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New York Criminal Law Newsletter

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

Inside

NYSBA

Message from the Chair

The Executive Committee of the Criminal Justice Section ("CJS Executive Committee") has had two meetings since my last report in the *Criminal Justice Newsletter*. We met on November 19, 2008 and on January 29, 2009, at our Annual Meeting in New York City. As part of my message, I would like to review some of the important matters which were discussed at these meetings. The highlights of each meeting can be summarized as follows:

November 19th Meeting

The November 19th meeting included a presentation by a CJS Executive Committee member regarding a Niagara County case, which was reported in local newspapers and illustrates significant inequities between prosecution services and financial compensation versus services and financial compensation for attorneys representing indigent defendants. This topic continues to be a major area of concern for the CJS. Members of the CJS Executive Committee agreed to send a letter to the Administrative Judge for Courts outside New York City ("NYC") and the Administrative Judge of the Eighth District alerting them to the situation and requesting a systemic resolution.

Further, the CJS Executive Committee discussed plans to adopt an implementation plan for those recommendations by the NYSBA Task Force on Collateral Consequences of Criminal Convictions that may require the drafting and passage of legislation. The CJS Executive Committee is in favor of bringing new lawyers on to the CJS Executive Committee who will work on these initiatives with members of other NYSBA sections.

CJS Annual Meeting and Luncheon, January 29, 2009

The CJS Annual Meeting on January 29, 2009, was very well attended with lawyers representing most districts of the state. The CJS Executive Committee took up many issues for discussion, including reform of the Rockefeller Drug Laws. Since 2004, the CJS has had a formal position on this issue, which, among other reformatory recommendations, calls for a reduction in certain drug sentences. It was suggested that we reevaluate our present position and determine if it needs to be updated or revised. A special CJS Executive Committee meeting was held in March 2009 for this purpose.

Additionally, the CJS Executive Committee discussed and took a position on a report by the NYSBA Committee on Court Structure and Judicial Selection (the "Committee"). Last year, the NYSBA House of Delegates adopted a report by the NYSBA's Task Force on Town and Village Justice Courts. That report recommended that the state require all judges in Town and Village Justice Courts to be lawyers, and if defendants went before judges who were not lawyers, they would be offered an opportunity to "opt-out" of a non-lawyer judge court and have their case transferred to a court with a presiding lawyer judge. However, the resolution and report by the Committee was not in favor of the "opt-out" plan, believing instead that an opt-out plan would threaten the public's confidence in justice courts and invite judge shopping. The CJS Executive Committee voted in favor of the report with an amendment to include the "opt out" plan in cases where a defendant faces a trial on the matter. This position was ratified by the Criminal Justice Section.

This year's keynote speaker at our annual luncheon was State Senator Eric Schneiderman (31st District, and new Chairman of the Senate's Codes Committee). He addressed several state criminal justice issues he believes are ripe for reform, including state sentencing procedures. At the luncheon, our Section also presented several awards to worthy recipients. The names of these recipients are given on page 30 of this *Newsletter*. We congratulate all of the award recipients. Following our luncheon, we also held our annual CLE Program. This year, for the first time, the CJS joined with the NYSBA Committee on Civil Rights. The program was entitled "The Changing Supreme Court in Challenging Times: Post-Election Perspectives on the Future of the Supreme Court Regarding Criminal Justice and Civil Rights." The program concentrated on the following criminal justice areas: executive detention and habeas corpus issues; *Batson* and voting rights; search and seizure rights (Fourth Amendment) and immigration rights. It was a very interesting and informative program. I sincerely thank all who contributed to the success of this year's Annual Meeting and the day's events.

At our Annual Meeting, new officers of the Section were also elected and they will assume office in June of 2009. This is therefore my last message as Section Chair. I wish to thank all of our members for their assistance and support during the last two years. It has been a pleasure serving as your Chair.

With best regards.

Jean Walsh

Message from the Editor

This issue provides details regarding the activities of our Section's Annual Meeting at the New York Marriott Marquis, which was held on January 29, 2009. During our annual luncheon, which was attended by approximately 100 members of our Section, several awards were distributed to noteworthy recipients. The awards, which deal with various categories, were presented to individuals who have contributed in some outstanding manner to the Criminal Justice Section. It was a pleasure to recognize these individuals for their outstanding work and service during the past year. The names of this year's award winners are published in our "About Our Section and Members" article. To provide a year-end review of the status of our Section, we also present a feature article covering details regarding our membership composition and our financial status.

The beginning of the new year also saw the selection by the Governor of a new Chief Judge for the New York Court of Appeals. Judge Lippman was selected by Governor Paterson and approved by the State Senate during the month of February. As one of our special feature articles, we present a profile of Judge Lippman. We congratulate him on his appointment, and are sure that he will ably and with distinction serve the People of our State.

In this issue we also provide up-to-date information on the final sentencing recommendations made by the Sentencing Commission, which has now been in existence for approximately two years. After making some initial recommendations, the Commission has held public hearings, reviewed numerous additional proposals, and after much careful review and deliberation, has now issued its final recommendations. We present these recommendations for review by our readers and will continue to follow developments in the State Legislature with respect to any final passage of major changes in the sentencing laws.

Also dealing with the area of sentencing, we present a scholarly and informative review of the important changes which have occurred in federal sentencing during the last few years. This article is written by Paul Shechtman, one of our leading criminal law practitioners and a frequent contributor to our publication.

During the last several months, both the United States Supreme Court and the New York Court of Appeals have issued significant decisions in the area of criminal law, and we continue to present summaries of these new decisions for the benefit of our readers. In our "For Your Information" section, we also continue to cover many topics relating both to developments in our legal system and of general concern dealing with a variety of topics.

I again thank our membership for their support of our publication, and hope that they will continue to find our issues both interesting and informative. I still am in need of additional feature articles which can be published in future issues, and I urge anyone having an interest in writing such an article to contribute to our publication.

Spiros A. Tsimbinos

Request for Articles

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

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

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

www.nysba.org/CriminalLawNewsletter

Sentencing Commission Issues New Recommendations

By Spiros A. Tsimbinos

In early February 2009, the Sentencing Commission presented Governor Paterson and the State Legislature with its final report containing recommendations for changes in New York's sentencing structure. The 11-member Sentencing Commission was established in March 2007 by an executive order from then Governor Spitzer. It issued its preliminary report in October of 2007, and thereafter held numerous public hearings throughout the State in order to receive comments and input from various sections of the criminal justice system on the proposals which were being considered. Our Criminal Justice Section was one of the organizations regularly consulted regarding the Sentencing Commission's initial recommendations. In fact, Denise O'Donnell, Chair of the Commission and Commissioner of the Division of Criminal Justice Services, and John Amodeo, Legal Counsel for the Commission, appeared at our 2008 annual CLE Program and provided details to our members regarding the Commission's recommendations.

Following its preliminary recommendations, the Commission continued to seek comments and additional input before completing its final work. Following the resignation of former Governor Spitzer, which also created a brief hiatus in the workings of the Commission, Governor Paterson, in June 2008, signed an additional executive order directing the Commission to continue and complete its work. The Governor requested that the Commission's final product be complete in early February 2009, so that the Legislature would have sufficient time to consider the recommendations in question. One of the areas of the Commission's initial report which had received some critical comment was the failure to provide for significant additional modifications of the Rockefeller Drug Laws. Governor Paterson himself had expressed in public comments that he felt that it was time to initiate additional changes in this area. Apparently responding to these concerns, the Sentencing Commission, in issuing its final recommendations, has included in more detail additional proposals for reducing maximum terms with respect to drug sentences, and provided for more rehabilitation programs and alternatives to incarceration as possible sentencing options.

As we were going to press with respect to this issue, our *Newsletter* received a full copy of the Commission's report to Governor Paterson, and we have summarized its major recommendations for the benefit of our readers. The recommended proposals can be summarized as follows:

- Simplify and streamline the current "hybrid" system of indeterminate and determinate sentences by creating new determinate sentences for more than 200 non-violent offenses.
- Provide for shorter sentences for low-level drug crimes and allow greater judicial discretion in the imposition of sentences relating to non-violent crimes.
- Permit the diversion of non-violent, drug-addicted felony offenders to community-based treatment facilities instead of state prison if the court, defense and prosecution agree.
- Improve availability of community-based drug treatment centers.
- Use curfews, home confinement, electronic monitoring and other means to sanction parolees for violations of parole rules in lieu of returning them to prison.
- Expand prison-based educational and vocational programs.
- Give crime victims a more significant role in the criminal justice process.
- Establish a permanent commission to advise the Governor and Legislature on future sentencing decisions.

We are in the process of analyzing in detail the lengthy report filed by the Sentencing Commission, and will present an additional article in our next issue regarding the details of the recommendations which have been made and the reasons given for their adoption. We will also monitor the legislative reaction to the Sentencing Commission recommendations, and will report on any legislation which is being considered or has been adopted. Any changes in the sentencing structure in New York should be of great concern to any criminal practitioner, and it is important that we all stay abreast of any new developments, and that sufficient time be allowed for all parts of the criminal justice system to become aware of any significant changes that are adopted. We must clearly avoid any future post-supervision fiasco. We thank Commissioner O'Donnell and legal counsel John Amodeo for keeping us fully informed regarding the Commission's activities and seeking our input.

The Changed Landscape in Federal Sentencing

By Paul Shechtman

State practitioners interested in federal sentencing should find instructive the saga of William Thurston, whose three-month sentence for conspiring to defraud the Medicare program of more than $5 million was reviewed three times by the Court of Appeals for the First Circuit—in February 2004, July 2006 and October 2008—before it was begrudgingly affirmed.

Thurston and Joseph Isola, the vice president and president respectively of Damon Clinical Testing Laboratories, were indicted for conspiring to defraud the Medicare program. The indictment alleged that the defendants had induced physicians to order a rarely needed test for ferritin (a protein that delivers iron to cells) by including it as part of a battery of more standard tests and falsely informing the physicians that the ferritin test was "free." In fact, Damon charged Medicare $24 for the battery of standard tests and an *additional* $21 for the ferritin test.

After indictment, the district court judge expressed skepticism about the government's case and announced that he was inclined to impose a probationary sentence if the defendants were convicted. That announcement prompted the government to offer a most generous plea deal: in exchange for a plea of *nolo contendere* to the charge, the government would not appeal the sentence imposed. Isola took the deal and was sentenced to three years' probation. Thurston did not, and in December 2001, a jury convicted him of the crime.

The Pre-Sentence Report (PSR) calculated that Thurston's offense level was 26: a base level of six; a 14-level enhancement for an intended loss of at least $5 million; a two-level enhancement for more than minimal planning; and a four-level enhancement for leadership role. Level 26 and criminal history category one result in a guideline range of 63 to 78 months. Since the sole charge was conspiracy, the PSR recommended the statutory maximum term of 60 months' imprisonment.

In June 2002, the district judge sentenced Thurston to three months' imprisonment with a recommendation that the term be served in a halfway house. The judge departed downward on the basis of (i) Thurston's record of charitable work and community service and (ii) the disparity that would have existed between his sentence and Isola's in the absence of a departure.

A. *Thurston I*

Outraged by the sentence, the government appealed. Before the appeal was decided, Congress enacted the Protect Act including a provision (the so-called Feeney Amendment after its sponsor, Florida Congressman Tom Feeney) requiring *de novo* review of a district court's decision to depart from the guidelines.[1] Applying that standard, the First Circuit concluded that neither departure—good works nor disparity with co-defendant—was warranted.[2] As for good works, the Court found that Thurston's charitable work and community service (he tithed 10% of his income to his church and devoted hours every week to unpaid service) were "hardly surprising [and not extraordinary] for a corporate executive like Thurston [who was] better situated to make large financial contributions than someone for whom the expense of day-to-day life was more pressing." As for departure on the ground of disparity between Thurston and Isola, the Court concluded that "a perceived need to equalize sentencing outcomes for similarly situated co-defendants without more" was an impermissible basis for a departure. Emphasizing that "the guidelines bind us and they bind the district [judge]," the Court remanded the case "for imposition of the statutory maximum of sixty months in prison."

B. *Thurston II*

That was not the last word on the subject: Thurston filed a petition for a writ of certiorari; the Supreme Court decided *United States v. Booker*, replacing the mandatory guideline regime with an advisory system; the Supreme Court remanded Thurston's petition for further consideration in light of *Booker*; and the First Circuit remanded to the district court for resentencing.[3]

On remand, a new judge imposed the same three-month sentence. (The original judge had recused himself because he could not impose the 60-month sentence prescribed in *Thurston I*.) The judge found that the disparity between Isola's sentence and Thurston's recommended sentence (60 months) was unacceptable and, if allowed to exist, would punish Thurston for exercising his right to trial. And he concluded that a three-month sentence was sufficient to deter other potential white collar criminals for whom "[i]t's not so much the amount of time, it's whether you go away."

Again the government appealed, and again the First Circuit reversed.[4] It concluded that none of the factors the district court had cited warranted "a sentence 95% below the incarceration period recommended by the guidelines."

The disparity between Isola and Thurston, the Court observed, flowed from the realities of the plea bargaining process. Isola had pleaded guilty and received leniency in recognition of the litigation risks that his case presented.

Once Thurston elected to go to trial and was convicted, those risks disappeared, and he was "no longer similarly situated to Isola." As for the district court's view that long prison sentences are unnecessary to deter white collar crimes, that belief was "not shared by Congress or the Commission," and therefore was an inappropriate ground for reducing Thurston's sentence.

Hoping to bring closure to the case, the Court noted that Thurston's good deeds and Isola's probationary sentence "might justify a somewhat shorter sentence under a reasonableness standard." And so it remanded the case with directions to impose a sentence of no less than 36 months' imprisonment "absent an extraordinary development."

C. *Thurston III*

Thurston again sought certiorari. While his petition was pending the Supreme Court decided *United States v. Gall*, holding that a deferential abuse of discretion standard applies to appellate review of all sentencing decisions whether inside or outside the Guidelines range.[5] Thurston's petition was then granted, and the case remanded for reconsideration in light of *Gall*.

This time the First Circuit relented.[6] *Gall*'s "broader definition of the deference given to district judge's sentencing decisions," it concluded, required affirmance of the three-month sentence.

In some ways, *Thurston* is unique. Having agreed to a plea deal that gave Isola a probationary sentence, the government was unable to persuade two district court judges that the seriousness of the crime warranted a lengthy prison term for Thurston. But *Thurston* tells a far broader story. The journey from *Thurston I* to *Thurston II* to *Thurston III* tracks that from mandatory guidelines (and the 2003 Feeney Amendment designed to discourage departures from those guidelines), to *Booker* and advisory guidelines, to *Gall* and expanded discretion for district judges under the new advisory regime. *Thurston* was a beneficiary of those developments; indeed, he may have benefited too much given his multi-million-dollar fraud.

No observer can fail to be astonished at the developments in federal sentencing that have occurred in the past three years. In 2000, Professor Frank O. Bowman, one of the nation's leading authorities on sentencing law, confidently predicted "that plac[ing] sentencing authority almost wholly with the judiciary branch is not going to happen."[7] As the *Thurston* trilogy shows, it has happened. Indeed, with the abolition of parole, federal judges may now have greater discretion in sentencing than at any time in our nation's history.

One final note: this November, a month after *Thurston III*, Congressman Feeney, the sponsor of the Feeney amendment, was defeated in his reelection bid by a 16-point margin.

Endnotes

1. *See* § 401 of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.
2. *United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004) ("*Thurston I*").
3. *United States v. Booker*, 543 U.S. 220 (2005).
4. *United States v. Thurston*, 456 F.3d 211 (1st Cir. 2006) ("*Thurston II*").
5. *Gall v. United States*, 128 S. Ct. 586 (2007).
6. *United States v. Thurston*, 544 F.3d 22, 2008 WL 4427627 (1st Cir. 2008) ("*Thurston III*").
7. Bowman, *Fear of Law: Thoughts on the Federal Sentencing Guidelines*, 44 St. Louis U. L. J. 299 (2000).

Paul Shechtman is a partner at Stillman, Friedman & Shechtman, P.C., which has offices in Manhattan, New York. He is recognized as a leading criminal law practitioner and a scholarly writer of numerous legal articles. He has contributed many articles to our *Newsletter* which have provided important and practical information on various criminal law subjects, all of which have been well received by our readers. Mr. Shechtman also serves as a professor of law at Columbia Law School, and previously served as Commissioner of the New York State Division of Criminal Justice Services. He also is presently serving on one of the sub-committees of the Sentencing Commission, and has lectured widely at various Bar Association functions, including being a featured speaker at the 2008 Annual CLE Program sponsored by our Section.

Judge Lippman Begins Service as New Chief Judge of the New York Court of Appeals

By Spiros A. Tsimbinos

On January 14, 2009, Governor Paterson announced that he had selected Jonathan Lippman as his nominee to be Chief Judge of the New York Court of Appeals. In early February, the State Senate confirmed Judge Lippman's nomination, and he assumed his seat on the Court of Appeals shortly thereafter. Judge Lippman has a long and distinguished career of service within the judicial system. He served as Chief Administrative Judge of the New York Unified Court System for over 10 years, and most recently was the Presiding Justice of the Appellate Division, First Department. Prior to his selection to serve on the Appellate Division, he was a Supreme Court Justice serving in Westchester County.

Judge Lippman is a graduate of New York University School of Law, and has been a long-time resident of New York City. He is married with two children. He was selected from a list of seven nominees presented to the Governor to fill the position recently vacated by Chief Judge Judith Kaye, who retired on December 31, 2008. Judge Lippman is 64 years of age and will be able to serve as Chief Judge of the New York Court of Appeals for 6 years, when he reaches the mandatory retirement age, which will occur on December 31, 2015.

Judge Lippman is well known for his administrative skills, and it was recently reported, as he was concluding his two-year tenure on the Appellate Division, that the backlog of that Court had been dramatically decreased, and that cases were being heard and decided in a more expeditious manner. Governor Paterson, in making his selection of Judge Lippman, praised the Judge's qualifications and character, and stated that he would make an outstanding Chief Judge of the Court.

It had been widely reported that Judge Lippman and Judge Jones, who was already sitting on the New York Court of Appeals, were the leading candidates for selection of Chief Judge. Evidently, because of the high quality of the candidates who were presented to him and the difficult decision he had to make, Governor Paterson waited almost until the last day of the required time period to announce his selection. Judge Lippman is the first Judge in more than 100 years to be selected as Chief Judge from outside of the Judges already sitting on the New York Court of Appeals. The choice of Judge Lippman was well received within the legal community and we are certain that he will make an outstanding contribution to the Court of Appeals and to the New York State Court System. In fact, shortly after his designation, Judge Lippman was the recipient of our Section's Vincent E. Doyle, Jr., Award for Outstanding Jurists, which was presented at our annual luncheon on January 29, 2009. We congratulate Judge Lippman on his appointment and wish him all the very best.

The State of Our Section

Since we have recently completed the year 2008, we thought it would be interesting and beneficial to our members to provide a year-end review of the status of our Criminal Justice Section. The two areas of primary focus are our membership composition and our financial status. Statistics regarding our membership were provided by the Membership Department of the State Bar Association, and are summarized in our first section. Information regarding our Section's finances was prepared by our Section's Treasurer, Malvina Nathanson, and is presented in the chart below.

Our Membership

As of January 29, 2009, our Criminal Justice Section had 1,566 members. This constitutes a slight loss of 11 members from a similar period last year. With respect to gender, the Section consists of 78% males and 22% females. This gender breakdown is almost exactly the same as last year. Fifty-one percent of the Section's members are in some type of private practice. This is an increase in the private practice composition of almost 3% over last year. Within the private practice group, the largest composition continues to be solo practitioners, which make up 26% of the Section. The number of members of the judiciary who are in our Section comprise only 2% of the Section, a drop from the 3.6% in January 2008.

In terms of age groupings, 24.2% of the Section consists of members 56 to 65 years of age. This category comprises the largest single age grouping. With respect to the number of years admitted to the Bar, 47% of the Section is comprised of members who are admitted to practice more than 20 years. A positive note for our Section is that this year the number of members who are admitted for fewer than three years comprises 13% of the membership, an increase over last year.

Category	Amount	Explanation
Postage/Shipping	$740	Annual Meeting mailings
	$225	Miscellaneous
Awards/Grants	$125	Plaque for Outgoing Chair
	$750	Ad in Young Lawyers Section newsletter, *Perspective*
	$250	Postage to send solicitation for awards nominations for 2009 Annual Meeting
Catering	$8,900	Annual Meeting luncheon (most of these expenses were covered by luncheon tickets. Note that awardees received two free tickets each)
Beverage	$1,170	Annual Meeting CLE (sodas, etc.—a fee was charged for CLE attendance)
	$450	Bartender (pre–Annual Meeting luncheon)
Speakers/Guests	$680	Hotel and travel for awardee
Audiovisual	$54	Annual Meeting luncheon and CLE
Executive Committee	$92	Telephone conferencing for meetings
	$2,349	Executive Committee breakfast meeting at Annual Meeting
	$6,000	Executive Committee dinner at Annual Meeting
Officer Expense	$39	Officer telephone conferences
	$1,183	Officer travel expense to Executive Committee meetings
Miscellaneous	$542	Annual Meeting expenses (signs, photocopies, etc.)
Newsletter	$8,000	Fees to editor
	$2,061	Postage
	$2,640	Printing

The Criminal Justice Section is one of 25 Sections in the New York State Bar Association. As of January 29, 2009, the New York State Bar Association had a total membership of slightly over 76,905. We are pleased that many younger members have chosen to join our Section, and we continually encourage members to fully participate in our programs. We regularly provide a welcome to those members who have recently joined, and a list of our new Section members who have joined during the last few months appears on page 32 of this issue.

Financial Report from Our Treasurer, Malvina Nathanson

Total income generated by our Section for the first 11 months of the fiscal year January to November 2008, was $51,647.00. Of this total, $43,604.00 came from membership dues to our Section. $7,708.00 was income derived from the annual luncheon held in January 2008, and the CLE Program also held at that time. In addition, $335.00 was received for payment of *Newsletter* issues. The Section's expenses amounted to $36,950.00, which are broken down in the chart at left.

Considering anticipated expenses, which will have been incurred in December, it appears that our Section will have ended the year 2008 with a surplus of approximately $11,000.00. This surplus, along with a $5,000.00 increase in our 2009 budget, should enable us to initiate several new projects in an effort to increase our membership, and to also provide some additional programs for our members. Thus, as we enter the new year, our Section is in sound financial condition.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from November 3, 2008 to February 2, 2009.

Batson Challenges

People v. Jones, decided October 28, 2008 (N.Y.L.J., October 29, 2008, p. 29)

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction and rejected his claim that he was denied a fair trial because the Prosecutor had improperly used racial factors in the selection of the jury. The Court of Appeals concluded that the Defendant had failed to meet his burden of establishing a prima facie case of discrimination under the landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). In the case at bar, the Prosecutor had used a peremptory challenge against a prospective juror who had been African American. Defense counsel's assertions did not find the requisite support in the record, and his sketchy declarations of a *Batson* violation were insufficient to establish a prima facie case of discrimination. The Court found the assertions to be vague and conclusory, and of the very nature which were rejected in *People v. Childress*, 81 N.Y.2d 263 (1993).

Ineffective Assistance of Counsel

People v. Ennis, decided November 20, 2008 (N.Y.L.J., November 21, 2008, pp. 1, 6 and 28)

In a unanimous decision, the New York Court of Appeals denied a Defendant's claim that he was denied the effective assistance of counsel because his Attorney did not seek to tell him, the Judge or the jury prior to receiving a verdict that the Defendant's brother, who was a co-Defendant in the case, had acknowledged that he alone committed one of the crimes for which both were accused. The People had failed to turn over exculpatory statements to the Defendant regarding his brother's admissions. Defense counsel had learned about the statements from the co-Defendant's Attorney, who revealed the information with the understanding that it would not be disclosed until the trial was over. The Defendant's Attorney was thus placed in a personal dilemma and several years after the conviction, defense counsel provided an affidavit outlining the information as part of a 440.10 Motion.

The Court of Appeals rejected the Defendant's claim, finding that there was no reasonable possibility that the information regarding the co-Defendant's statements would have led to a different verdict. The Court found that even if the statement had been turned over by the prosecution as *Brady* material, there was no avenue for defense counsel to admit it into evidence, either at a joint trial or at a separate trial if the Defendant had been granted a severance. Even if a separate trial had been held, the Court of Appeals concluded that the co-Defendant would have undoubtedly asserted his Fifth Amendment privilege against self-incrimination if he had been called to testify.

In reviewing the totality of the trial, the Court further concluded that defense counsel performed as an effective advocate in many significant respects, conducting vigorous cross-examination, providing a strong closing argument, and actually obtaining an acquittal on the most serious charges the Defendant faced. Under these circumstances, defense counsel's overall performance had not fallen below constitutionally adequate levels. Under all these circumstances, the Defendant's conviction was upheld, and the Appellate Division's Order to that effect was affirmed. The Court's unanimous decision was written by Judge Graffeo.

Sufficiency of Evidence

People v. Naradzay, decided November 24, 2008 (N.Y.L.J., November 25, 2008, pp. 8, 26 and 27)

In a 5-2 decision, the Court of Appeals held that the Defendant's activities which led to his arrest in 2003 outside of his home when he possessed a loaded shotgun and a "to-do" list that included gunning down some of the residents inside the house, came dangerously near to committing attempted murder and burglary, and had crossed the boundary line where preparation ripened into punishable conduct. Under these circumstances, the Court concluded that the attempted murder and attempted burglary charges could be sustained, and that the Defendant's conviction of those counts would be upheld. The majority opinion was joined in by Judges Read, Kaye, Graffeo, Smith and Pigott. In a separate dissenting opinion by Judge Jones, which was joined in by Justice Ciparick, the dissenters argued that the Defendant's conduct had not reached the critical point where it could be punishable under the law of attempt. The dissenters argued that although the Defendant's actions indicated an intent to commit the crime in question, his actions had not proceeded far enough to establish an attempt under New York's Penal Law.

Batson Issue

People v. Macshane, decided November 24, 2008 (N.Y.L.J., November 25, 2008, p. 29)

In a unanimous decision, the New York Court of Appeals affirmed the Defendant's conviction and rejected his claim that the prosecution had improperly utilized gender

considerations in challenging prospective jurors. In the case at bar, defense counsel had asserted that the prosecutor had eliminated two male prospective jurors for no good reason because she wanted a female jury. According to the Court of Appeals, however, defense counsel did not sufficiently articulate facts and circumstances that raised an inference that the prosecutor had excused these jurors purely for discriminatory purpose. Since under the *Batson* ruling the defendant has the burden of establishing a prima facie case of discrimination, the record in the case at bar was insufficient to establish a *Batson* violation, and an affirmance of the conviction was warranted.

Sex Offender Classification

People v. Johnson, decided November 24, 2008 (N.Y.L.J., November 25, 2008, pp. 8 and 27)

In a unanimous decision, the Court of Appeals refused to reduce a Defendant's sex offender classification score and deferred to the Board's assessment with respect to the classification that was applied. In the case at bar, points were assessed against the Defendant for victimizing a stranger because he had pornographic images of unknown children on his computer. The Defendant argued that he did not have any relationship with the children whose images were on the computer, and this should not have been used as a factor to elevate his score.

Judge Smith, writing for the unanimous Court, stated that the Defendant's position was contrary to the text dealing with risk factor number 7, under which the Board applied the enhanced score. Judge Smith wrote that the Statute is quite clear that the Board's duty is to make recommendations to the sentencing court, and the sentencing court, applying a clear and convincing evidence standard, then makes its determination after considering the Board's recommendation and any other materials properly before it. Judge Smith suggested that any further remedy the Defendant might seek should be addressed to the County Court Judge who imposed the classification in question.

Sufficiency of Evidence

People v. Hawkins

People v. Eduardo, decided November 25, 2008 (N.Y.L.J., November 26, 2008, pp. 1, 2, and 26)

In a single decision dealing with two separate cases, the New York Court of Appeals unanimously affirmed the Defendants' convictions and found that the claims of legal insufficiency were not adequately preserved so that the Court of Appeals could rule on the matter. Judge Kaye, writing for the unanimous Court, reiterated the Court's firm policy on the need for adequate preservation and stated that "to preserve for this Court's review a challenge to the legal sufficiency of a conviction, a defendant must move for a trial order of dismissal, and the argument must be specifically directed at the error being urged." The Court made reference to its earlier decisions in *People v. Gray*, 86 N.Y.2d 10 (1995) and *People v. Hines*, 97 N.Y.2d 56 (2001).

Applying the Court's standard to the cases in question, the Court held that the Defendant Hawkins had not adequately preserved his legal sufficiency claim. Although defense counsel had argued at the close of trial that the prosecutors had failed to prove a prima facie case of depraved indifference murder, the objections were not deemed specific enough to apprise the Court that he was seeking relief under the Court of Appeals doctrine enunciated in *People v. Payne*. In *People v. Eduardo,* the Court of Appeals did conclude that the Defendant's legal sufficiency claim was preserved, but found that the claim lacked merit. The Defendant Eduardo was convicted of a drug sale, and the Court of Appeals concluded that in applying the rule, an Appellate Court must view the evidence in the light most favorable to the People, and determined that the jury could have concluded beyond a reasonable doubt that the Defendant aided in the sale of drugs and shared a community of purpose with his co-Defendants.

People v. Jean-Baptiste, decided November 25, 2008 (N.Y.L.J., November 26, 2008, pp. 2 and 28)

In a unanimous decision, the New York Court of Appeals determined that its ruling in *People v. Feingold*, 7 N.Y.3d 288 (2006), regarding a refined standard for determining depraved indifference to human life should be applied to cases pending on direct appeal in which the Defendant had properly challenged the sufficiency of the proof. In *Feingold*, the Court of Appeals had held that it is not the circumstances under which the homicide occurred, but the Defendant's mental state at the time of the crime that determines if a Defendant is guilty of depraved indifference murder as opposed to intentional murder.

Judge Pigott, writing for a unanimous court, issued an affirmance of a ruling by the Appellate Division, Second Department, and upheld the determination that the evidence failed to establish that the Defendant had the requisite mental state for depraved indifference murder, and that the proper crime for which the Defendant should have been convicted was second degree manslaughter.

Sufficiency of Evidence

People v. George, decided November 25, 2008 (N.Y.L.J., November 26, 2008, p. 28)

In a unanimous decision, the Court, based upon its *Hawkins* ruling, found that the Defendant's claim of legal insufficiency was adequately preserved, and that the Appellate Division had correctly determined that the evi-

dence was insufficient to establish the Defendant's guilt of depraved indifference murder. The Court further held that the Appellate Division's determination that a conviction for manslaughter in the second degree was legally sufficient was correct, and that therefore the Appellate Division's decision should be affirmed and the Defendant's conviction of the lesser included charge should be upheld.

Sufficiency of Evidence

People v. Castellano, decided November 25, 2008 (N.Y.L.J., November 26, 2008, p. 28)

In another unanimous ruling, the Court determined that the Defendant's claim that the evidence presented at trial was insufficient to support his conviction for depraved indifference murder was unpreserved for Court of Appeals' review under the standards set forth in *People v. Hawkins*.

Double Jeopardy

Rivera v. Firetog, decided December 2, 2008 (N.Y.L.J., December 3, 2008, pp. 1, 2 and 26)

In a 6-1 decision, the New York Court of Appeals held that there would be no double jeopardy violation to try a Defendant again for murder, although there was evidence the jury, at his first trial, had acquitted him of that charge before a mistrial was declared. In the case at bar, the trial court had declared a mistrial after six days of deliberations without asking the jurors if they had reached a partial verdict. The Defendant argued that if this had been done, it would have been revealed that the jurors were deadlocked on the lesser included charge of first degree manslaughter, but had acquitted him of the murder count. In refusing to grant the Defendant's Article 78 Petition to prohibit a retrial, the Court of Appeals stated that trial judges have significant discretion in determining whether to declare a mistrial. Considering all the factors involved, the Court of Appeals concluded that no abuse of discretion had occurred.

The Court's majority opinion was written by Judge Graffeo. Judge Pigott dissented, finding that the trial court should have conducted a further inquiry before declaring a mistrial, and should have determined whether the jury had reached a partial verdict. Judge Pigott noted that the jury had requested certain information, which indicated that they might have reached a partial verdict, but that the Court never specifically advised them that they could render such a verdict. The majority ruling overturned a determination of the Appellate Division, Second Department, which had granted the Article 78 Petition in question.

Evidence of Prior Uncharged Crimes

People v. Giles, decided December 2, 2008 (N.Y.L.J., December 3, 2008, pp. 1, 2 and 26)

In a unanimous decision, the New York Court of Appeals ordered a new trial for a Defendant who had been convicted of attempted burglary and possession of burglar's tools.

The Court found that the prosecution had improperly been allowed to submit evidence of past uncharged crimes. Prosecutors had been allowed to admit a stolen Visa card and testimony of witnesses regarding other burglaries in which credit cards had been stolen. The Defendant, however, had never been charged in either of the earlier burglaries. In a decision by Judge Ciparick, the Court of Appeals held that the evidence of the credit card and the testimony of the witnesses should have been excluded under *People v. Molineux*. The Court concluded that the possible prejudice to the Defendant outweighed any probative value, and that the prejudice to the Defendant was compounded because the trial court failed to issue any limiting instructions to the jury as to their consideration of the evidence which was submitted.

Predicate Felony Statement

People v. Diggins, decided December 16, 2008 (N.Y.L.J., December 17, 2008, pp. 23 and 26)

In a unanimous decision, the New York Court of Appeals determined that a Defendant had been given adequate notice of a predicate felony which was used as the basis for an enhanced sentence, and that an evidentiary hearing was not required with respect to his claims that one of his predicate felony convictions was secured in violation of his constitutional right to counsel. Writing for a unanimous Court, Judge Read emphasized that the persistent violent offender statute sets up a tight time framework, and that after the Defendant had received notice that the people would be seeking an enhanced sentence based upon the prior felony conviction in question, defense counsel had failed to timely request a hearing or make efforts to establish the basis of the Defendant's claim. Under these circumstances, the Defendant's conviction and sentence were affirmed.

Sex Offender Registration

People v. Buss, decided December 16, 2008 (N.Y.L.J., December 17, 2008, pp. 23 and 27)

In a unanimous decision, the New York Court of Appeals determined that a Defendant was required to register as a sex offender since the registration statute was in effect when he was in prison for a second crime while on

parole for a sexual abuse conviction. In the case at bar, the Defendant had been sentenced in 1983 to a term of two-to-six years for first degree sexual abuse. In 1987, while he was on parole for the sexual abuse charge, he stabbed an acquaintance and pleaded guilty to an assault charge, for which he was sentenced to 10-to-20 years in prison. After being released, the prosecution claimed that the Defendant was required to register as a sex offender, based upon the earlier conviction. The Defendant argued that he was not required to register because he was no longer serving a sentence for a sex crime when the offender registration act became effective in 1996.

Judge Pigott, writing for a unanimous Court, concluded that for the purposes of determining whether a Defendant was in prison for a sex crime at the time the registration requirement went into effect, all sentences, whether concurrent or consecutive, should be taken into account. In the case at bar, the Defendant's initial sex abuse sentence expired in 1989 and overlapped with the 10-to-20-year sentence imposed in 1987. The Court held that since the primary goal of the registration act was to prevent sex offenders from committing further crimes after being released from prison, a person who is returned to prison while on parole for a sex offense continues to be subject to his sex offense sentence for the duration of the aggregate sentence involving both crimes. Registration as a sex offender was therefore required.

Submission of Lesser Included Offense to Jury

***People v. Tebrue*, decided December 18, 2008 (N.Y.L.J., December 19, 2008, p. 27)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction and held that since there was no reasonable view of the evidence to support a conviction of the lesser included offense of robbery in the third degree, the trial court did not commit reversible error in declining to submit that charge to the jury. In the case at bar, the Defendant, along with three companions, had approached the victim as he left a high school in Manhattan. Two of the co-Defendants crossed the street to act as lookouts, and the Defendant and another surrounded the victim and backed him against the wall. The Defendant pressed what appeared to be a gun against the victim's body, and the Defendant and his co-Defendant then took the victim's money and fled. During the trial, one of the Defendant's co-Defendants testified that he had not observed any gun being used, and no weapon was recovered from the Defendants when they were arrested. Thus the Court was requested to submit a lesser included charge of robbery in the third degree.

The victim, during the trial, testified that he clearly saw the barrel and the handle of a black gun. Further, a co-Defendant testified that he heard one of the participants in the crime tell the victim that the Defendant had a gun. Under these circumstances, the New York Court of Appeals concluded that there was no reasonable view of the evidence to support a jury finding that the Defendant committed the lesser included offense of robbery in the third degree, and not robbery in the first degree. A co-Defendant's mere statement that he had not seen the Defendant with a gun was insufficient to overcome the other, more specific and compelling testimony.

Post-Release Supervision

***People v. Collado*, decided December 18, 2008 (N.Y.L.J., December 19, 2008, p. 27)**

In a unanimous decision, the New York Court of Appeals once again remanded a matter for re-sentencing based upon the fact that the trial court had failed to pronounce the term of the Defendant's mandatory post-release supervision in his presence. Based upon the Court's recent ruling in *People v. Sparber,* 10 N.Y.3d 447 (2008), re-sentencing was required, since a Defendant must be personally notified that a period of post-release supervision is being imposed and its imposition can be effectuated only by the sentencing court, and not in an administrative manner.

Re-Sentencing for Certain Drug Offenders

People v. Mills

***People v. Then*, decided December 17, 2008 (N.Y.L.J., December 18, 2008, pp. 1, 8 and 27)**

In a unanimous decision, the New York Court of Appeals held that drug offenders who were serving indeterminate prison terms under the Rockefeller Drug Laws for Class A-II non-violent offenses are not eligible for re-sentencing under the Drug Reform Laws enacted in 2005 if they are within three years or less of their parole eligibility date. In an opinion written by Judge Read, the Court concluded that the public policy goals behind the re-sentencing provisions were not meant to cover inmates who were convicted of lower-level drug crimes and who were serving short-term indeterminate sentences. The Court concluded that the reforms enacted in 2005 were meant only to reduce the longest of the terms for defendants who were serving up to life imprisonment for non-violent drug offenses.

The decision by the New York Court of Appeals affirmed the conclusions reached by all four Appellate Division Departments who had decided the same issue in several cases. The Courts all concluded that A-II narcotics offenders who were serving terms ranging from a minimum of three years up to life imprisonment were not entitled to the benefits of the reform legislation, which was obviously aimed at offenders who had received long-term minimum sentences.

Evidence Sufficient to Establish Robbery in the First Degree

***People v. Ford*, decided December 17, 2008 (N.Y.L.J., December 18, 2008, p. 28)**

In a 4-3 decision, the New York Court of Appeals reinstated a conviction for Robbery in the First Degree which had previously been reduced by the Appellate Division First Department to robbery in the third degree. The Appellate Division had found that although the charge to the jury had alerted the jurors to the fact that robbery in the first degree required the finding of an actual possession element, the evidence as presented to the jury regarding actual possession of the knife was legally insufficient.

The four-Judge majority, however, concluded that in viewing the evidence in the light most favorable to the People, the evidence in the case at bar was legally sufficient to establish the Defendant's guilt of robbery in the first degree. The majority opinion found that during the course of the robbery, the Defendant stated, "I got a knife," while simultaneously moving his hand toward his pants pocket. These acts considered together provide a legally sufficient evidence to establish that the Defendant used or threatened the immediate use of a knife in the course of the robbery. The majority opinion was joined in by Chief Judge Kaye and Judges Ciparick, Graffeo and Read.

Judge Jones issued a dissenting opinion, arguing that the victim had testified during the trial that he never saw a knife, and no knife was recovered after Defendant's arrest. Judge Jones concluded that a verbal threat by the Defendant that he possessed a dangerous instrument standing alone is clearly insufficient to establish the dangerous instrument element of robbery in the first degree. Judges Smith and Pigott concurred in Judge Jones' dissent.

***People v. Silvestry*, decided January 13, 2009 (N.Y.L.J., January 14, 2009, p. 31)**

In a unanimous decision, the New York Court of Appeals upheld the suppression of evidence by a trial court Judge, finding that the record supported the determination that the police lacked a sufficient basis to establish reasonable suspicion to support the search in question.

Recent United States Supreme Court Decisions Dealing with Criminal Law

The United States Supreme Court opened its 2008-2009 term on October 6, 2008, and during the next several months issued several decisions dealing with criminal law, including some significant rulings in the area of search and seizure. These cases are summarized below.

***Medellin v. Texas*, 129 S. Ct. 360 (August 5, 2008)**

In a 5-4 decision, the United States Supreme Court once again dealt with a matter which has involved years of litigation and has been before the Court on several prior occasions. In March 2008, in a 6-3 decision, the Court held that President Bush had exceeded his authority in ordering the State of Florida to grant a new hearing to the Defendant, who was facing a death penalty sentence for killing two teenagers almost 15 years ago. The Defendant was a Mexican national who claimed that the State of Texas violated his rights under an international treaty. An International Court had held in 2004 that the convictions of Medellin and 50 other Mexicans who were on death row in the United States had violated the 1963 Vienna Convention, which provides that people arrested abroad should have access to their home country's consulate officials. As a result of the International Court decision, President Bush had ordered the State of Texas to provide the Defendant with a new hearing.

Under the present proceeding, which again appeared before the Court, the Defendant had requested a further stay of his execution, arguing that further action by the President, Congress, or the Governor of Texas could prevent his execution. In a ruling which was supported by five of the U.S. Supreme Court Justices, the Court held that the stay of sentence imposed by Texas State Courts was not warranted, based upon the remote possibility that either Congress or the State Legislature might determine that actions of the International Court of Justice should be given controlling weight. The Court noted that there was no current indication that any further action was likely on this matter, and the Court dismissed the Petitioner's application on all grounds. The Court's majority was comprised of Chief Justice Roberts and Justices Alito, Thomas, Kennedy and Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

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

In another controversial and closely watched decision relating to the area of search and seizure, the United States Supreme Court, in a 5-4 vote, upheld the conviction of an Alabama Defendant who was arrested on what turned out to be an inactive warrant. Based upon the erroneous information which emanated from a mistake in recordkeeping by another police department, Deputy Sheriffs had searched the Defendant's vehicle and had discovered drugs and a pistol in his possession. The Defendant had argued that based upon the exclusionary rule, the improper police activity should have resulted in a suppression of the evidence found.

The Supreme Court, however, in a majority opinion written by Chief Justice Roberts, stated that good evidence obtained during a bad search could be used as long as it was the result of isolated negligence rather than systematic error or reckless disregard of constitutional requirements. The majority opinion is another step in the relaxation of the strict application of the exclusionary rule, and has led to a sharp dispute among the various Justices of the Court. The five-Justice majority consisted of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito.

In a dissenting opinion written by Justice Ruth Bader Ginsburg, the dissenters argued that the exclusionary rule should be strictly enforced, and that the majority ruling will seriously undercut the public policy considerations behind the imposition of the exclusionary rule. Justice Ginsburg stated in her opinion that the majority ruling will have a serious impact on innocent persons wrongly arrested based upon erroneous information.

This most recent ruling by the United States Supreme Court in the area of search and seizure is a significant one, indicating a trend which is more favorable to law enforcement, and which has been occurring over the last few years. Not surprisingly, many prosecutors and law enforcement officials applauded the Court's majority ruling, stating that it was based upon common sense, and that law enforcement should not be penalized for good faith errors. The defense community, on the other hand, viewed the majority ruling as a continued chipping away of Fourth Amendment protections, and a step closer toward removing exclusion of evidence as a sanction for improper searches and seizures.

***Pearson v. Callahan*, 129 S. Ct. 808 (January 21, 2009)**

In a unanimous decision also involving a search and seizure matter, the Supreme Court held that police officers who searched a suspect's home without a warrant had qualified immunity and could not be sued for violating his constitutional rights. In making its ruling, the Court abandoned a rigid two-step test that had been adopted in 2001 as a means of guiding judges in assessing alleged violations of constitutional rights.

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

In a 5-4 decision, the Supreme Court held that police officers had not violated a Defendant's constitutional rights regarding improper searches and seizures when they frisked a passenger who was seated in a car which had been stopped for a violation. The Court ruled that the officer's actions were justified even if nothing showed that the driver or passenger had committed a crime or were about to do so.

Assignment of United State Supreme Court Justices to Federal Districts

At the opening of its October term, the Court also announced the designation of Justices for the various Federal Districts. The current assignments are as follows:

District of Columbia Circuit	**Chief Justice John G. Roberts, Jr.,** of Washington, D.C. Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005.
First Circuit Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico	**Justice David H. Souter**, of New Hampshire Appointed by President George H.W. Bush on October 3, 1990; took office October 9, 1990.
Second Circuit Connecticut, New York, and Vermont	**Justice Ruth Bader Ginsburg**, of New York Appointed by President Clinton August 3, 1993; took office August 10, 1993.
Third Circuit Delaware, New Jersey, Pennsylvania, and Virgin Islands	**Justice David H. Souter**, of New Hampshire Appointed by President George H.W. Bush October 3, 1990; took office October 9, 1990.
Fourth Circuit Maryland, North Carolina, South Carolina, Virginia, and West Virginia	**Chief Justice John G. Roberts, Jr.,** of Washington, D.C. Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005.
Fifth Circuit Louisiana, Mississippi, and Texas	**Justice Antonin Scalia,** of Washington, D.C. Appointed by President Reagan September 25, 1986; took office September 26, 1986.
Sixth Circuit Kentucky, Michigan, Ohio, and Tennessee	**Justice John Paul Stevens,** of Illinois Appointed by President Ford December 17, 1975; took office December 19, 1975.
Seventh Circuit Illinois, Indiana, and Wisconsin	**Justice John Paul Stevens**, of Illinois Appointed by President Ford December 17, 1975; took office December 19, 1975.
Eighth Circuit Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota	**Justice Samuel A. Alito, Jr.,** of New Jersey Appointed by President George W. Bush January 31, 2006; took office January 31, 2006.
Ninth Circuit Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Northern Mariana Islands	**Justice Anthony M. Kennedy**, of California Appointed by President Reagan February 11, 1988; took office February 18, 1988.
Tenth Circuit Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming	**Justice Stephen Breyer,** of Massachusetts Appointed by President Clinton August 2, 1994; took office September 30, 1994.
Eleventh Circuit Alabama, Florida, and Georgia	**Justice Clarence Thomas**, of Georgia Appointed by President George H.W. Bush October 16, 1991; took office October 23, 1991.
Federal Circuit	**Chief Justice John G. Roberts, Jr**., of Washington, D.C. Appointed Chief Justice by President George W. Bush September 29, 2005; took office October 3, 2005.

Scenes from the
Criminal Justice Section

Annual Meeting and Luncheon

Thursday, January 29, 2009

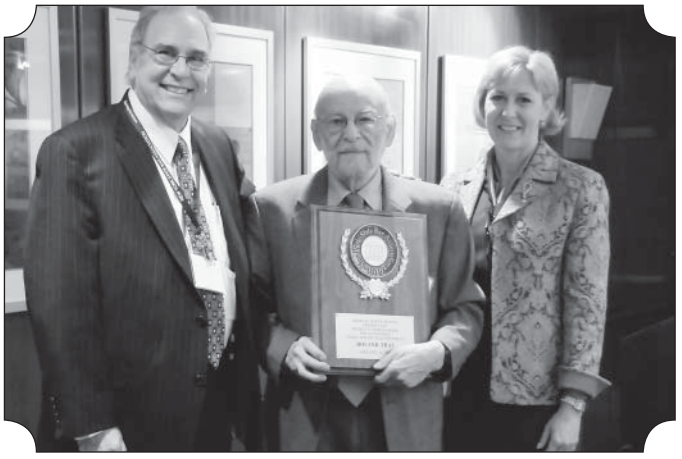
New York Marriott Marquis

Jean Walsh congratulates new officers Jim Subjack, Marvin Schechter and Mark Dwyer

Award winners Steven Kartagener and Robert L. Dreher with Bronx District Attorney Robert Johnson

Chief Judge Lippman in conversation with guest speaker State Senator Eric Schneiderman

Jean Walsh and Norm Effman present award to Eleanor Jackson Piel



Jean Walsh and Norm Effman present award to Klaus Eppler

Section Chair Jean Walsh welcomes guest

Guest speaker State Senator Eric Schneiderman

Andre Allen Vitale receives award from David Schaver

Attendees at Awards Luncheon

Jean Walsh, Vincent Doyle and Norm Effman present outstanding jurist award to Chief Judge Jonathan Lippman

Guest speaker State Senator Eric Schneiderman with Section members

Panelists at afternoon CLE program

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from October 29, 2008 to February 2, 2009.

People v. Sanchez (N.Y.L.J., October 29, 2008, p. 26)

In a unanimous decision, the Appellate Division, First Department, upheld a Defendant's conviction of gang assault in the second degree, and rejected his claim that the acquittal of two other co-Defendants on the gang assault charges required a reversal of his conviction. In reviewing the applicable statutes regarding the presence of two or more other persons which elevate the gang assault crime to a higher level, the Court concluded that it was possible for a Defendant to be convicted of gang assault in the second degree, even though the other persons did not have the requisite intent to commit the crime, but were actually present on the scene. Using this approach, the Appellate Division concluded that the Trial Judge was correct in instructing the jury that an acquittal of one of the three Defendants on the gang assault charge did not require an acquittal of the others. Even though defense counsel objected to the charge in question, and argued that an acquittal of one required an acquittal of all, the Appellate Division concluded that the trial court was within its prerogative to provide the charge in question and that the verdict of the jury was not repugnant and should be upheld.

People v. Sandoval (N.Y.L.J., November 10, 2008, p. 26)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's burglary conviction and ordered a new trial. The Court found that with respect to its instructions to the jury, the Trial Court had improperly relieved the prosecution of its obligation to prove beyond a reasonable doubt that the Defendant had illegally entered the victim's apartment building.

In re Richard U.U. (N.Y.L.J., December 2, 2008, pp. 1 and 2, and December 3, 2008, p. 26)

In a unanimous decision, the Appellate Division, Third Department, upheld a juvenile delinquency determination and determined that a 14-year-old Defendant had knowingly waived his *Miranda* rights before acknowledging to police that he had sexual contact with a four-year-old girl. The teenage Defendant had been living in foster care and when he was questioned by police, a caseworker for the Department of Social Services who was with him advised him to talk to authorities. The juvenile Defendant did not have a law guardian present when he was questioned by police. The Appellate Division found that there was no compelling evidence that the Department of Social Services, in whose custody the Defendant had been placed, had acted contrary to the Respondent's interests. The Appellate Court further concluded that while the parent or legal guardian may invoke the right to counsel on a child's behalf, in the case at bar, the Department of Social Services was the legal guardian of the youth and its representative was present at the time and could properly render advice to the juvenile regarding questioning by the police.

People ex rel. Blake v. Pataki (N.Y.L.J., December 8, 2008, pp. 1 and 9)

In a 3-1 decision, the Appellate Division, Second Department, held that a New York resident had to be extradited to South Carolina to face charges on a 30-year-old crime. The Defendant was accused of forging a check for $495 in 1976 in South Carolina and was subsequently sentenced to a seven-year term in that State. He subsequently escaped and relocated to New York, where he established a new life raising several children and caring for a disabled wife. South Carolina, in 1993, had sought the Defendant's extradition to that State, but after the Defendant had opposed extradition, the former Governor in South Carolina sent a letter to New York authorities stating that he was declining to support the extradition petition. In 2006, after a new Governor was elected in South Carolina, he sought to renew the extradition petition and again requested that New York authorities extradite the Defendant to South Carolina.

Initially, the Supreme Court in Suffolk County had granted the Defendant's Habeas Corpus Petition, finding that the actions of the Governor in South Carolina in 1993 had evidenced a clear and unambiguous determination by the State of South Carolina to stop seeking the return of the Defendant. The three-Judge majority in the Appellate Division held, however, that the Defendant's arguments should be addressed to the South Carolina Courts and that under the extradition principles, the State in which the Defendant is located has only limited authority in determining an extradition application. If the extradition documents are in order, the individual sought is properly identified and the Defendant is a fugitive, then the Defendant is subject to extradition, and the merits of his case must be reviewed in the State seeking extradition.

The majority opinion was joined in by Justices Mastro, Santucci, and Eng. The dissenting opinion was written by Justice Belen. Justice Belen argued that the letter from the South Carolina Governor in 1993 was determinative of the issue and nowhere did the State of South Carolina reserve its right to seek additional relief. This case is an interesting one, involving the fundamental principles of extradition, and based upon the division in the Court and the equity consideration, it is possible that the matter may be pursued in the New York Court of Appeals.

People v. Wood (N.Y.L.J., December 10, 2008, pp. 1 and 9, and December 15, 2008, pp. 18 and 26)

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction for possessing a switchblade knife. The Appellate Court found that the Trial Judge had committed reversible error because he failed to instruct the jury that a conviction for third-degree weapons possession required proof that the Defendant knew the object was a weapon and not merely a lighter. In the case at bar, the weapon in question had been disguised as a cigarette lighter. The Court stated that although the offense in question was a "strict liability crime," where the nature of the object possessed fails to provide notice to the possessor that the object may be subject to government regulation or prohibition, it would violate principles of due process to allow a conviction without proof of mental culpability.

During summation, the prosecutor had argued that the Defendant knew the object he possessed functioned as a weapon as well as a lighter. Defense counsel had argued after the Court's charge that the jury should be instructed as to what knowing possession meant, and objected to the Court's comment that there was no requirement that the Defendant know the precise nature of the weapon as long as it was in fact a switchblade. The Appellate Division concluded that the Trial Court's failure to comply with the defense request and to provide clearer instructions denied the Defendant a fair trial, and a reversal of the conviction was required.

People v. Kass (N.Y.L.J,. December 12, 2008, pp. 1 and 2, and December 17, 2008, p. 26)

In a 3-2 decision, the Appellate Division, Second Department, held that a Trial Court's erroneous hearsay rulings and failure to provide a missing witness charge deprived the Defendant of a fair trial. The Defendant was charged with seeking to hire someone to commit a murder, and according to the prosecution, the Defendant had made statements to this effect to a fellow inmate who was actually working as an informant. During the trial, the prosecutors produced recordings of the Defendant's alleged statements. The issue during the trial focused on whether the Defendant harbored the requisite intent or whether he was pretending.

During the trial, the Court allowed a police officer to testify that the inmate informant had said that the Defendant was looking for someone to eliminate two people. The three-Judge majority found that although the statement may have been permissible for establishing the officer's state of mind, the Court's failure to provide any limiting instructions constituted a serious and prejudicial error. The inmate informant never testified at the trial, and the majority opinion also concluded that the trial court's refusal to give the jury a missing witness charge also required a new trial. The majority opinion was written by Justice Fisher, and was joined in by Presiding Justice Prudenti and Justice McCarthy. Justices Dillon and Skelos dissented, finding that there was sufficient other evidence to establish intent to arrange for the killings and therefore any error which occurred was harmless. Due to the sharp division in the Court, it appears likely that this matter will be eventually determined by the New York Court of Appeals.

People v. Bennett (N.Y.L.J., December 15, 2008, pp. 1 and 2)

In a unanimous decision, the Appellate Division, Second Department, held that an indictment charging the Defendant with first degree rape and sexual abuse had to be dismissed, since the allegations relating to the time period in which the crimes were allegedly committed were too broad and could not survive due process principles. In the case at bar, the indictment alleged that the Defendant had raped a seven-year-old girl and that the offenses had been committed on or about and between June 2001, and December 2001. The Appellate Panel determined that this seven-month period alleged a time interval which was so large that it was virtually impossible for the Defendant to answer the charges and prepare a proper defense. The Court based its ruling on the New York Court of Appeals decision in *People v. Beauchamp*, 74 N.Y.2d 639 (1989). In issuing its ruling, the Court further noted that even though the prosecution had issued an amended bill of particulars after the time issue had been raised, it still did not sufficiently narrow the seven-month time frame contained in the indictment.

State of New York v. Randy M. (N.Y.L.J., December 16, 2008, pp. 1 and 2, and December 18, 2008, p. 26)

In a unanimous decision, the Appellate Division, Third Department, ordered the release of a sex offender being held for civil confinement proceedings because the offender's incarceration was based on an invalid post-release supervision order. In the case at bar, the Defendant did not have a period of post-release supervision added to his sentence by the sentencing court as was statutorily required. Instead, the post-release supervision period had been imposed administratively by the Department of Correctional Services. Since the Court of Appeals, in *Garner v. New York State Department of Correctional Services* (10 N.Y.3d 358 (2008)), held that only the Court could impose the required post-supervision period, the action of the Department of Corrections was invalid. Thus the Defendant's subsequent reincarceration for violating the conditions of the supervision period was improper, and he was not legitimately under the control of the Department of Corrections when they sought to impose an additional period of civil confinement.

The Appellate Court further found that the recent statutory legislation that authorized a retroactive resentencing in order to impose the required post-release supervision had not cured the defect in the case at bar, since once

the Defendant's original term had been completed, he was no longer under the jurisdiction of either the Court or any administrative agency. In granting the Defendant's Article 78 proceeding, the Appellate Panel held that the Defendant could no longer be held pursuant to an invalid supervision order, and ordered the Defendant's immediate release. This case is another one of the hundreds, and perhaps thousands, which are being relitigated in the Appellate Courts because of the post-release supervision fiasco.

People v. Riback (N.Y.L.J., December 30, 2008, pp. 1 and 2, and January 5, 2009, p. 21)

In a 4-1 decision, the Appellate Division, Third Department, upheld the conviction of a Defendant who claimed that he was denied a fair trial because of certain remarks made by the prosecutor during summation. In the case at bar, the Defendant was a pediatric neurologist who had been convicted of sexually abusing 14 young male patients. During the summation, the prosecutor, on two occasions, called the Defendant a pedophile, and the trial court subsequently provided the jury with definitions of sexual fetish and pedophilia. The Defendant had argued that these comments and the follow-up by the Court of the definitions in question improperly branded the Defendant, and amounted to an emotional appeal to the jury.

The Court's majority, in an opinion written by Justice Spain, held that the prosecutor's remarks were fair comment on expert testimony which had previously been admitted and on the defense summation. The majority opinion concluded that essentially the prosecutor was arguing that the Defendant's conduct, as described by the testifying patients, was consistent with the definition of the sexual disorder of pedophilia and undertaken for the purposes of sexual gratification. Justice Spain, in issuing the majority opinion, also noted that the evidence of the Defendant's guilt was overwhelming and that any error which may have occurred was harmless. Justice Malone, Jr., dissented, claiming that the actions of the prosecutor and the instructions provided by the Court amounted to reversible error and an improper passionate and emotional appeal to the jury, which in effect branded the Defendant as a "modern day devil."

People v. Daly (N.Y.L.J., January 2, 2009 p. 41, and January 5, 2009, p. 1)

In a unanimous decision, the Appellate Division, Second Department, reversed a Defendant's conviction for robbery and assault, and ordered a new trial. The Appellate Panel concluded that the Defendant had been denied a fair trial because the prosecution had failed to turn over some statements of witnesses who had viewed the event, and which contained information which may have been helpful to the defense. Two witnesses had provided police with statements that the perpetrator of the crime in question had been a "dark-skinned Italian." The Defendant was white, and the Appellate Court concluded that the statements from the witnesses could have been used by the defense to support their claim that the Defendant was the victim of a misidentification. The Appellate Panel found that the Defendant's *Brady* and *Rosario* rights had been violated, and that a new trial was required.

People v. Wrotten (N.Y.L.J., December 31, 2008, pp. 1 and 2, and January 7, 2009, p. 18)

In a 3-2 decision, the Appellate Division reversed a Defendant's conviction and ordered a new trial. The three-Judge majority concluded that the Trial Court had committed reversible error in allowing the jury to hear a two-way televised testimony of the alleged victim of the crime. In the case at bar, the Defendant was a home health aide who was accused of attacking an 85-year-old man with a hammer. The victim had relocated to California and was in poor health, so that the prosecution made an application to the Trial Judge to allow the victim's testimony to be heard by the jury via a live two-way television conversation.

The Trial Court, finding no specific statutory authority to support this request, nevertheless relied upon Judiciary Law § 2-b(3), which gives a court inherent power to devise forms of proceedings necessary to carry out its function. The three-Justice majority, in an opinion written by Justice McGuire, concluded that the Trial Court did not have the authority to allow the two-way live testimony in question. It noted that although CPL Article 65 authorizes Trial Courts to admit televised testimony of child witnesses in certain sex crime cases, there is no specific CPL provision to cover the testimony in question. The majority opinion further concluded that the Trial Judge's reliance upon the Judiciary Law provision was misplaced, and improperly applied to the circumstances herein. The majority opinion specifically noted that "permitting courts to decide when to allow the use of televised testimony in criminal cases would obligate them to make judgments about the relative importance of various public policy concerns—judgments that are not the province of the Judiciary." Thus, in the absence of any specific authority in the Criminal Procedure Law, the admission of the testimony in question violated the Defendant's constitutional rights to a fair trial, and a new trial was required. The majority opinion was joined in by Justices Andrias and Sweeny, Jr.

Justices Friedman and Saxe dissented. The two dissenters emphasized that forcing the elderly victim to travel to New York from California could have posed a serious danger to his life and health, and that therefore the Trial Court had inherent power and authority under the Judiciary Law to allow the testimony in question via a television transmission. The dissenters argued that since the legislature had not specifically addressed the issue, the Trial Court retained discretion to allow the testimony in question. Given the sharp 3-2 split, and the interesting issue presented herein, it appears that this matter is headed for review by the New York Court of Appeals.

For Your Information

Federal Courts Quickly Process Crack Cocaine Resentencing Matters

Within approximately one year, the Federal District Courts within the Second Circuit have moved swiftly to resentence thousands of Defendants who were eligible for reduced sentences following the Sentencing Commission's modification of crack cocaine sentencing guidelines. The ability to impose lower sentences under the revised guidelines, which went into effect in November 2007 presented the Federal Courts with the huge practical problem of how this was to be accomplished in an efficient and effective manner and how long would it actually take to effectuate the proposed changes.

As of September 30, 2008, the U.S. Sentencing Commission has reported that 815 Defendants have had their cases reviewed within the Second Circuit, and that 63.6% of these Defendants have received shorter sentences, while 36.4% have had their requests denied. The Sentencing Commission had made an initial estimate that as many as 1,028 Defendants within the Second Circuit would be eligible for resentencing. It thus appears that although some additional Defendants may be eligible to apply, the local District Courts have already made a huge dent in the resentencing caseload.

Southern District Chief Judge Kimba Wood commented that the Judges within her District had been able to process a huge number of resentencing cases because of the fine cooperation obtained from the Probation Department, the U.S. Attorney's Office, and the Federal Defender's Office. In the Eastern District, Chief Judge Raymond Dearie stated that most of the Judges, if not all, had already reviewed their files and had accomplished a lot of resentencing.

A breakdown of the requests for resentencing already received and processed provided by the U.S. Sentencing Commission as of Sept. 30, 2008 is reproduced below.

Applications for Retroactive Crack-Cocaine Sentencing in Second Circuit

District	Total Requests	Granted	Denied
Southern	231	106	125
Western	141	91	50
Northern	126	104	22
Eastern	106	60	46
Vermont	23	23	0
Connecticut	188	134	54
Total in Second Circuit	**815**	**518**	**297**

Personnel Changes within the Appellate Divisions

Largely as a result of the recent November election results, the composition of the various Appellate Divisions will be undergoing some dramatic changes. Due to the Democratic tide that was sweeping the Nation and the State, several Republican Supreme Court Justices who were sitting on the Appellate Divisions lost their seats to Democratic challengers, and as a result, additional vacancies have opened up in the various Appellate Divisions. In the Second Department, Justice Robert A. Lifson, who was appointed to the Appellate Division by former Governor Pataki in 2004, lost his election and left the Bench as of December 31, 2008. In the Third Department, Justice Anthony J. Carpinello also was defeated and vacated a seat on the Third Department Bench which he had held since 1996. In the Fourth Department, Justice Robert J. Lunn also lost his bid for re-election and vacated a Fourth Department seat which he had held since 2006.

The defeat of three Republican Justices who were appointed by Governor Pataki will in all likelihood mean that they will be replaced by Democrats to be appointed by Governor Paterson within the next few weeks. With the changing political landscape, the makeup of the various Appellate Divisions appears to be rapidly changing from Republican, with a large number of upstate Justices, to Democratic, with many more Justices coming from New York City. In the Second Department especially, it appears likely that Justice Lifson's seat will be filled by a Judge from Queens, which used to have at least a complement of four Justices on the Appellate Division, Second Department, and now has only three from that County. We will report any future nominations to the Appellate Divisions as they occur.

Former Governor Spitzer Appears Likely to Avoid Criminal Prosecution

Shortly before announcing his resignation from the office of U.S. Attorney for the Southern District, Michael J. Garcia announced that his office would not pursue criminal charges against former Governor Spitzer for any offense relating to patronizing a high-end prostitution ring. Governor Spitzer's involvement with the prostitution ring resulted in his resignation in March of 2008, after only 15 months in office. He was subsequently replaced by Governor Paterson, and the U.S. Attorney's Office, along with the F.B.I., had been conducting a detailed investigation as to whether any criminal charges should be lodged as a result of Spitzer's actions. In announcing

the results of the investigation, Mr. Garcia stated that his office uncovered no evidence of misuse of public or campaign funds, and that there was insufficient evidence to proceed with any criminal action. He also stated that the public interest would not be furthered by the bringing of any criminal charges.

Appellate Division, Third Department, Dismisses Judicial Pay Increase Lawsuit

As a result of a long battle by members of the Judiciary to obtain judicial pay increases, three major lawsuits have been filed, which are now either pending or have been determined by the various Appellate Divisions. Within the First Department, the case of *Larabee v. The Governor* was argued on November 18, 2008, and a decision is presently pending. On November 13, 2008, the Appellate Division, Third Department, in the case of *Maron v. Silva*, in a 4-1 decision, held that the Justices lacked grounds to bring their claims for higher compensation. The lawsuit was thus dismissed, with the Appellate Panel finding that there was no adequate basis for an assertion that the judiciary would not continue to function as in the past if no judicial pay increase was obtained. The Court also found that the contention that the legislature was holding back on pay raises because of unpopular rulings from the Bench, or that the legislature was improperly tying their own quest for raises to increases for judicial personnel, was highly speculative, and could not form the basis for judicial relief. The Third Department decision was written by Justice Mercure and was joined in by Justices Rose, Lahtinen, and Kane. Justice Karen K. Peters dissented, stating that a dismissal for failure to state a cause of action was a drastic remedy at the early stage of the proceeding, and that the Petitioners should be given the benefit of any favorable inference so as to allow the litigation to continue.

The third lawsuit regarding judicial pay increases, which was initiated by former Chief Judge Kaye, is also pending in Manhattan, and will be reaching the Appellate Division, First Department, shortly. The eventual outcome of that case, *Kaye v. Silver,* will probably be determined by the Court's ruling in *Larabee,* which is forthcoming in the near future.

Attorneys Warned to Timely Register with Office of Court Administration

In one of our previous issues, we had alerted attorneys to the fact that the various Appellate Divisions are beginning to take dramatic action against attorneys who have failed to comply with the registration requirements under Judiciary Law § 468-a. The Appellate Division, Third Department, had recently announced the suspension of attorneys who had failed to register within that Department, and in late November, the Appellate Division, First Department, also issued a similar warning.

As announced in a special court note which appeared in the *New York Law Journal* for several days in November, the Appellate Division, First Department, announced that the Office of Court Administration had forwarded to its Disciplinary Committee a list of approximately 3,890 attorneys who were admitted to work in the First Department and who had failed to respond to three notifications that they were in default of their obligation to comply with the registration and fee requirements. The notice further warned that attorneys who did not cure their default by November 24, 2008, would be named as Respondents in an omnibus disciplinary proceeding seeking their immediate suspension from the practice of law.

The failure of many attorneys to promptly register as required is a long, ongoing problem which has only created difficulty for the various Appellate Divisions, and in the end can result in severe and unpleasant consequences for the attorneys involved. Registration and the payment of the required fee is a simple matter which only takes a few minutes. All lawyers are requested to fully comply with the registration requirements to avoid unwarranted consequences.

Office of Court Administration Submits No-Increase Budget

As her term of Chief Judge drew to a close, Judith S. Kaye submitted to the legislature and the Governor the judiciary's budget requests for the 2009-2010 fiscal year. Obviously aware of the State's fiscal crisis, and the need to depict fiscal restraint, the budget submitted contained almost no increases, and largely mirrored the Court's budgets for the current year. The actual 2009-2010 budget which was submitted requested just slightly over 2.27 billion dollars, an increase of 2.3 million dollars. This represented an increase of just one tenth of one percent. The New York Court System also receives some federal assistance, and when this money is included in the overall judicial budget, it is expected that the court system will have available to it approximately 2.5 billion dollars for the year 2009-2010.

The Office of Court Administration, in making its budget request, indicated that it had initiated several measures to reduce expenditures and save money, and that this year it had been able to save approximately 40 million dollars. The Office of Court Administration has also imposed a hiring freeze of administrative personnel and has placed a limitation on unnecessary travel and office equipment expenditures. As in prior years, the budget proposal contains money for proposed judicial pay increases, but due to the large state budget gap which is expected, and the deteriorating economic conditions in

the State, it appears unlikely that any judicial pay raise will be approved in the near future.

Chief Judge Kaye Issues Her Final State of the Judiciary Address and Reveals Several New Court Initiatives

In November 2008, as she neared the end of her term as Chief Judge, Judith S. Kaye delivered her final State of the Judiciary Message and revealed that during the last year, several new initiatives to improve the judicial system have been undertaken. Judge Kaye announced that the court system is attempting to deal with the foreclosure crisis by holding pre-foreclosure conferences, pursuant to a new State law which went into effect on September 1, 2008, and which provides for a 90-day moratorium on any foreclosure proceeding. Judge Kaye also stated that the Court had moved to make the various court facilities more energy efficient and more compatible with environmental concerns. Concern was also expressed that the various family courts are greatly overburdened and that the calendars of various courts are constantly increasing.

In an effort to improve court efficiency, Judge Kaye also announced that the court system will be expanding electronic filing of documents and video conferencing of court matters. Judge Kaye has served on the Court of Appeals for 25 years, and has been Chief Judge for 15 years. Her final State of the Judiciary Address was given before an overflow crowd at New York University, where she was joined by her Court of Appeals colleagues.

Deportation of Illegal Immigrants Increases While Naturalization of New Citizens Rises

A recent government report stated that during the past year, the government had arrested and deported a record number of illegal aliens; to wit: just over 350,000. The record arrests were a result of increased border patrols and the addition of more law enforcement personnel. It was also reported that because of the huge increase in immigration arrests, the Justice Department has been forced to divert some of its resources from other areas in order to deal with the immigration situation.

The report also indicated that the Immigration and Naturalization Service had increased its resources and efforts to more quickly process the application of legal immigrants who wish to become naturalized citizens. In the past year, approximately one million persons were sworn in as naturalized citizens. According to the report, it now takes approximately nine to ten months to fully process naturalization applications, compared to the previous time period of sixteen to eighteen months. The backlog of naturalization applications has also been reduced, from 3.6 million in 2004 to approximately 1.1 million at the end of 2008.

Recent Presidential Election Drew Record Voter Turnout

After all of the States finished certifying their election returns with respect to the recent presidential election, it became apparent that voter turnout in 2008 was the highest in forty years. It was reported that 131 million people voted in the Presidential election in November 2008. This constituted 61.6% of the eligible voters, the highest percentage turnout since 1968. Nine million additional voters cast their ballots over 2004, when 122 million people had voted. This was the third consecutive Presidential election in which voter turnout increased. The large increase in voter turnout was largely attributed to substantial increases in the number of black voters and those voters who identified themselves with the Democratic Party. Voter turnout increased substantially in such states as Virginia, Indiana and North Carolina, which were classified as highly competitive States. For example, North Carolina saw an increase in its voter turnout from 57.8% in 2004 to 65.8% in 2008.

Overall, 33 States saw an increase in voter turnout in 2008. The States with the lowest percentage of voter turnout were reported as being West Virginia and Hawaii, where only 50.6% of the voters participated in the election. Final voter turnout results also clearly established a growing trend toward early voting, with 31% of all voters in 2008 having cast their ballots before the official November 4th election date. The number of early voters in 2008 increased by 9% over the 22% who cast their ballots early than in 2004.

Governor's Proposed Budget Limits Any Sharp Decrease for Judicial System

In late December, Governor Paterson submitted a proposed state budget for 2009-2010. The proposed budget called for an expenditure of 121.1 billion dollars, a slight increase over the year 2008-2009. The state budget also includes the request of the Office of Court Administration for an operating budget of 2.5 billion dollars for 2009-2010, to cover the costs of operating the State's judicial system. The Governor's budget basically adopts the request submitted by Chief Judge Kaye shortly before she left her position as Chief Judge.

The Governor, in including the requested judicial allocation, praised the Office of Court Administration for submitting an austere request which recognized the current economic downturn and the need for belt tightening over the next few years. The one major change in the Governor's budget with respect to the judiciary was the failure to include monies for a requested raise for judges. The issue of judicial raises has become a highly emotional and controversial matter during the last few years and unfortunately, the sharp economic downturn makes it unlikely that any judicial raises will be forthcoming in the

near future. In presenting his proposed budget, Governor Paterson emphasized that it is estimated that the State budget will have a $1.7 billion gap in the current fiscal year and a projected $13 billion gap in the 2009-2010 fiscal period unless drastic action is taken soon.

U.S. Prison Population Continues to Grow

A recent study estimates that at the end of 2008, some 2.3 million Americans were incarcerated in the Nation's Federal and State correctional facilities. This accounts for approximately 1 in every 100 adults in the United States, making the U.S. the world leader in total prison population. In fact, a recent study has estimated that the United States, which has about 5% of the world's population, has nearly 25% of the world's prison inmates. During the last year, the inmate population has increased in 36 of the 50 States, as well as within the Federal prison system. Several states now have prison populations which exceed 100,000 inmates. California currently has the largest prison population, with about 170,000 inmates. Texas is second with 155,000 inmates. Florida recently became the latest State to have a prison population which tops 100,000. It has been estimated that the average national cost of maintaining an inmate is approximately $24,000.00, and the increasing rise in the prison population is imposing huge economic burdens on the various States, at a time when the economic downturn has imposed severe fiscal restraints.

Fortunately, in New York, our prison population over the last few years has stabilized at approximately 65,000 inmates, which is substantially lower than some of the other large population states. This is due to the adoption of many alternative measures and recent modifications in the Rockefeller drug laws, which have somewhat helped to reduce or at least limit our prison population. Recent recommendations, which have been finalized by the Sentencing Commission, will further seek ways to provide reasonable alternatives to incarceration, thereby hopefully keeping New York's prison populations within manageable numbers.

U.S. Population Trends Reveal Slow Growth in South and West

A recent report from the United States Census Bureau discussing population trends from April 1, 2000 to July 1, 2008, reveals that although the Western and Southern States have experienced rapid population growth, the trend appears to be slowing in the last few years. Most Southern and Western States aren't growing nearly as fast as they were at the start of the decade. The study attributes the current slowdown to the deteriorating economic situation and the recent housing crisis, which is making it harder for many people to move from one area to another. The report also found that foreign immigration has also slowed since the start of the decade. Only 13% of U.S. residents moved from 2006 to 2007, the smallest percentage since the late 1940s.

The State of Utah was found to be the fastest growing State, with a population increase of 2.5% from July 2007 to July 2008. Utah was followed by Arizona, Texas, North Carolina and Colorado. Two States which were found to have lost population from 2007 to 2008 were Michigan and Rhode Island, which are still experiencing severe economic conditions. The State of Florida, which had attracted more people from other states than any other state in the nation, has suddenly seen a severe slowdown in its population growth, and in fact, from 2007 to 2008, more people left Florida for other states than moved in, resulting in a loss of nearly 9,300 people in 2008.

Even though the population growth has slowed in the Western and Southern States, these areas are still expected to pick up additional congressional seats as a result of the 2010 census, based upon their earlier population growths. Florida is expected to gain as many as two House seats, and Texas could gain as many as four. Some States in the Northeast and Midwest are expected to lose seats, with Ohio losing as many as two seats. New York is expected to lose one seat. In the West, California, which is our Nation's most populous State, may be losing a seat for the first time, based upon the fact that its growth has dramatically leveled off in the last few years. From 2007 to 2008, it was estimated that California had the biggest net loss of people moving to other states, approximately 144,000 people. New York also experienced a net loss of people moving to other states. The expected change in Congressional seats will further increase the political power of the Southern and Western States, and will also result in changes in the Electoral College which elects our President.

U.S. Population Continues to Increase

As we entered the new year 2009, the census bureau reported that the current U.S. population now stands at approximately 305,600,000. This represents an increase of almost three million people within the last year. The census bureau further estimated that during the coming year, one birth is expected to occur every 8 seconds in the United States, with one death occurring every 12 seconds. International immigration is also expected to add one person every 36 seconds to the U.S. population. Based upon these expectations, the population of the nation should continue to steadily grow in the coming years.

New Study Casts Doubt on Value of College Education

While it has long been an accepted practice to encourage people to attend college and to view a college education as a valuable commodity, a recent new study has cast some doubt on both the economic value of obtaining a

college education and whether a college education actually makes persons more knowledgeable on various subjects and fields of endeavor. The National Center for Public Policy and Higher Education recently reported that college tuition and fees have increased 439% since 1982. This is about three times as much as the increase in the median family income. Based upon this fact, the Center has raised some question as to whether the economic benefits obtained from a college degree are no longer sufficient to cover the costs of obtaining such an education.

The Center also reported that a recent survey among high school seniors who immediately entered the job market and college graduates reveals only slight differences in the overall knowledge of the two groups. For example, in the area of civic literacy, the study found that a person can learn just as much outside of college as in it. For example, in 2006 and 2007, the Intercollegiate Studies Institute provided a nationwide test covering some 14,000 freshman and seniors at 50 campuses around the Country. The typical college graduate failed to correctly answer about 50% of the questions relating to American history, government, international relations and economics. When a similar test was provided to high school graduates and persons in the general working population who had never attended college, the average scores of the participants were 20 points higher than the average college graduate. It appears that modern technology, such as the Internet and other mass media outlets, has enabled persons to become self-educated in many areas without the necessity of a formal college education.

After conducting the surveys in question, the Intercollegiate Studies Institute concluded as follows:

> Gaining knowledge about America's history and institutions isn't the only reason to attend college. There are other subjects worth learning about, professional paths that cannot be followed without a degree.
>
> But if colleges continue escalating their costs and "dumbing down" their curricula, an increasing number of Americans may discover a liberating fact: With the right reading and conversational habits, it is possible to become more knowledgeable, a more active and a wealthier citizen than the average person who invests tens of thousands of dollars in a college degree.

Year-End Financial Review

The year 2008 was noteworthy for the sharp downturn in the U.S. economy and the growing economic concerns that many people in the U.S. face. A year-end summary of some financial data released by Bloomberg News placed the economic situation in sharp focus. The summary revealed that the year 2008 saw some 30 trillion dollars in value erased with respect to stocks worldwide. The Standard and & Poor's 500 Stock Index in the U.S. has also seen its sharpest percentage decrease since 1937. In addition, the U.S. Government pledged some 8.6 trillion dollars in taxpayer money to prop up cash-strapped financial companies. It was estimated that the total cost of the bailout money provided by the Government could actually cost each American taxpayer approximately $61,000.00 over the course of the next several years, based upon the 139 million tax returns which were filed in 2007.

It was further estimated that 11.7 million households in the U.S. now owe more on their mortgages than their homes are worth. The number of persons who have become unemployed during the last year was also estimated at approximately 2.6. million. An additional study released by the Associated Press also found that the jobless rate, as of the end of 2008, had reached 7.2%, with approximately 11.1 million people out of work. Broken down by different job categories, the report also found that the highest jobless rate was among teenagers, with approximately 20% of teenagers who are seeking employment unable to find a job. The jobless rate among men was listed at 7.2%, and women at 5.9%. By racial and ethnic groups, 11.9% of blacks were out of work, 9.2% was the rate among Hispanics, whites had a 6.6% rate, and Asians were at 5.1%.

Among the various States, the States which were listed as having the highest unemployment were Michigan, with a 9.6% unemployment rate, Rhode Island with a 9.3% rate, South Carolina and California with 8.4% rates, and Oregon, with an 8.1% rate. The most fortunate States, with a very low unemployment rate, were listed as Wyoming with a 3.2% rate, North Dakota with a 3.3% rate, South Dakota with a 3.4% rate, and Nebraska and Utah with 3.7% rates. The statistics in question were gathered by the Associated Press from the United States Department of Labor. Let's hope that as the year 2008 has ended and we progress through the year 2009, the economic situation will improve and we can report better news.

China's Economy Continues to Grow

Despite the recent worldwide economic downturn, it was recently reported that China's economy in the last 30 years has increased tenfold, and that Country is now the third largest economic power in the world. Only the United States and Japan rank ahead of China, and China recently surpassed Germany, which used to be listed in the third position. Germany's economy has now fallen to fourth place among the world's economic leading powers. A clear indication of China's economic growth is that in January 2009, auto sales in China topped those in the United States. This was the first time in history that China's monthly vehicle sales surpassed those in the United

States. It was reported that in January 2009, sales of automobiles in China amounted to 735,000, while in the Unites States, they had fallen to a 26-year low of 656,976.

Homicides Involving Female Victims are Largely Based Upon Domestic Violence

A recent study by the New York State Divisions of Criminal Justice Services which reviewed homicide statistics for 2007 revealed that of the 157 women killed in New York State in 2007, 87 had a domestic relationship to the offender. This relationship was either as a spouse, a girlfriend or a daughter. The study also found that there were approximately 800 homicides throughout the State in 2007, and that the 157 women killed during that year represented slightly less than 20% of the total. Thirty-one of the State's 62 Counties had no domestic violence homicides in 2007, and the number of homicides in the State appears largely concentrated in a few Counties, primarily in the densely populated areas of the State. In commenting upon the study, Governor Paterson stated that the new data shed new light on the extent of domestic violence, and he indicated that even though the fiscal crisis was placing a severe burden on the State budget, the area of public safety would not be abandoned, and that victims of domestic violence will continue to be aided by the various agencies of the State.

New Push for Additional Equal Pay Legislation

Although the Equal Pay Act was passed by Congress in 1963, a recent study revealed that women overall are still making 78 cents to a male colleague's dollar. The study specifically found that women age 15 to 24 are making an average salary of $23,357.00, while men in the same age category are making $26,100.00. For the age group 25 to 44, women are making $41,558.00 as an average salary, while men are making $55,286.00. In the 45 to 64 age category, the average salary for women is $44,808.00, while for men it is $67,040.00.

The continued salary gender gap has brought forth renewed calls for additional legislation to correct the situation. Two bills were filed in Congress with respect to this issue. One bill, known as the Paycheck Fairness Act, would force employers to justify pay differences and would increase penalties for discrimination. The second bill, known as the Lilly Ledbetter Fair Pay Act, would greatly increase the time period in which a woman can sue for pay discrimination. The Act is intended to override the Supreme Court case of *Ledbetter v. Goodyear*, in which the Supreme Court ruled in 2007 that a woman must sue within 180 days of the start of the pay discrimination, otherwise her suit would be barred by a Statute of Limitations. The Ledbetter Act has in fact already received approval by both Houses of Congress and President Obama signed the bill at the end of January.

The salary differentials between men and women also have ramifications upon retirement, since if a woman is paid less, her Social Security payments are lower, and her pension is lower. It appears that the issue of the salary gender gap will play an important role in the upcoming legislative session, and there is a good likelihood that several new legislative enactments to correct the situation will be forthcoming.

Heller Decision Having No Effect on New York State Gun Laws

When the United States Supreme Court, in June of 2008, determined in *District of Columbia v. Heller,* 128 S. Ct. 2783, that under the Second Amendment, an individual has a constitutional right to keep and bear arms, it was felt that the decision placed in jeopardy the New York State and local Statutes which restricted the possession of handguns. The *New York Law Journal*, in an article of January 8, 2009, at page 1, recently reported, however, that a survey of developments in the six-month period following *Heller* revealed that no judge has voided the New York Statutes or dismissed a gun possession case based upon the constitutional issues raised in the *Heller* decision. On the contrary, six decided opinions to date have all rejected arguments made pursuant to *Heller*, and have upheld the criminal proceedings in question relating to gun possession.

The decisions which have been issued in the various trial courts have relied upon the *Heller* language that the State can still pursue reasonable restrictions on the use of firearms, and the fact that the Washington, D.C. Statute which was ruled unconstitutional is different in many respects from the New York enactments. One of the written decisions which has dealt with the issue has come from the Brooklyn Supreme Court, while another has been issued by the Rockland County Court, and a third has emanated from Nassau County.

Those seeking to overturn New York's gun possession laws, although disappointed by the initial decisions which have been issued, have pledged to continue to raise the issue in the Federal Courts. It thus appears likely that the eventual determination of the constitutional status of New York's gun possession laws will be decided first by the Second Circuit Court of Appeals, and ultimately by the United States Supreme Court. In the *Law Journal* article, Robert A. Levy, who served as co-counsel in the *Heller* decision when the case appeared before the United States Supreme Court, continued to express the view that the New York Statutes were constitutionally infirm and would eventually be struck down by the United States Supreme Court. We await further developments in this area and will report accordingly to our members.

Denise O'Donnell Assumes Additional Duties

On January 27, 2009, Governor Paterson announced that Denise O'Donnell, who has been serving as the Commissioner of the Division of Criminal Justice Services, will also now serve as Deputy Secretary for Homeland Security. As part of her new additional duties, Denise O'Donnell will oversee the Office of Homeland Security and the Operation of the State Police. Ms. O'Donnell is a former U.S. Attorney for the Western District of New York, and has been serving as Criminal Justice Commissioner for the last two years. She has also headed the State Sentencing Commission, which recently issued its final recommendations to Governor Paterson and the State Legislature. As a result of her additional duties, Ms. O'Donnell's salary has been increased to $165,000.00 per year.

DNA Samples Now Required With Respect to All Federal Arrests

The United States Justice Department recently announced that effective as of January 9, 2009, it will require the taking of DNA samples from all Defendants who are arrested and charged with Federal crimes. This is a drastic departure from the prior policy, which required DNA samples only for those convicted, rather than charged, with federal crimes. With respect to New York State crimes, the policy continues to be that DNA samples are required for those convicted of felony crimes and certain misdemeanor offenses. The recent change in the Federal policy has drawn some criticism from the defense community and civil liberties organizations, and it is unclear whether the criticism lodged will result in any modification of the announced changes.

About Our Section and Members

Winter Annual Meeting

Our Annual Meeting, luncheon awards program and CLE seminar were held on January 29, 2009 at the New York Marriott Marquis Hotel. We were pleased to have as our guest speaker at the luncheon State Senator Eric T. Schneiderman, who was recently appointed as Chairman of the Senate Codes Committee, which considers criminal justice legislation. Senator Schneiderman commented on the recent proposals made by the Sentencing Commission and Governor Paterson's efforts to further modify the Rockefeller Drug Law sentences. Governor Paterson has recently commented that he felt that original Rockefeller Drug Laws have proven to be a major public policy failure, and that he is in favor of modified sentences and expanded treatment programs. The sentencing proposals recommended by the Sentencing Commission, including modifications in sentences for drug offenses, are discussed in detail in our first feature article in this issue. Senator Schneiderman stated that he welcomed the Section's input with respect to any future legislation regarding sentencing issues.

Following the luncheon, awards were also presented to outstanding practitioners and governmental officials for exemplary service during the past year. The awards were as follows:

The Michele S. Maxian Award for Outstanding Public Defense Practitioner
Roland Thau, Esq.
Federal Defenders of New York
New York City

The Vincent E. Doyle, Jr. Award for Outstanding Jurist
Honorable Jonathan Lippman
Chief Administrative Judge,
Office of Court Administration
New York City

Charles F. Crimi Memorial Award for Outstanding Private Defense Practitioner
Joel L. Daniels, Esq.
Law Firm of Joel L. Daniels
Buffalo

David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System
Eleanor Jackson Piel, Esq.
Law Office of Eleanor Jackson Piel
New York City

Outstanding Contribution to the Bar and the Community
Klaus Eppler, Esq.
Proskauer Rose LLP
New York City

Outstanding Appellate Practitioner
Steven R. Kartagener, Esq.
Law Office of Steven R. Kartagener
New York City

Denison Ray Award for Outstanding Criminal Defender
Andre Allen Vitale, Esq.
Monroe County Public Defender's Office
Rochester

Outstanding Prosecutor
Robert L. Dreher, Esq.
Executive Assistant District Attorney
Office of the Bronx District Attorney
Bronx

This year's luncheon was well attended and was both an enjoyable and informative event. We were pleased that many governmental officials and several district attorneys from throughout the State attended. These included Robert Johnson, District Attorney from the Bronx, and Gail Prudenti, Presiding Justice of the Appellate Division, Second Department.

In the late afternoon following the luncheon, our Section also presented a valuable and interesting CLE program. The CLE program dealt with the issue of "The Changing Supreme Court in Challenging Times." The lecture offered post-election perspectives on the future of the United States Supreme Court regarding criminal justice and civil rights issues. The program was co-sponsored with the Committee on Civil Rights and included various speakers dealing with a variety of matters. Primary attention was given to *Batson* issues, Executive Detention and Habeas Corpus, and Search and Seizure. In addition to the formal lectures, attendees at the CLE program were also provided with detailed materials on the topics which were covered. Photos of our various events during our Annual Meeting appear on pages 18-19 of this issue.

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

Position	Individual	Venue
Chair:	James P. Subjack, Esq.	Fredonia
Vice-Chair:	Marvin E. Schechter, Esq.	Manhattan
Secretary:	A.D.A. Mark R. Dwyer (lives in Park Slope, Brooklyn)	Manhattan

District Representatives

1st	Guy Hamilton Mitchell	Manhattan
2nd	David M. Schwartz	Brooklyn
3rd	Dennis Schlenker	Albany
4th	Donald T. Kinsella	Schenectady
5th	Nicholas J. DeMartino	Syracuse
6th	Betsy Carole Sterling	Tompkins
7th	Hon. John D. Tunney	Corning (Steuben County)
8th	Paul J. Cambria	Erie
9th	Gerald M. Damiani	Rockland
10th	Marc Gann	Nassau
11th	Spiros A. Tsimbinos	Queens
12th	Hon. Michael R. Sonberg	Bronx

House of Delegates Approves Town and Village Court Report Supported by Section

At its stated meeting held on Friday, January 30th, the House of Delegates of the New York State Bar Association voted to approve a report issued by the Committee on Court Structures and Judicial Selection relating to improvements within the system of Town and Village Courts. In addition to approving the report, which called for additional funding and more extensive training for Town and Village Judges, the House of Delegates also voted to include as part of the report's recommendation a right of defendants to insist that any proceedings held which involve criminal misdemeanor charges within the Village and Town Courts be conducted by judges who are licensed attorneys. The original report of the Committee on Court Structure had declined to include the opt-out provision. At a vote of the Executive Committee of the Criminal Justice Section, the Section had addressed the issue of the opt-out provision and had voted to support the Committee's original report with the recommendation that the opt-out provision be included, and that the Section go on record as supporting the right of defendants appearing in Town and Village Courts to choose to be tried before judges who are attorneys.

The issue of improving the operation of Town and Village Courts has received a lot of attention during the last year, and efforts have been lodged to improve the system. At the present time, only about 25% of persons serving as Town or Village judges are attorneys, and although as a general rule our Bar Association and Section have been in favor of having legally trained and licensed attorneys as judges, the practical considerations in some small upstate communities often require that laypersons fill these positions, usually on a part-time basis. The report of the Committee on Court Structure in the very least proposes additional training and funding, so that non-lawyers will receive the necessary assistance and support in properly handling judicial matters.

Barry Kamins Heads Wrongful Conviction Committee

Barry Kamins, who has long been active in our Criminal Justice Section, and who has contributed many articles to our *Newsletter*, is presently serving as Chair of a Special Committee established by the New York State Bar Association to review the issue of wrongful convictions which have occurred in our State. The Committee has reviewed the circumstances of over 50 wrongful convictions, and has prepared a report outlining recommended procedures and safeguards so as to minimize the possibility of wrongful convictions in the future. The Committee will be issuing its final report to the House of Delegates in April 2009, and we will report on the details of the recommendations and any final action taken by the House of Delegates in our summer issue. Barry Kamins was recently appointed a Judge of the New York City Criminal Court, but despite his new duties, he continues to work diligently on issues of concern to the legal profession. We are proud to have Barry as a longtime member of our Criminal Justice Section.

New Members—The Criminal Justice Section Welcomes Its New Members

We are pleased that during the last several months, many new members have joined our Section. We welcome these new members and invite them to contribute articles or comments to our *Newsletter*, and to fully participate in our various events. The names of our new members are listed on the next page.

The Criminal Justice Section Welcomes New Members

Ronnie Abrams
Grace Ethel Albinson
Stuart Keith Austin
Richard N. Bach
Barry Baines
Gillian Taicia Ballentine
Richard J. Barrett
Jessica Jackie Beauvais
Richard Blake
Felicia L. Boles
Eugene Deronn Bowen
Daniel M. Branower
Rebecca Rader Brown
Collin D. Bull
Michael K. Burke
Colin G. Byrne
Matthew Aaron Calarco
Sherry Cameron-Harry
Brooke A. Camhi
Lindsay Blair Coleman
David M. Cooper
Lee Mathias Cortes
Katherin Marie Crossling
Christine Delince
Nicholas DeMartino
Bert Jan Denolf
Adekunle A. Deru
Nestor H. Diaz
James Richard Dillon
Xavier R. Donaldson
John W. Dormin
Audrey Baron Dunning
Linda Fang
Michael Seth Farber
Farris Mian Fayyaz
David A. Feldman
Bridget M. Fleming
Maureen Fleming
Ramon Ernesto Flores
Frances Maria Forgione
Doris T. Friedman
Yael Friedman
Veronica E. Frösen
Matthew Christopher Gagliardo
Nina M. Giuliano
Lisa Marie Golden
Aaron Goldsmith
Thomas J. Grillo
George Michael Groglio
Paul S. Grosswald
Ronald P. Hart
Meredith Stacy Heller
Kieran Patrick Holohan
Timothy W. Hoover
Jessica A. Horani
Shannon Katherine Hynes
Peter T. Juliano
Marc Scott Kallman
Bradley Edward Keem
Tracey Lena Kiernan
Eli R. Koppel
Ronald Joseph Lanouette
Yaniv Lavy
Robert Steven Lefkowitz
Ryan Leonard
Alan S. Lewis
Meri M. Lopez
Adam Max Lubow
Osnat Lupesko-Persky
Andrea R. Maimone
Victor Manibo
William Preston Marshall
David S. Martin
Matthew J. Martinez
Erika P. McDaniel-Edwards
Michael B. Mednick
Joseph R. Miano
Karla Linn Momberger
Todd W. Morrow
Rachel T. Newman
Esereosonobrughue Joy Onaodowan
Domenica Padula
Laurie Anne Parise
Emily K. Paul
William M. Permutt
Allen S. Popper
Harlan J. Protass
J. Antonio Ramirez
James A. Randazzo
Michael Patchin Ribley
James Lawrence Riotto
Jesus M. Rivera-Delgado
Michael Joseph Rocco
Natasha Rachelle Roche
Claudia Teresa Romano
John C. Rowley
Anthony C. Saline
Alessandra T. Scalise
W. Ross Scott
Dayna M. Shillet
Stephen M. Signore
Adam W. Silverman
Karl J. Sleight
Asha Saran Smith
Michelle A. Smith
Jessika Marie Stadwick
Nancy Stillman
Michael David Story
Kristin Nicole Tahler
Michael Testa
LaToya Thomas
Leslie Renee Thomas
Mark DeWitt Thrasher
Dilia K. Travieso
Judith Vargas
Kevin E. Verge
Jacob A. Vredenburgh
Lynette Shant'ay Wade
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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.

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(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 preferably in Word Perfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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