endangerment

People v. Lewie, decided June 9, 2011 (N.Y.L.J., June 10, 2011, p. 27)

In a unanimous decision, the New York Court of Appeals determined that the Defendant's conviction for reckless endangerment was insufficient as a matter of law and had to be vacated. The Defendant had been convicted of both manslaughter in the second degree, based upon recklessness, and reckless endangerment in the first degree, based upon depraved indifference to human life. The case involved the death of an 8-month old baby; the Defendant had been convicted on the basis of injuries found on the infant, and a delayed period of time in seeking medical help. All seven Judges concluded that the evidence did not make out a case of depraved indifference, and therefore the conviction for reckless endangerment in the first degree was dismissed. Five Judges constituting a majority of the Court did find sufficient grounds for reckless conduct, and therefore upheld the conviction for manslaughter in the second degree based upon reckless conduct. Judge Jones and Chief Judge Lippman dissented in part on the grounds that they would also have reversed the conviction for manslaughter.

Plea Agreement

People v. Albergotti, decided June 9, 2011 (N.Y.L.J., June 10, 2011, p. 29)

In a unanimous decision, the New York Court of Appeals held that the trial court had conducted a sufficient inquiry into the reasons why a Defendant who had agreed to a plea bargain had failed to appear in court on the designated date. In the case at bar, the Defendant had pleaded guilty and was promised a sentence of 2 to 4 years provided he return to court, stay out of trouble, and cooperate with the Department of Probation. Following the plea agreement, the Defendant, on the scheduled day of sentence, left the Courtroom without notifying his Attorney or the Court, and failed to answer the cal-

endar call at both morning and afternoon sessions. After a bench warrant had been issued, and the Defendant was returned to Court, the Judge informed him that the promised sentence was no longer available because of his failure to comply with the plea terms. The Defendant was thereafter sentenced to 2½ to 5 years.

The New York Court of Appeals upheld the trial court sentence, finding that a sufficient inquiry had been conducted by the Court regarding the reasons for the Defendant's initial absence and it further found that the Court was not required to conduct an evidentiary hearing to determine the veracity of the Defendant's excuses. That the Court chose not to credit Defendant's account of events was not a ground for reversal.

Removal of Potential Juror

People v. Johnson, decided June 9, 2011 (N.Y.L.J., June 10, 2011, P. 29)

In a unanimous decision the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial because the trial judge did not conduct a proper inquiry regarding a potential juror who indicated that she had a strong bias with respect to the insanity defense which was to be raised by the Defendant. The trial judge denied the Defendant's challenge for cause, and forced defense counsel to use a peremptory challenge to excuse the juror, thereby exhausting peremptory challenges. The Court of Appeals determined that the trial judge should have conducted follow-up questioning regarding the juror's expressed uncertainty regarding her ability to fairly consider a major issue in the case. A reversal was therefore required.

Search and Seizure

People v. Concepcion, decided June 14, 2011 (N.Y.L.J., June 15, 2011, p. 20)

In a 5-2 decision, the New York Court of Appeals remitted the matter back to the Appellate Division for further consideration on an issue involving the suppression of evidence. In the case at bar, the Defendant was arrested following a shooting, and his minivan was searched and little more than an ounce of cocaine was recovered from a compartment behind the ashtray in the front console. The Defendant moved to suppress, and the People argued that he had consented to the search, or alternatively, that the drugs were admissible under the inevitable discovery doctrine. The trial court rejected the inevitable discovery theory but found that the People had failed to establish the Defendant's consent. In the Appellate Division, the People conceded that the inevitable discovery doctrine was not applicable, but again argued that the Defendant had consented to the search. A 3-Judge majority in the Appellate Division agreed with the People and upheld the denial of the suppression motion. The New York Court of Appeals determined that the Appellate Division's decision was erroneous, pursuant to their determination in *People v. La Fontaine*, 92 NY 2d 470, 1998, which precluded the affirmance of the denial of suppression on the basis of consent which the trial judge had already found in favor of the Defendant. The Court of Appeals majority determined that the proper remedy in the case at bar was to remit the matter back to the Appellate Division so it could decide whether the erroneous denial of the suppression motion could constitute harmless error so that the Defendant's conviction could be sustained.

Judges Smith and Pigott argued that the Court's determination in *People v. LaFontain*e was a serious mistake which had not been followed and which should be officially overturned.

The Granting of Prosecutorial Immunity

People v. Abrams, decided June 14, 2011 (N.Y.L.J., June 15, 2011, p. 21)

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and determined that no error had occurred when the special prosecutor granted a witness prosecutorial immunity for perjury in the event her trial testimony conflicted with her grand jury testimony. The Court of Appeals found that a prosecutor possesses discretion when to immunize a witness from prosecution and the County Court is a competent authority to confer immunity when expressly requested by the District Attorney to do so. In the case at bar, the Special Prosecutor acted within his discretionary authority, and he had properly conferred with the District Attorney.

Right to Counsel

People v. Gibson, decided June 14, 2011 (N.Y.L.J., June 15, 2011, p. 21)

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and determined that under the circumstances of the case, the collection of Defendant's DNA while he was in custody did not contravene his right to counsel. In the case at bar, the Defendant was suspected of robbing a gas station. Subsequently he was arrested on a bench warrant stemming from an unrelated matter in which his right to counsel had attached. While incarcerated, the Defendant asked to speak to a Detective he had known for several years. The Detective brought the Defendant to an office for a conversation and offered the Defendant a cigarette. The Defendant's cigarette was eventually taken and tested. The DNA results linked the Defendant to the robbery. The Court of Appeals concluded that the Defendant's right to counsel had not been violated under the circumstances herein. The Defendant had initiated the meeting with the Detective, and the Detective had simply capitalized on the situation that manifested itself through the Defendant's own actions.

Dismissal of Appeal

***People v. Joseph R.*, decided June 14, 2011 (N.Y.L.J., June 15, 2011, p. 21)**

In a unanimous decision, the New York Court of Appeals ordered the dismissal of a People's appeal, finding that no statute authorized the appeal by the People to the Appellate Division from the County Court judgment adjudicating the Defendant a youthful offender.

Depraved Indifference Murder

***People v. DiGuglielmo*, decided June 23, 2011 (N.Y.L.J., June 24, 2011, pp. 2 and 29)**

In a unanimous decision, the Court of Appeals rejected the Defendant's claim that the evidence supporting his conviction of depraved indifference murder was legally insufficient based upon the Court's 2006 ruling in *People v. Feingold*, 7 NY 3d 288. The Court stated that the standard enunciated in *Feingold* does not apply retroactively to cases on collateral review, and Defendant's claim that such a result violated the federal due process clause was without merit. In a secondary ruling, the Court held that even assuming that the Defendant made a specific request for material alleged to be exculpatory, no reasonable possibility existed that any such failure to disclose contributed to the verdict.

Re-Sentencing of Drug Offenders

***People v. Paulin*, decided June 28, 2011 (N.Y.L.J., June 29, 2011, p. 20)**

In a unanimous decision, the New York Court of Appeals determined that the 2009 Drug Law Reform Act allows certain prisoners sentenced under the Rockefeller Drug Laws to be re-sentenced, and applies to prisoners who have been paroled and then re-incarcerated for violating their parole. The Court found that the purpose of the 2009 Reform Act was to grant relief from the inordinately harsh punishment which was applied to low level drug offenders under the Rockefeller Drug Laws. Although the conduct of parole violators could be considered with respect to any re-sentencing application, no automatic bar should be applied so as to prevent a re-sentencing from being considered.

***People v. Santiago*, decided June 28, 2011 (N.Y.L.J., June 29, 2011, p. 21)**

In a related matter to the *Paulin* decision, the New York Court of Appeals also held that a prisoner who applied before being paroled is not barred from obtaining re-sentencing after release. The Court noted that until a recent amendment, the original 2009 Drug Law Reform Act allowed only incarcerated offenders to apply for re-sentencing. Based upon their determination in *Paulin*, the Court held that a prisoner who applied before being paroled is not barred from obtaining re-sentencing after release.

Sentencing as a Predicate Felon

People v. Acevedo

***People v. Collado*, decided June 30, 2011 (N.Y.L.J., July 1, 2011, p. 26)**

In a decision involving two cases, the New York Court of Appeals held that Defendants could be sentenced as predicate felons, even though they had sought a re-sentencing to correct an illegally lenient sentence, and this action did not alter the underlying conviction as a predicate for enhanced sentencing. The two cases involved Defendants who had been convicted of drug offenses, and where the imposed sentence had originally failed to include a period of post-release supervision. The Defendants argued that because re-sentencing to include the post-release supervision period had occurred after the date of the second offense, the underlying conviction no longer qualified as a predicate for enhanced sentencing. The Defendants relied upon Penal Law section 70.06, which provided that a predicate sentence must have been imposed before the commission of the present felony.

The New York Court of Appeals determined that the decisive feature of the cases at hand was that the sentencing errors the Defendants sought to correct by re-sentencing were errors in their favor. The only practical benefit the Defendants could possibly gain from the re-sentencing was to move their sentences to a later date, thus eliminating their prior crimes as predicates in their latter cases. The Court of Appeals held that this tactic was ineffective, and that the original sentencing date should be the one to be considered for predicate felony purposes. Chief Judge Lippman wrote the decision for the six-Judge majority, and Judge Jones issued a dissenting opinion.

Speedy Trial

***People v. Mungro*, decided June 30, 2011 (N.Y.L.J., July 1, 2011, p. 29)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction and denied his claim that he had been denied a right to a speedy trial. The Court concluded that the People did not violate the Defendant's rights to a speedy trial, pursuant to CPL 30.30, by failing to request his presence in New York from federal custody in Ohio until his prosecution there was completed and he began serving his sentence. The Court found that the People had no statutory authority to request Defendant's presence until such time as was designated by CPL 580.20, and therefore should not be penalized for the period of time that the Defendant was unavailable for trial. In issuing its decision, the Court cited its previous case of *People v. Vrlaku*, 73 NY 2d 800 (1988).

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

Beginning in early May, the United States Supreme Court began issuing several decisions in the Criminal Law area. These cases are summarized below.

King v. Kentucky, 131 S. Ct. 1849 (May 16, 2011)

In an 8-1 decision, the United State Supreme Court reversed a Kentucky Court ruling which had suppressed evidence which the police had obtained after they had entered the Defendant's apartment. The police had burst into the apartment without a search warrant because they smelled marijuana and believed that the Defendant was trying to get rid of the incriminating evidence. The eight-Judge majority found that there was no violation of the Defendant's constitutional rights because the police had acted reasonably. Justice Alito, who wrote the opinion for the Court, stated that occupants who choose not to stand on their constitutional rights, but instead elect to attempt to destroy evidence, have only themselves to blame. Although people have no obligation to respond to knocks or to open the door to allow police to come in, once the police heard noises that indicated whoever was inside was trying to get rid of incriminating evidence, then the police action in breaking in was reasonable and justified. Justice Ginsburg issued a dissenting opinion in which she stated that the majority ruling was giving police an easy way to routinely avoid getting warrants in drug cases. She stated that police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant.

Brown v. Plata, 131 S. Ct. 1910 (May 23, 2011)

In a 5-4 decision, the United States Supreme Court determined that California prison officials must remove tens of thousands of inmates from their prison rolls in the next two years. In a decision written by Justice Kennedy, the majority concluded that the conditions in the California prison system amounted to cruel and unusual punishment, and that the severe overcrowding has resulted in needless suffering and death. The majority concluded that the California prison system was designed to hold 80,000 inmates, and had as many as 156,000 a few years ago. The Court upheld a lower court ruling which ordered the State of California to correct the deplorable conditions, even if it would require the release of thousands of inmates. The majority opinion consisted of Justices Kennedy, Ginsburg, Breyer, Sotomayor and Kagan. The majority opinion specifically stated that if a prison deprives prisoners of basic sustenance, including adequate medical care, the Courts have a responsibility to remedy the resulting Eighth Amendment violation.

Justice Scalia and Justice Alito issued vigorous dissenting opinions, which were joined in by Chief Justice Roberts and Justice Thomas. The four dissenting Justices basically argued that federal judges did not have the authority under the Constitution to interfere in the operation of state correctional institutions. Thus, Justice Alito and Justice Roberts, in their dissenting opinion, argued that "Decisions regarding state prisoners have profound public safety and financial implications, and the states are generally free to make these decisions as they choose." The four dissenting Judges also accused the majority of gambling with the safety of the people of California, and that dire consequences could result from the Court's decision. In his dissenting opinion, Justice Alito stated that the prisoner release ordered in the case was unprecedented and improvident. He concluded by stating, "I fear that today's decision, like prior release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years we will see."

The decision in this case clearly reflects some sharp divisions in the Court, and has probably been one of the most controversial of the Court's most recent term. The full impact of the Court's decision will not be known for the next several years, as state officials in California attempt to rectify the severe overcrowding conditions in the State's prisons.

Skinner v. Switzer, 131 S. Ct. 1289 (March 7, 2011)

In a 6-3 decision, the United States Supreme Court held that a convicted state prisoner may seek DNA testing of crime-scene evidence in a section 1983 civil rights action. The Court's determination answered a question which was previously unresolved as to whether a convicted state prisoner seeking DNA testing of crime scene evidence may assert that claim in a civil rights action under 42 U.S.C. Section 1983, or may assert the claim in Federal Court only in a petition for Writ of Habeas Corpus. The Courts' six-Judge majority determined that habeas was not the exclusive remedy, and that the prisoner could raise the issue in a Section 1983 action. The opinion was written by Justice Ginsburg, and was joined in by Justices Roberts, Scalia, Breyer, Sotomayor and Kagan. Justices Thomas, Kennedy and Alito dissented.

Campeta v. Green, 131 S. Ct. 2020 (May 26, 2011)

In a 7-2 decision, the United States Supreme Court held that the Court had authority to review an immunized governmental official's challenge to a constitutional ruling. In the case at bar, a mother, on behalf of her minor

daughters, had sued state officials, pursuant to a section 1983 action alleging violations of the Fourth Amendment. The U.S. District Court had originally granted summary judgment for the Defendants, but the Circuit Court of Appeals had reversed in part and had addressed Fourth Amendment issues. After determining it had authority to review the government official's challenge to the constitutional ruling issued by the Circuit Court of Appeals, the United States Supreme Court held that the appropriate disposition was to vacate the part of the Court of Appeals opinion that addressed the Fourth Amendment issue, and that the matter should be remanded to that Court. The majority opinion was written by Justice Kagan. Concurring opinions were also issued by Justices Scalia and Sotomayor, and Justices Kennedy and Thomas dissented.

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (May 31, 2011)

In a unanimous decision, the United States Supreme Court held that former U.S. Attorney General Ashcroft had absolute immunity in a matter involving the arrest of a material witness in the days following the 9-11 attack. The Court ruled that the lawsuit which was brought by the Plaintiff had to be dismissed on the grounds that public officials cannot be personally sued unless the conduct at issue had been clearly established as being unconstitutional. In the case at bar, the Plaintiff had been arrested pursuant to an arrest warrant and had been held for a significant period of time without being charged with any crime. The United States Supreme Court declared that the arrest and detention of a witness that arises from a valid warrant cannot be challenged on the grounds that authorities had an improper motive in seeking the warrant. Although concurring in the result, three of the Judges filed separate opinions indicating that they had problems with the way the government had taken the action in question. The Court's main decision was written by Justice Scalia, and the three Justices who indicated some reservations were Justices Kennedy, Sotomayor and Ginsburg.

J.D.B. v. North Carolina, 131 S. Ct . 2394 (June 16, 2011)

In a 5-4 decision, the United States Supreme Court indicated that the age of a suspect must be considered when determining whether they would feel free not to respond to officers' questions and leave. The case involved a 13-year-old student who confessed to two home breakins after he was removed from class and questioned for more than ½ hour in a school room by police officers and school administrators. The police and the prosecution had argued that the Defendant was not in custody and that therefore Miranda warnings were not required to be provided to the Defendant. The North Carolina courts in fact had held that the Defendant was not in custody and that the Defendant's age was not a factor to be considered in whether the Defendant believed he was free to leave.

In issuing its ruling, however, the 5-Judge majority reversed the lower court determination and remitted the matter back to the North Carolina courts for further consideration. In a majority opinion written by Justice Sotomayor, the Court held that a child's age must be considered as a factor in making its overall determination on the issue of whether a defendant is in custody for the purposes of receiving the Miranda warnings. Justice Sotomayor was joined in the majority by Justices Ginsburg, Breyer, Kagan and the crucial swing vote, Justice Kennedy. Justice Alito issued a vigorous dissent in which Chief Judge Roberts and Justices Scalia and Thomas joined. Justice Alito stated that the majority's decision would inject unnecessary uncertainty into the process, requiring Miranda warnings, and would cause great difficulty in law enforcement in dealing with this issue. Justice Alito also stated that the majority complicated the Miranda analysis by requiring one characteristic—age—to be in the mix, when others, such as intelligence and experience with police, may be more pertinent in a case.

Davis v. United, 131 S. Ct. 2419 (June 16, 2011)

In a 7-2 decision, the United States Supreme Court held that evidence collected during a police search could be used even if the search is of a type that is later found to be unconstitutional. The decision constitutes a further chipping away of the exclusionary rule. Justices Breyer and Ginsburg dissented.

Tapia v. United States, 131 S. Ct. 2382 (June 16, 2011)

In a unanimous decision, the United States Supreme Court ruled that judges may not impose longer prison terms on a defendant in the hopes of rehabilitating them. In the case at bar, a California Federal Judge had extended a Defendant's prison term so she could participate in a drug rehabilitation program. The Defendant appealed the 51-month prison term which was imposed, and argued that the federal sentencing law stated that imprisonment is not an appropriate means of promoting correction and rehabilitation. Citing this phrase, the Supreme Court ruled in favor of the Defendant, and ordered the sentencing Judge to reconsider the length of the sentence imposed.

Brown v. Entertainment Merchants Association, 131 S. Ct. ____ (June 27, 2011)

In a 7-2 decision, the United State Supreme Court struck down a California law which prohibited sales of violent video games to minors. The Court found that the ban was an unconstitutional infringement on the freedom of speech. Justice Scalia wrote the majority opinion, which stated that disgust is not a valid basis for restricting expression. Justice Alito and Justice Roberts, while concurring in the decision, indicated they would have supported

a more carefully written statute which may have distinguished between children of a higher age and those who were in an extremely young category. Justices Breyer and Thomas dissented, finding that the State had a valid reason to impose the ban in question.

Bullcoming v. New Mexico, 131 S. Ct. ___ (June 27, 2011)

In a 5-4 decision, the United States Supreme Court held that the Sixth Amendment right of confrontation requires that a forensic analyst who certified a lab report must testify, and not a substitute from the same facility. In the case at bar, the analyst who had conducted a test on a blood sample had been placed on unpaid leave and prosecutors had brought in another analyst who had not participated or observed the test. The five-Judge majority found that this was insufficient to satisfy the requirements of the confrontation clause. The Court's most recent decision was a further affirmation of its determination two years ago in the *Melendez-Diaz* case. The Court's majority consisted of Justices Scalia, Thomas, Ginsburg, Sotomayor and Kagan. Justices Kennedy, Alito, Roberts and Breyer dissented.

Other Matters

Before ending its 2010-2011 term, the United States Supreme Court agreed to review the application of GPS tracking devices by police without the use of warrants. The Court granted certiorari in the case of *United States v. Maynard*, and will review the determination of the U.S. Court of Appeals for the D.C. Circuit. That Court had held that a warrant was required to install a GPS device and to monitor a defendant's movements. A similar ruling was issued by the New York Court of Appeals two years ago in *People v. Weaver*, 12 NY 3d 433 (2009). The issue of the use of GPS tracking devices has been in the forefront for the last few years, and it appears that the United States Supreme Court is prepared to make an ultimate ruling on the issue.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from April 25, 2011 to September 1, 2011.

People v. Hall (N.Y.L.J., April 25, 2011, pp. 1 and 8)

In a unanimous decision, The Appellate Division, First Department, held that a Defendant was not denied his Sixth Amendment right of confrontation when the factual findings of an autopsy of the victim was used as evidence and analyzed in Court by a medical examiner who did not perform the autopsy. The Court found that the evidence in question could not be considered as being testimonial and that a blanket prohibition on the admission of autopsy reports could result in practical difficulties for murder prosecutions.

People v. Garcia (N.Y.L.J., April 28, 2011, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, held that a Defendant's conviction must be reversed on the grounds that his Motion to Suppress was improperly denied. The appellate panel ruled that the nervousness of a passenger during a traffic stop did not justify the police inquiry regarding the presence of weapons, even though a resulting search turned up an air pistol and air rifle. The Court stated that New York State law requires a founded suspicion that criminality is afoot in order to engage in a common law inquiry of the type which the officers conducted. No such suspicion was supported by the record in the case. The Defendant's car had been pulled over because of a broken tail light. During the stop, the officers reported that the passenger looked stiff and nervous and stared directly ahead. These observations were insufficient to support the subsequent actions of the police.

People v. Lockley (N.Y.L.J., May 10, 2011, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's murder conviction and ordered a new trial on the grounds that the trial court had failed to give the defense attorney any opportunity to discuss the Judge's answers to five jury notes. The Appellate Court found that the trial Judge violated procedures set forth in CPL section 310.30. The Appellate Court, in issuing its decision stated "The jury's notes called for a substantive response that required careful crafting after hearing argument from both the people and the defense. Since defense counsel was not afforded the opportunity to provide suggestions, he was prevented from participating meaningfully at this critical state of the proceedings."

People v. Vickers (N.Y.L.J., May 26, 2011, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, vacated a Defendant's guilty plea on the grounds that the brief plea allocution was insufficient to establish that the Defendant was aware of the constitutional rights she was waiving, and that she knowingly and voluntarily entered a plea of guilty. The *Vickers* case is the subject of a detailed article written by Judge Seth Marvin, which appears in our featured article section at page 7.

People v. Cortez (N.Y.L.J., June 6, 2011, pp. 1 and 2)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction, although it found that the summation by the prosecutor was excessive, and appealed to the emotions of the jury. The panel concluded, however, that any error which may have occurred was harmless, and that there was overwhelming evidence of the Defendant's guilt. The First Department also rejected defense claims on the appeal that the Defendant had been deprived of the effective assistance of counsel. One of the Defendant's retained attorneys had failed to appear on the first three scheduled days of the trial and had eventually been found in contempt by the Court. The other Attorney had a pending matter with the District Attorney's Office involving an unrelated criminal charge. On appeal, the Defendant had argued that because of the difficulties faced by his trial attorneys, they were driven to avoid professional and criminal stigma and did not exert their best efforts on the Defendant's behalf. The appellate panel concluded that the Defendant's claims regarding the ineffective assistance of counsel were total speculation and were not demonstrated in the record. With respect to one of the Attorneys, the Court held that any conflict presented by the pending criminal charge was waivable because counsel was not charged with any crime related to the Defendant. The Court also noted that the Defendant had also made a valid waiver of any possible conflict during the trial.

People v. Arnold (N.Y.L.J., June 13, 2011, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Third Department, concluded that the Defendant was denied the effective assistance of counsel due to several errors committed by his defense attorney. The Court found that defense counsel had made certain promises to the jury in his opening statement and had totally failed to follow through during the trial. It also found that he failed

to make appropriate objections and to conduct proper cross-examinations. The Judges found that the accumulation of the various errors demanded that the Defendant obtain a new trial.

People v. Lora (N.Y.L.J., June 15, 2011, pp. 1 and 6)

In a 3-1 decision, the Appellate Division, First Department, vacated a conviction for second degree manslaughter against a former police officer who had killed a motorist after his van had crashed into two parked cars. The appellate panel concluded that the trial court committed reversible error in considering the lesser included offense of manslaughter in the second degree over Defendant's objection because there was no reasonable view of the evidence that the Defendant engaged in reckless conduct rather than an intentional action. Justice Richter dissented. Due to the sharp division in the Court and the already announced intention of the Bronx District Attorney to seek a further appeal in this matter, it appears possible that the case may eventually find its way to the New York Court of Appeals.

People v. Dashnaw (NY.L.J., June 17, 2011, pp. 1 and 5)

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's murder conviction and ordered a new trial because the Defendant had been improperly interrogated without counsel and his statements were impermissibly introduced at trial. The Defendant had been questioned by State Police three times in the days following discovery of the victim's bodies. Two hours after the start of a 14 hour interrogation, the Defendant had requested an attorney and invoked his right to remain silent. The appellate panel found that statements made in a second interrogation on the next day after he presumably voluntarily waived his previously invoked right to counsel should not have been admitted. The Court found that the right to counsel had indelibly attached once he made the initial request, and any further questioning should have ceased. The Court further found that any subsequent waiver was not valid without the presence of counsel.

Green v. DeMarco (N.Y.L.J., June 22, 2011, pp. 1 and 2)

In a unanimous decision the Appellate Division, Fourth Department, granted a prosecutor's motion prohibiting a judge from holding a joint suppression hearing and a bench trial. The appellate panel found that if the procedure in question was followed, it would compromise the ability of the District Attorney to appeal a ruling suppressing statements and physical evidence the prosecution might seek to use against a defendant. The court determined that extraordinary circumstances existed in the case at bar, since the judge lacked the authority to take the action in question. The appellate panel further cited CPL Article 710, which provides that when a motion is made before trial, the trial may not be commenced until determination of the motion.

People v. Wright (N.Y.L.J., June 23, 2011, pp. 1 and 2)

In a 4-1 decision, the Appellate Division, First Department, upheld the imposition of consecutive sentences for murder and weapons possession. The 4-Judge majority found that a Defendant who had been convicted of killing two different people engaged in acts which constituted two separate crimes, and that therefore consecutive sentences could be imposed. Justice Peter Tom issued a dissenting opinion.

People v. Bellamy (N.Y.L.J., June 27, 2011, pp. 1 and 8)

In a unanimous decision, the Appellate Division, Second Department, upheld the granting of a new trial pursuant to a CPL 440 motion for a Defendant who had spent 14 years behind bars for a murder he claimed he did not commit. After a lengthy hearing, a trial court had vacated the Defendant's conviction based upon newly discovered evidence: to wit a statement by an informant that another man had confessed that he had committed the murder. The informant later recanted and Queens' prosecutors sought to overturn the granting of a new trial. The Appellate Division, however, found that the trial court had properly determined that the likely cumulative effect of the new evidence would have been a verdict more favorable to the Defendant if it had been available at his trial. The Queens District Attorney's Office has indicated it will attempt to have the matter heard in the New York Court of Appeals.

People v. Ortiz (N.Y.L.J., June 28, 2011, pp. 1 and 6)

In a unanimous decision, the Appellate Division, First Department, ordered a new trial because the trial Judge had prevented defense attorneys from using documents to impeach a former Assistant District Attorney's testimony at trial that the Defendant admitted at a jailhouse interview that he had aided a man he had known planned to kill, not just injure, his victim. The panel concluded that the erroneous preclusion of the evidence in question, which could have led the jury to reject the witnesses' original testimony, was not harmless error. A new trial was therefore required.

People v. Clay (N.Y.L.J., July 5, 2011, pp. 1 and 6)

In a unanimous decision, the Appellate Division, Second Department, held that the confrontation clause does not bar the use at trial of dying declarations, even where they are clearly testimonial in nature. Relying upon the *Crawford* decision and subsequent case law from the United States Supreme Court, the appellate panel concluded that the United States Supreme Court had addressed the issue in question but had not answered it. The panel concluded, however, that based upon a footnote in the *Crawford* decision, there was a strong indication that if faced squarely with the issue, the U.S. Supreme Court would conclude that dying declarations are admissible against criminal defendants, even when they are testimonial. In the case at bar, the dying victim had told a police captain, after being advised that he was dying, that "Tom shot me." The Defendant's first name was Tom, and the police captain testified to the statement at trial. Based upon the continuing evolution of the *Crawford* issue, it appears likely that the matter may find its way to the New York Court of Appeals, and defense counsel in the case at bar have already indicated that they would be seeking leave to appeal.

People v. Foster (N.Y.L.J., July 5, 2011, p. 1)

In a unanimous decision, the Appellate Division, Second Department, held that a law extending the permissible period for orders of protection by three years, to a total of eight, applies to crimes committed before the statute's enactment. The Court found that the legislative history of the 2006 statute reflected an intent to provide greater protection for victims and witnesses, and was not intended to punish defendants. Thus, a retroactive application was not prohibited.

People v. Pagan (N.Y.L.J., July 18, 2011, pp. 1 and 4)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction despite concluding that the trial court had committed an evidentiary error. The trial court had permitted the admission of two taped telephone calls. The appellate panel concluded that the conversations lacked probative value, and should have not been admitted. However, because the other evidence in the case regarding the Defendant's guilt was overwhelming, the appellate panel concluded that the evidentiary ruling by the trial court was harmless error. The appellate panel therefore affirmed the Defendant's conviction and concluded, "We do not see any likelihood that the jury would have acquitted defendant if it had not heard the improperly admitted conversations."

People v. Engstrom (N.Y.L.J., July 19, 2011, pp. 1 and 3)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction and ordered a new trial based upon several judicial errors which had occurred. The appellate panel, first of all, found fault with the trial court for releasing a juror without conducting an adequate inquiry after the juror, who was a Doctor, had stated that he had to leave to attend a conference. Defense counsel had objected and the Appellate Court concluded that the Judge should have made a more thorough inquiry as to whether the juror's release was required by illness, incapacity or unavailability. The appellate panel also found that when the alleged victim made derogatory and unrelated comments about the Defendant, the trial Judge had failed to issue a proper admonition. The appellate panel also found fault with the trial court's charge with respect to an issue that had arisen during the trial. Based upon several judicial errors which had occurred, the Appellate Court determined that a new trial was required.

People v. Calvin Harris (N.Y.L.J. July 29, 2011, pp. 1 and 2)

In a 3-1 decision, the Appellate Division, Third Department, upheld a Defendant's murder conviction, even though the alleged victim's body was never found. The 3-Judge majority, consisting of Judges Mercure, Spain and Stein, concluded that even though the case was a totally circumstantial one, the evidence was legally sufficient to sustain the conviction. Justice Malone dissented. It appears likely that leave to appeal to the New York Court of Appeals will be sought in this case.

For Your Information

New York State Law Enforcement Council Issues Legislative Priorities

In late May, the New York State Law Enforcement Council, which consists of various law enforcement agencies throughout the State, issued its legislative priorities for the year 2011. Bronx District Attorney Robert T. Johnson currently serves as counsel for the organization, and we thank him for providing our Section with an information booklet setting forth the legislative initiatives sought by the law enforcement group. The legislative priorities of the Law Enforcement Council can be summarized as follows:

1. Expand the State DNA Identification Index.
2. Provide Tools to Protect Victims and Witnesses.
3. Create a New Felony Offense of Endangering the Welfare of a Child.
4. Remove Loopholes that Allow Public Corruption to Flourish.
5. Enhance Protections for Police Officers.

Further details regarding the council's proposals can be obtained by writing to the New York State Law Enforcement Council, 1 Hogan Place, New York, New York 10013, or by calling (212) 335-8927.

The legislature appears to have taken very little action at this year's legislative session with respect to criminal law matters. We will review any new legislation which has been passed, when we issue our legislative update in the Winter issue of our *Newsletter*.

Hispanic Population Dramatically Increases in Several States

As a result of the report from the 2010 census, it has been determined that the Hispanic population in the United States is rapidly rising, and in several states Hispanics comprise 20% or more of the population. Recent statistics, for example, indicate that Hispanics make up approximately 37% of the population in California, 26% of the population in Nevada, 46% of the population in New Mexico and 37% of the population in Texas. Within our own State of New York, Hispanics are reported to make up approximately 18% of the population. The growing Hispanic population could have an important political impact in upcoming elections, and the Hispanic vote is considered a critical swing vote in many contested states.

Older Voters Constitute New Majority

Another interesting statistic emerging from the 2010 census report is that for the first time, Americans 45 and older make up a majority of the voting age population. Since there are currently approximately 78 million baby boomers who are between the ages of 46 and 65, the nation is rapidly graying, and older voters in the next few years will constitute the new voting majority. These voters are greatly concerned about issues regarding Medicare, Social Security and the current state of the American economy. Approximately 119 million people are now 45 and older, and since older Americans usually have a higher election turnout, it is estimated that in the upcoming presidential election seniors 45 and older could represent about 60% of the votes cast.

Patriot Act Extended

After many months of controversy, both the House and the Senate passed an extension of several key provisions of the Patriot Act for a four-year period until June 1, 2015. The extended provisions include roving wiretaps, broader surveillance and court ordered searches of business records. In the past, the Act has been extended for short periods of time due to the controversial nature of its provisions. However, Republican and Democratic leaders reached a compromise and agreed to extend the law for an additional four years. The legislation was passed by both Houses in late May, and was signed by President Obama in the beginning of June.

Susan Carney Appointed to Second Circuit Court of Appeals

In late May, Susan Carney was confirmed by the United States Senate for a seat on the U.S. Court of Appeals for the Second Circuit. She had been nominated by President Obama several months ago, but her nomination had raised some questions among some members of the Senate Judiciary Committee. When her name came up for vote, however, she was approved 71 to 28. Susan Carney has served as the Deputy General Counsel for Yale University, and she previously was a partner at two law firms

in Washington, D.C. Her basic legal practice was in the area of appeals, and as in-house counsel.

New York State Tops in Education Spending

In voicing concerns regarding the State's spending and the need to obtain better results from the spending of public dollars, Governor Cuomo recently cited a statistic from the 2010 Census Bureau which reported that New York State spends $18,126 per student, which is the highest in the nation. The State's four-year graduation rate, however, is 73.5%, which ranks 39th among the States. The Governor stated, "We spend too much money and get too few results."

2010 FBI Crime Statistics

Initially, in its crime statistics for the year 2010, the FBI reported that violent crime throughout the nation fell by about 5.5% in 2010 over the prior year. The report stated that violent crime fell in all four regions of the country, dropping 7.5% in the South, 5.9% in the Midwest, 5.8% in the West, and 0.4% in the Northeast. Data relating to New York State indicated that the decade-long decline in major crimes may be coming to an end, and in some areas violent crime had risen. Violent crimes in New York State were up approximately 1% from 2009. Although this was still significantly lower than the year 2000, when the crime rate was reaching its peak, it indicates some cause for concern. New York City Police reports regarding the first half of the year 2011 also indicate that 76 of the police precincts have shown spikes in the crime rate. The possibility that a resurgence of the crime situation which once seriously threatened the quality of life in both the City and State, may be returning requires the attention of those in the Criminal Justice System, and the situation, should be monitored carefully.

New York State Court System Continues Layoffs

In late May and early June, the Office of Court Administration laid off an additional 367 non-judicial employees in order to comply with the budget cuts which were recently ordered. A total of 194 positions were lost within New York City, and 173 jobs were eliminated in Courts upstate. Previously, in April, an additional 74 positions had been eliminated. The recent layoffs account for 2.4% of the court system's 15,326 employees. In addition to the cuts made within the trial courts, the New York Court of Appeals lost three positions, the Appellate Division First Department—ten positions, the Second Department—six positions, the Third Department—one position, and the Fourth Department—four positions. As of late June, the court system in New York will be operating with about 6.8% fewer jobs than were filled last year. The most recent layoffs, and the loss of many other employees who accepted early retirement packages, will undoubtedly have a negative impact on the operation of the court system. Already in some courts, the current financial crisis is leading to greater delays in the processing of cases, and reduced hours of operation.

Justice James M. McGuire Leaves Appellate Division, First Department

In late May, Justice James M. McGuire, who has served for the last several years in the Appellate Division, First Department, announced that he would be leaving that Court at the end of its June session in order to join the Dechert firm as a partner. Justice McGuire is 57 years of age, and in announcing his resignation he indicated that his move was based upon financial considerations. The Judge stated, "I'll miss public service, but I have to do the right thing for my family." Judge McGuire has two small children. Judge McGuire previously served as Chief Counsel to Governor George A. Pataki. He was elected to the Supreme Court in 2004, and joined the Appellate Division, First Department, in 2005. He is a graduate of Cornell Law School. It is not known at the present time whether the vacancy created by Judge McGuire's resignation will be filled.

Comptroller and Attorney General to Cooperate on Public Corruption Probes

In late May, Attorney General Eric T. Schneiderman and Comptroller Thomas DiNapoli announced that they had agreed to work together to investigate instances of possible misuse of public funds. Under the agreement, when evidence of criminality exists the Comptroller's Office will request the Attorney General to handle the criminal investigations and prosecutions of public officials. Under State law, with some limited exceptions, the Attorney General is prevented from pursuing criminal public integrity cases unless invited to do so by the Governor or the head of some executive agency. The Comptroller is one of the officials who can, under Executive Law, Section 63, ask the Attorney General to investigate the alleged commission of any indictable offense or offenses in violation of law. Both Mr. Schneiderman and Mr. DiNapoli signed an executive order establishing a joint task force on public integrity, calling for the two offices to work collaboratively and cooperatively to investigate public corruption.

In light of the recent rash of cases involving corruption with certain public officials in New York State, it is hoped that this new joint effort will have a beneficial effect in alleviating a serious problem.

U.S. Economic Situation Still Problematic

Although in the last year, there has been some improvement in the overall economic situation in the United States, recent indicators reveal that difficulties still lie ahead and it may still be some time before the nation re-

turns to good economic times. Over the summer, it was revealed that the nation's unemployment rate stands at 9.1%. In addition, a recent real estate survey found that more than 28% of U.S. homeowners owe more than their properties were worth. This is a sharp increase from the 22% which were in this position a year earlier. Home prices continue to fall, and average home prices now seem to be at their 2002-2003 levels. With the huge number of foreclosures still within the system, real estate experts predict that the housing market will not recover for several years, and that the price of homes may continue to drop through the end of 2012. A recent report from the Federal Reserve indicates that the average household in the United States now owes nearly $119,000 on mortgages. The report also indicated that as of the first quarter of this year, average home equity plunged from more than 61% at the start of 2001, to 38% as of April 1, 2011.

18-B Attorney Lawsuit Against New York City Awaits Appellate Division Decision

The lawsuit commenced by several New York City Bar Associations on behalf of 18-B attorneys against the City of New York, with respect to its proposal to transfer many conflict of interest cases to contractual providers, was heard in the Appellate Division, First Department, on May 31, 2011. A previous ruling by the trial court had upheld the City's right to make the changes in question, but the Bar Associations, on behalf of the 18-B attorneys, have raised serious statutory challenges to the New York City plan. The First Department had granted a stay barring the City from implementing its plan until the appeal is finally decided. It is expected that a decision from the Appellate Division, First Department, will be forthcoming shortly.

There are currently approximately 1,100 attorneys in New York City who are approved to accept cases under the Article 18-B system. These private attorneys have been handling some 44,000 cases a year. The City recently reported that in 2010, it paid 18-B lawyers $41.7 million for their work defending indigent criminal defendants.

2010 Law Graduates Face Difficult Employment Prospects

A recent report released by the National Association for Law Placement reported that law school students who graduated in 2010 faced one of the worst job markets since 1996. According to the report, overall employment nine months after graduation stood at 87.6%, the lowest since 1996. The report indicated that 41,156 had graduated from law school in 2010, and as of February 15, 2011, 36,043 had found some type of employment. The largest number of employment was found in private practice, with over 50% of the students working in that sector. 15% had also found employment in the business area, and 11% had found work with the government. In a separate report, the Association also indicated that salaries for recent law school graduates have basically dropped during the last two years. The median salary reported for the class of 2010 was listed at $63,000, as compared to $72,000 for the class of 2009. The average salary reported for the class of 2010 was listed as $84,111, as compared to $93,454 for the class of 2009. Due to the lingering precarious economic situation, the forecast for employment of law school graduates, and salary benefits, in both 2011 and 2012 also appears dim, with any significant improvement not expected until after 2012.

Recent OCA Report Highlights Enormous Workload in Criminal Justice System

A recent report issued by the Office of Court Administration with respect to the caseload of the various courts revealed an enormous volume in the various courts that handle criminal law cases. It was reported, for example, that the New York City Criminal Court in the year 2010, had 373,724 filings. Indictments filed in the criminal term of the Supreme Court within the City of New York were 23,729. As of April 24, 2011, 40,885 matters were still pending in the Criminal Court of the City of New York, and 13,642 felony matters were pending in the Supreme Court.

With respect to Courts outside of the City of New York, felony filings in the Supreme and County Courts amounted to 27,186 in 2010, with 5,491 still pending as of April 24, 2011. The Office of Court Administration issued its most recent statistics in an effort to better monitor the impact of recent personnel cutbacks and to highlight the enormous workload that the State court system has to handle each year.

New York City Reduces Prosecutors' Budgets for 2011-2012

Following the Mayor's proposal to reduce funding for the six prosecutors within New York City, the New York City Council, in late June, approved a final budget which calls for modest cutbacks for the fiscal year 2011-2012, commencing July 1. The Mayor's executive budget had called for a 1.3% decrease in current spending, with the overall budget for the six prosecutors being set at $257.2 million. That would amount to $2.7 million less than the amount that the prosecutors had received for the current fiscal year.

The City Council, in July, basically adopted the Mayor's request with respect to the budgets for the City prosecutors, and only added $250,000 in discretionary funds to keep a drug treatment court in Staten Island operating for another year. The individual breakdown for each of the City prosecutors is as follows:

New York County—$72.5 million

Brooklyn—$73.9 million

Queens—$44.2 million

Bronx—$43.8 million

Staten Island—$7.6 million

Special Narcotics—$15.2 million

U.S. Life Expectancy Increases on National Level, but Decreases in Some Areas

A recent study conducted by the World Health Organization indicated that life expectancy in the United States continues to increase on an overall basis. In some areas of the Country, however, life expectancy has declined. Overall, life expectancy in the United States is at an all-time high, and the Centers for Disease Control and Prevention recently estimated that a baby born in 2009 could expect to live 78 years and 2 months. Life expectancy is still higher for women than for men. The study also revealed that life expectancy has improved, largely in the Northeast, and has declined somewhat in areas of the South. New York State appears to be one of the Northeast regions which has significantly improved in life expectancy, and the Counties of Kings and Queens were singled out in the report as revealing a substantial increase in life expectancy over a 20-year period from 1987 to 2007. On the other hand, some areas in Mississippi, Alabama and Kentucky have experienced a 2-year drop in life expectancy during the last 20 years. In a comparison with other nations, the study revealed that people in Japan and France have a much higher life expectancy than people in the United States. Interestingly, with respect to increases in life expectancy, large metropolitan areas appear to have made greater strides than rural sections. New York City, for example, was found to have increased its life expectancy rate by more than 3 years.

Obesity Problem Continues to Plague U.S.

A recent report from the Robert Wood Johnson Foundation indicates that the percentage of obese adults in the Unites States increased in 16 states over the past year and did not decline in any single state. In addition, the number of adults who stated that they do not engage in any physical activity increased in 14 States during the past year. The South still has the highest percentage of people who are too heavy. Nine of the ten states with the highest obesity rates are in the South. Mississippi continues to be the State with the highest level of obesity with 34.4 percent being overweight. The State with the lowest rate of obesity is Colorado, with has a rate of 19.8%. The study also revealed some other interesting results. It found that 34% of adults who earn less than $15,000 a year are obese, while only 24.6% of those who earned over $50,000 a year are in that category. The good news for New Yorkers is that we are not in the group with the highest obesity rates. The bad news is that we are not among the lowest either.

Unemployment by Gender

A recent report from the U.S. Bureau of Labor Statistics reveals that women have fared better than men during the most recent economic downturn. Unemployment nationwide for males during the year 2011 has averaged 9.5%, while for women it has averaged 8.5%. In 2007, unemployment for both men and women was basically the same, hovering around 5.5% In the last several years, however, the disparity in unemployment has widened. In 2009 for example, unemployment among men had reached 10.6%, while for women it was 8.8%. Economists have indicated that the growing difference may be attributed to the severe downturn in many manufacturing and industrial positions which have taken the greatest hit during the last few years and which basically employed more men than women. Let us hope that the unemployment rate for both men and women drops to a more positive level.

Prison Closings

As part of the effort to reduce budgetary expenses, Governor Cuomo, in early July, announced that the State would be closing seven prison camps and work release facilities. The list includes both minimum and medium security facilities. The closings are expected within sixty days, and the State is expected to save almost two hundred million dollars during the next two years. New York's prison population has declined from about seventy-one thousand in 1999 to approximately fifty-six thousand at the present time. The drop in the prison population has made it possible to close the facilities in question without causing any overcrowding in the State's correctional institutions.

Retroactive Reduction of Sentences for Crack-Related Offenses

The U.S. Sentencing Commission recently decided that some twelve thousand federal prisoners can get their sentences reduced under a new law that brought the penalties for crack cocaine more in line with those for the powdered form of the drug. Congress, last year, substantially lowered the sentences for crack-related crimes. The Commission was asked to consider whether defendants already incarcerated under the old law could benefit from the changes which were made. In early July, the six-member Commission unanimously decided that defendants in this category could retroactively receive the benefits of the new statute. The Commission's decision would be final unless Congress decides by the end of October to oppose it.

An Aging America

Continued data from the 2010 census report clearly indicate that the number of people in the United States 65 and older is increasing, and the number of children

in the nation is decreasing. Based upon the latest census figures, it is expected that by the year 2050, the percentage of people 65 and older will rise from 13% today to 20%. In 1990, the percentage of seniors 65 and older was only 4% of the U.S. population. On the other hand, the percentage of children in the United States is currently 24% of the population. By 2050, it is projected that this will further drop to 23%. In 1990, the percentage of children under 18 was 26% of the population, and in 1990, children made up 40% of the U.S. population. Based upon the 2010 census data, and anticipated predictions, the U.S. is aging.

Official Census Report Concludes New York State Tops Nineteen Million

The final official statistics from the 2010 census report places the total population in New York State as of the end of 2010 at 19,378,102. New York continues to hold its place as the third most populous State, behind California and Texas, and staying ahead of Florida by approximately 700,000 people. Because New York State and Florida are relatively even in population, they will have the same number of Congressional seats and the same number of electoral votes beginning with the elections in 2012. The census figures also provided a racial and ethnic breakdown of New York State's population. The report indicated that the State had 12,740,974 whites, which constitutes 65.7% of the population. Blacks account for 3,073,800, which is 15.9% of the population. Hispanics amounted to 3,416,922, which amounted to 17.6% of the total population. The Asian population in the State has also increased dramatically, and now constitutes 7.3% of New York's population, or 1,420,244 people.

Special Commission Makes Recommendations Regarding Judicial Salary Increases

During the summer, the special seven-member Commission which was recently appointed to make recommendations regarding increases in judicial salaries met and held several public hearings on the issue. The Commission was charged with making its recommendations to the Governor and Legislature by August 29th for the fiscal year that begins April 1, 2012. The Office of Court Administration had recommended that a 41% increase be granted for Supreme Court Judges, raising judicial salaries to $195,754 from the current level of $136,700. Various Bar Associations have supported the concept of judicial raises without specifying the amounts in question, and some suggestions have included incremental increases over a period of time. In an appearance before the Special Commission, Robert Megna, the New York State Budget Director, indicated that the poor fiscal condition of the State made it difficult for any large increase to be granted at the present time, and that the State might only accept a modest increase spread over a period of time. Mr. Megna was quoted as stating that an immediate pay raise on the order of 40% or more to make up for judge's losses to inflation since 1999 would throw the State's pay scale out of whack. Since any increase recommended by the Commission still requires the acquiescence of the Governor and Legislature, it is still unclear what if any level of judicial salary increases will be enacted. The Commission's recommendations would affect the 1,200 statewide Judges in New York. The law, which was passed in 2010, establishing the Special Commission, lists the factors which the Commission must consider in making its recommendation. These factors are listed as follows:

The overall economic climate.

Rates of inflation.

Changes in public-sector spending.

Compensation and non-salary benefits received by judges, executive branch officials and legislators of other states and the federal government.

Compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise.

The State's ability to pay for increases in compensation and non-salary benefits.

On August 28, 2011, the Commission recommended increase of 27.3% over a three-year period. Details will be provided in our next issue.

Janet DiFiore Elected as New President of New York State District Attorneys Association

During the summer it was announced that Westchester County District Attorney Janet DiFiore has been selected to serve as the new President of the New York State District Attorneys Office. Ms. DiFiore is 55 years of age and is a graduate of St. John's Law School. Prior to becoming District Attorney, she had served as a Judge in the County Court and Supreme Court in Westchester County. She was elected as Westchester County District Attorney in 2005, and was re-elected in 2009. She has been serving on various task forces and committees regarding criminal law issues, and she will be leading the statewide organization of 62 County District Attorneys during the coming year. We congratulate her on her recent selection.

About Our Section and Members

Section Members Assume Leadership of New York State Bar Association

Two active members of the Criminal Justice Section have now assumed leadership positions in the New York State Bar Association. Vincent E. Doyle, III, who several years ago served as Chair of the Criminal Justice Section, and who has been a longtime and hard-working member of our group, assumed office as President of the New York State Bar Association in June. He formerly took the oath of office on June 25th, during the House of Delegates meeting in Cooperstown. Vincent has served on numerous task forces and special committees, and practices law with the firm of Connors and Vilardo, LLP in Buffalo, New York. Seymour W. James, Jr., another member of our Executive Committee, will be serving as President-Elect of the State Bar Association. Seymour has served as Treasurer of the Bar Association since June 2008. He is a former President of the new Queens County Bar Association, and currently serves as the Attorney in charge of the Criminal Division of the Legal Aid Society. Both Mr. Doyle and Mr. James sit on advisory committees relating to Criminal Law and Procedure formed by the Chief Administrative Judge of the State. Our Section is pleased and honored to have two of our distinguished members now heading the State Bar Association. We congratulate them and wish them all the best in their new positions.

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
____Expungement
____Judiciary
____Juvenile and Family Justice
____Legal Representation of Indigents in the Criminal Process
____Legislation
____Membership
____Newsletter
____Nominating
____Prosecution
____Sentencing and Sentencing Alternatives
____Sentencing Reform
____Traffic Safety
____Transition from Prison to Community
____Victims' Rights
____Wrongful Convictions

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

Section Chair
Marvin E. Schechter, Esq.
New York City

Program Chair
Hon. Phylis S. Bamberger
New York City

NYSBA

Criminal Justice Section

Fall Meeting

Preventing Wrongful Convictions

Concierge Conference Center
780 Third Avenue, New York, New York
Saturday, October 29, 2011
9:00 a.m.–4:25 p.m.

Under New York's MCLE rule, this program has been approved for a total of 5.0 credit hours of professional practice and 1.5 hours of ethics. This program does not qualify for credit for newly admitted attorneys because it is not a basic practical skills program.

SCHEDULE OF EVENTS

Friday, October 28

2:00 p.m.	**Meeting of the Criminal Justice Section Executive Committee.** Neighborhood Defender Service 319 Lenox Avenue, 10th Floor New York, NY 10027

Saturday, October 29

8:30 a.m.	**Welcome and Introductions**
9:15 a.m.–10:55 a.m.	**Why Innocent Suspects Confess– And How Their Confessions Corrupt Judgments** **Prof. Saul Kassin** John Jay College New York City **Honorable Phylis S. Bamberger** New York City
10:55 a.m.–11:10 a.m.	Coffee Break
11:10 a.m.–12:25 p.m.	**Perspectives on the Investigation of Crime Scenes for Physical Evidence in New York** **Dr. Peter Pizzola** Pace University New York City **Honorable Phylis S. Bamberger** New York City
12:25 p.m.–1:45 p.m.	Lunch on Your Own
1:45 p.m.–3:00 p.m.	**The Forensic Lab Accreditation Scandal: What Prosecutors and Defense Attorneys Need to Know and Do** **Marvin E. Schechter, Esq.** New York City
3:00 p.m.–3:10 p.m.	Coffee Break

Saturday, October 29 (continued)

3:10 p.m.–4:25 p.m.

A Panel Discussion on Legal and Ethical Implications for Defense Counsel, Prosecutors and the Court in Cutting Edge Forensic Science Issues: Discovery and Disclosure Obligations

Moderator

Prof. Ellen Yaroshefsky
Cardozo Law School
New York City

Panelists

Hon. Jerald S. Carter
Nassau County Court
Mineola

Anthony J. Girese, Esq.
Counsel to the District Attorney
Bronx County

Guy H. Mitchell, Esq.
New York State Department of Law
New York City

Marvin E. Schechter, Esq.
New York City

Cocktail Reception Immediately Following Program

IMPORTANT INFORMATION

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York's MCLE rule, this program will provide you with a total of **6.5 credit hours,** consisting of **5** in **Professional Practice** and **1.5** in **Ethics.** Except for the ethics portion, this is **NOT** a transitional program and is **NOT** suitable for MCLE credit for newly admitted attorneys.

DISCOUNTS AND SCHOLARSHIPS: New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who requires financial aid may apply in writing, not later than two working days prior to the program, explaining the basis of his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact: Barbara Mahan, New York State Bar Association, One Elk Street, Albany, New York 12207 or e-mail bmahan@nysba.org.

Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Barbara Mahan at 518-487-5653.

The Criminal Justice Section Welcomes New Members

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

David M. Abbatoy
Rondu Allah
Susan C. Azzarelli
Andrea Bible
Stephanie A. Bugos
Julia Elizabeth Burke
Stephen L. Buzzell
Todd Carpenter
Andrea Catalina
Kiran Chaitram
Jeffrey Paul Chartier
Charles B. Ciago
Jason Myles Clark
Joel Steven Cohen
Deanna L. Collins
Kathryn Grace D'Angelo
Delinda C. Dacoscos
Justin Victor Daly
Sandra Davermann
Mark Thomas Doerr
Benjamin Josef Doscher
Andrew Mark Ferencevych
Richard L. Ferrante
Marissa A. Fierz
Erin Kathleen Flynn
Anjula Garg
Elan Gerstmann
Euphemia Gravesande
Yolanda Guerra
John Stanley Hart
James S. Hinman
Robert J. Hoffman
Michael James Ingham
Lauren Beth Jacobs
Richard P. Jacobson
Patricia W. Johnson
Elizabeth S. Kase
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Sean Patrick Kelly
Benjamin Kramer-Eisenbud
Beth Kublin
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Melissa Candelaria Lee
Douglas Leff
Cynthia Leveille
Lindsay Nicole Leventhal
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Carly E. Lynch-McGuire
Kathleen Mary McMonagle
Eric Matthew Milner
John Joseph Montes
Pashan Movasseghi
Micah Mtatabikwa-Walker
Katherine Grace Mulvey
Vanity Rosa Muniz
Walter Newsome
Esther Ann Nguonly
Alison Noonan
Leah R. Nowotarski
Anthony Joseph Perrotto
Amanda Peterson
Kathleen E. Plog
Michael S. Pollok
Samuel Augusto Rosado
Nicholas Michael Rossi
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Debora Silberman
Mark Smalec
Kyung-rak Mark Son
John Robert Spagna
William Edward Stanton
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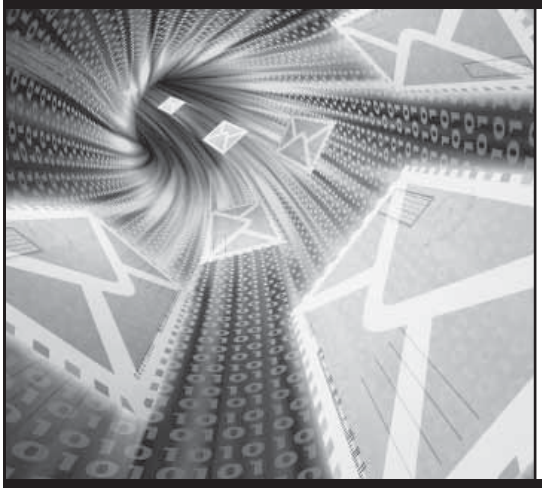
Markus Sztejnberg
Jenesha Mellisa Tai
Matthew Tallia
Diana Teverovskaya
Erin Rebecca Tomlinson
Anne Genevieve Turner
Emily Booth Viglietta
Sarah Jones Waltzer
George Weinbaum
Menachem Mendel White
Avionne A. Wilson
Ryan Charles Woodworth
Yahaida Zabala

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 (NY)
(727) 733-0989 (Florida)

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

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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.

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