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New York Criminal Law Newsletter

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of the New York State Bar Association

Inside

NYSBA

Message from the Chair

A Review of the Section's Recent Activity on Criminal Justice Issues

The Criminal Justice Section's Executive Committee ("CJS Executive Committee") is committed to addressing the most urgent and critical criminal justice initiatives on the legislative horizon. This year, however, the resignation of Governor Spitzer and the subsequent change in state leadership has made our mission more challenging. The CJS Executive Committee, with the assistance of the NYSBA staff, is attempting to ascertain whether Governor Paterson will support the same criminal justice initiatives as his predecessor. Unless there is a clear divergence from the criminal justice priorities of the previous administration, the CJS Executive Committee will move forward with its agenda to review and comment on newly proposed criminal justice legislation, including, but not limited to the following: 1) the creation of a victim / witness protection statute; 2) the creation of an Office of Indigent Services in the Department of State; and 3) the revision of the state medical parole statute.

CJS Executive Committee Meetings

The CJS Executive Committee has had two meetings since our Annual Meeting in January 2008, both of which were in New York City on March 7th and on May 7th. A brief description of the meetings is discussed below.

March 7th Meeting: A majority of the meeting was dedicated to a review and discussion of certain recommendations made by the NYSBA Special Committee on the Civil Rights Agenda ("Special Committee") in their December 2007 report ("Report"). The CJS Executive Committee focused on two criminal justice matters taken up by the Special Committee. The first recommendation was that the trial court be required to give a verbal instruction consistent with the finding in *Batson v. Kentucky*, 476 U.S. 79 (1986), to counsel for both sides at the beginning of jury selection. The CJS Executive Committee was unanimous in its opposition to the first recommendation. The second recommendation of the Special Committee was that NYSBA, along with other bar associations and interest groups, undertake a comprehensive study of the necessity for continued use of peremptory challenges. As to this second recommendation, a majority of the CJS Executive Committee was opposed to the recommendation. The CJS Executive Committee will issue a report to the Special Committee and the NYSBA Executive Committee explaining its position on the two recommendations.

May 7th Meeting: The meeting was highlighted by a presentation from Sate Senator Eric Adams (D-Brooklyn) who discussed his plans to draft legislation creating a Special Prosecutor's Office for police corruption cases and cases where police have caused life threatening injuries or death to individuals. The CJS Executive Committee has agreed to review the Senator's proposed bill and provide recommendations to the NYSBA Executive Committee.

The next CJS Executive Committee meeting was held on June 4, 2008.

Best wishes for a wonderful summer,

Jean Walsh

Message from the Editor

We are pleased to present in this issue, as one of our feature articles, a detailed report on the changes in the sex crime statutes which occurred in 2007. The author, Madeline Singas, presently serves as Chief of the Special Victims Bureau in the Nassau County District Attorney's Office. In a concise and precise manner, she outlines the increased penalties for sex offenders and discusses the changes which were made by the Legislature effective April 13, 2007. For the convenience of practitioners, a detailed chart is also provided indicating possible sentence ranges for felony sex offenses.

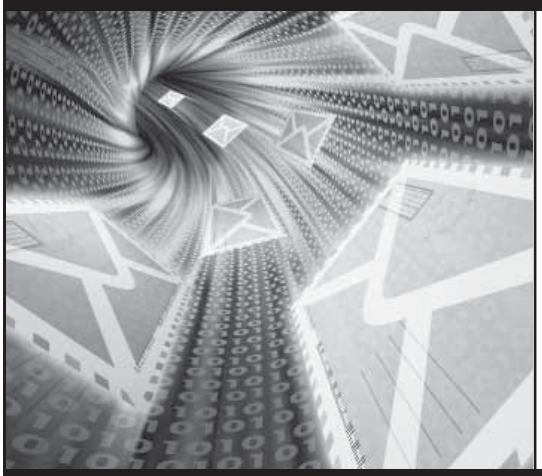
We are also pleased to report on some major decisions which were handed down by the United States Supreme Court, dealing with death penalty matters and the constitutionality of various gun law statutes. The New York Court of Appeals has also issued some interesting decisions on the right of jury trials and has made a definitive ruling on the necessity to include post-release supervision as part of a determinate term. These cases are discussed in further detail in the U.S. Supreme Court and the New York Court of Appeals sections.

As in the past, we are also providing a variety of information on numerous topics of interest to criminal law practitioners and these are discussed in our For Your Information section. Information regarding the activities of our Criminal Justice Section and matters pertaining to our Section members are again covered in our About Our Section feature.

I continue to thank our readers for their support of our *Newsletter* and am grateful to the many members who have contributed articles. I encourage additional members to submit articles. I am currently up to date in publishing articles received and I am most anxious to receive new material for consideration. I especially urge newer members to consider submitting materials of interest. Again, thank you for your support.

Spiros A. Tsimbinos

Request for Articles



If you have written an article and would like to have it considered for publication in the *New York Criminal Law Newsletter*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information, to its Editor:

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

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Recent Changes in Sex Offense Sentencing

By Madeline Singas

Effective April 13, 2007, the Sex Offender Management and Treatment Act was enacted which contained comprehensive changes concerning the civil commitment of sex offenders, and which greatly enhanced the criminal punishment of sex offenders. This article will focus on changes to the Penal Law and the Criminal Procedure Law which resulted in the creation of a new crime, as well as the reclassification of numerous felonies within Article 130 of the Penal Law, the sentencing changes regarding these crimes and the sexual offender's post-release supervision.

The Legislature armed prosecutors with a new crime, *Sexually Motivated Felony*, PL § 130.91, which reads as follows, "[a] person commits a sexually motivated felony when he or she commits a specified offense for the purpose, in whole or substantial part, of his or her own direct sexual gratification." There are twenty seven (27) felonies cited as specified offenses under subsection (2) of the statute: assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10, gang assault in the second degree as defined in section 120.06, gang assault in the first degree as defined in section 120.07, stalking in the first degree as defined in section 120.60, manslaughter in the second degree as defined in subdivision one of section 125.15, manslaughter in the first degree as defined in section 125.20, murder in the second degree as defined in section 125.25, aggravated murder as defined in section 125.26, murder in the first degree as defined in section 125.27, kidnapping in the second degree as defined in section 135.20, kidnapping in the first degree as defined in section 135.25, burglary in the third degree as defined in section 140.20, burglary in the second degree as defined in section 140.25, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, arson in the first degree as defined in section 150.20, robbery in the third degree as defined in section 160.05, robbery in the second degree as defined in section 160.10, robbery in the first degree as defined in section 160.15, promoting prostitution in the second degree as defined in section 230.30, promoting prostitution in the first degree as defined in section 230.32, compelling prostitution as defined in section 230.33, disseminating indecent material to minors in the first degree as defined in section 235.22, use of a child in a sexual performance as defined in section 263.05, promoting an obscene sexual performance by a child as defined in section 263.10, promoting a sexual performance by a child as defined in section 263.15, or any felony attempt or conspiracy to commit any of the foregoing offenses.

In essence, if a defendant commits any of the specified offenses for sexual gratification, a sexually motivated felony may be charged. The sexually motivated felony takes on the characteristics of the felony to which it is wedded. Therefore, the offense level for the sexually motivated felony is the same offense level as the specified crime. The underlying felony also dictates whether the sexually motivated felony will be a violent or nonviolent, crime. For example, if a defendant breaks into a woman's home and is armed with what appears to be a gun, and a prosecutor can demonstrate the defendant gained entry into that dwelling for sexual gratification, the defendant could be charged with one count of burglary in the first degree, and one count of burglary in the first degree as a sexually motivated felony. Burglary in the first degree is a B violent felony; therefore, burglary in the first degree as a sexually motivated felony is also a B violent felony.

With this addition of sexually motivated felony, offenders who perpetrate crimes outside Article 130 of the Penal Law and who would not otherwise be subject to strict and intensive supervision, or to indefinite civil confinement, can now be brought into the sex offender realm and sentenced accordingly. The manner in which prosecutors introduce evidence tending to establish the defendant acted for sexual gratification will likely generate much litigation. Prosecutors may wish to consider a perpetrator's statements to the police or uncharged crime evidence to establish a defendant's motive in committing the underlying non-sex crime. Given the enhanced sentences and post-release supervision sentences that sex offenders now face, prosecutors will attempt to utilize this new crime as forcefully as the defense bar tries to prevent them from doing so.

The Sex Offender and Management Act also designated more sex offenses as violent crimes. The following offenses are now violent felony offenses:

D-violent

Criminal Sexual Act 2	PL § 130.45
Facilitating a Sexual Offense w/controlled substance	PL § 130.90
Rape	2 PL § 130.30

E-violent

Aggravated Sexual Abuse 4	PL § 130.65-a
Persistent Sexual Abuse	PL § 130.53

In addition, the Legislature amended the Penal Law by adding § 70.80 which created and defined different categories of sex offenses to be utilized for enhanced sentences. A *Felony Sex Offense* is a conviction of any felony defined in Article 130, or Patronizing a Prostitute in First Degree (PL § 230.32), Incest in the First and Second Degrees (PL §§ 255.26, 27), or a felony attempt or conspiracy to commit any of the above crimes. A *Predicate Felony Sex Offender* is a person who stands convicted of any felony sex offense after having previously been subjected to one or more predicate felony convictions. A *Violent Felony Sex Offense* is a felony sex offense if it is for an offense defined as a violent felony

offense under PL § 70.02, or for a sexually motivated felony where the specified offense is a violent felony offense.

As a result of the new crime, and redefined categories of crimes, as well as the reclassification of more sex offenses as violent felonies, the sentencing structure for most sex offenses has been altered, resulting in enhanced sentences. With the change to determinate sentences, the minimum sentences on most sex offenses, predicate and non-predicate, have been enhanced. Additionally, with the reclassification of some felonies to violent crimes the sentence terms have dramatically increased.

All sentences imposed for felony or violent felony sex offenses must now be determinate sentences, in whole or half years. Some exceptions do apply. For convictions on non-predicate D felonies, both violent and non-violent, and non-predicate E felonies, both violent and non-violent, the court can sentence a defendant to a definite sentence of one year or less, if mitigating circumstances concerning the history and character of the defendant or the nature of the crime so warrant. The court can also sentence a defendant to probation for those crimes.

In imposing a sentence for any felony sex offense, the sentencing court now may consider the following: defendant's criminal history, if any, including any history of sex offenses; any mental illness or mental abnormality from which the defendant may suffer; the defendant's ability or inability to control his or her sexual behavior; and, if the defendant has difficulty controlling such behavior, the extent to which that difficulty may pose a threat to society.

The statute has also enhanced post-release supervision (PRS) periods for all felony sex convictions where a determinate sentence has been imposed. For non-sex offense felonies, the maximum PRS period is five years. As a result of the Sex Offender Management and Treatment Act, sex offenders in some cases may face up to 25 years post-release supervision. Moreover, a defendant who violates any condition of his or her sex offender PRS is subject to a term of imprisonment of "up to the balance of the remaining period of post-release supervision." In the burglary example cited above, that defendant, if convicted of burglary in the first degree as a sexually motivated felony, could be sentenced to twenty-five (25) years incarceration, with a maximum of twenty years (20) post-release supervision. Potentially, because of the sexually motivated felony and the changes in post-release supervision, that defendant could serve up to forty-five (45) years in prison, as compared to a maximum of thirty (30) years if convicted of burglary in the first degree.

Additionally, the Act greatly enhanced sentences for those defendants who violate a condition of their PRS. A revocation of a defendant's PRS may result in significant additional periods of incarceration. Upon a revocation of PRS, a defendant who owes more than three years PRS and has been actually sentenced to more than three years PRS is only entitled to review of his revocation after he has served the additional three years incarcerated. And if this defendant is not released upon this first assessment, his status will not be reviewed until two years later. That review process will continue every two years if a defendant fails to be released.

Those defendants, however, who abide by the conditions of their PRS do have a vehicle for early release. A defendant who was originally sentenced to more than five years PRS may be released early from PRS following five years of PRS and three consecutive years of unrevoked PRS. To be entitled to such release, the parole board must find, after consulting with the licensed health care professional treating the defendant during his release, that a discharge is in the best interest of society and the defendant is financially able to pay any money owed as a result of fees, restitution and surcharges.

Post-release supervision does not apply to A-felony convictions, mandatory persistent sentences and discretionary persistent sentences, since these convictions mandate indeterminate life sentence.

The attached charts encapsulate the changes made to sex offense sentences and outline the post-release supervision terms.

All sex offense convictions still require a defendant to pay a DNA fee and $1,000 supplemental sex offender fee. Moreover, most sex offense convictions will require registration under the Sex Offender Registration Act (SORA) and a SORA registration fee.

Finally, outside the sentencing arena but equally relevant, two additional changes are worthy of mention for the criminal law practitioner. First, the Corrections Law has been amended by making a sex offender's failure to register or verify under the SORA a class E felony as opposed to a class A misdemeanor. A second failure to register remains a class D felony. Additionally, under the newly added Criminal Procedure Law § 210.16, courts can order defendants who are charged with Article 130 offenses where an essential element of the crime is an act of "sexual intercourse," "oral sexual conduct," or "anal sexual conduct" to submit to HIV testing if the results of such testing would be medically or psychologically beneficial to the victim of the crime, and the victim requests it. Be aware, however, that the statute contains time limits within which such requests must be made.

It is hoped that this article and the attached charts will assist both prosecutors and defense attorneys in dealing with the complex changes which have recently been enacted with respect to sex offenses.

Madeline Singas is Chief of the Special Victims Bureau of the Nassau County District Attorney's Office. Ms. Singas has been a prosecutor for 17 years, having previously served in the Queens' County District Attorney's Office. Her article is an updated adaptation of her recent lecture presented by the Criminal Justice Section at its Annual Meeting in January 2008.

Instant felony sex offense	1st "felony sex offense"		"Predicate Felony Sex Offender" (2nd felony sex offense w/prior felony)				Discretionary Persistent (no time limit for priors)		Mandatory Persistent (priors w/in past 10 yrs)	
			Any Prior Not VFO		Any prior Violent Felony					
Class	Min	Max	Min	Max	Min	Max	Min	Max	Min	Max
A-I SMF	15-25	LIFE	12-25	Life	12-25	Life				
A-II	10-25	LIFE	10-25	Life	10-25	Life	15-25	Life		
B-Violent	5	25	8	25	10	25	15-25	Life	20-25	Life
B	5	25	8	25	9	25	15-25	Life		
C-Violent	3.5	15	5	15	7	15	15-25	Life	16-25	Life
C	3.5 (Prob or def. sentence)	15	5	15	6	15	15-25	Life		
D-Violent	2 or alt.sent.	7	3	7	5	7	15-25	Life	12-25	Life
D	2 or alt.sent.	7	3	7	4	7	15-25	Life		
E-Violent	1½ or alt sent.	4	2	4	3	4	15-25	Life	3-4	Life
E	1 1/2 or alt. sent.	4	2	4	2.5	4	15-25	Life		

2ND CHILD SEXUAL ASSAULT FELONY OFFENDER
(Art. 130 & cw of both prior and instant off is<15)

Conv.	Prior w/in 15yrs	Sent. Range
A-II or A-II, B	B or C	15-25 to life indeterminate
B	D or E	12-30 determinate
C	A-II, B or C	12-30 determ or 15-25 to life indeterminate
C	D or E	10-25 determinate
D	Any	5-15 determinate
E	Any	4-12 determinate

Post Release Supervision: 10 to 20 years Determinate

**"FELONY SEX OFFENSE" is any felony Art 130-Sex Offenses, Sexually Motivated Offense PL§ 130.91, Patronizing a Pros 1 § 230.06, & Incest 1 & 2nd § 255.27 & 26.

SUBJECT TO POSSIBLE CIVIL COMMITMENT
**"Predicate Felony Sex Offender" convicted of a "felony sex offense" and previously convicted of one or more predicate felony convictions"

A-II FELONY SEX OFFENSES
Predatory Sexual Assault
§ 130.95(1) Rape 1, CSA 1, Agg Sex Abuse 1 or Course 1 + Serious Physical Injury or Dangerous Instrument
§ 130.95(2) - Rape 1, CSA 1, Agg Sex Abuse 1 or Course 1 "against one or more additional persons"
§ 130.95(3) - Prior conviction for an Art. 130, §255.25 &

POST-RELEASE SUPERVISION

Instant felony sex offense	1st felony sex offense		Prior Felony *not* VFO		Prior Felony *is* VFO	
Class	Min	Max	Min	Max	Min	Max
A-I SMF	No PRS on Indet. Sent.					
A-II	No PRS on Indet. Sent.					
B-Violent	5	20	10	25	10	25
B	5	20	10	25	10	25
C-Violent	5	15	7	20	7	20
C	5	15	7	20	7	20
D-Violent	3	10	5	15	5	15
D	3	10	5	15	5	20
E-Violent	3	10	5	15	5	15
E	3	10	5	15	5	15

VIOLENT
'SEXUALLY MOTIVATED FELONIES PL 130.91, including attempts & conspiracy to commit "for the purpose, in whole or substantial part, of his or her own direct sexual gratification"

Assault 1 & 2	**§ 120.10, 05**
Gang Assault 1 & 2	**§ 120.07, 06**
Stalking 1	**§ 120.60**
Manslaughter 1	**§ 125.20**
Murder 1 & 2	**§ 125.27, 25**
Agg Murder	**§ 125.26**
Kidnap 1 & 2	**§ 135.25, 20**
Burglary 1 & 2	**§ 140.30, 25**
Arson 1 & 2	**§ 150.20, 15**
Robbery 1 & 2	**§160.15, 10**

SORA REGISTERABLE OFFENSES
Conviction or Attempt (Not applicable to YO):

Sexual Misconduct	§ 130.20
Rape 1°, 2°, 3°	§ 130.25-.35
Sodomy 1°, 2°, 3°(+CSA)	§ 130.40-.50
Persistent Sxl Abuse	§ 130.53
Sexual Abuse 1°, 2°	§ 130.60-.65
Sex Ab 3° or Forc Touch	§ 130.52 -.55
(CW <18 yo or D has prior sex off convic.)	
Agg Sex Abuse 1°-4°°	§ 130.65a-.70
Crse Sxl Cndct 1°,2°	§ 130.75-.80
Fac. Sx w/ Substance	§ 130.90
Unlw Surv 1°, 2° (not att)	§ 250.45(2,3,4)-.50
Incest	§ 255.25
Any Crime Under	Art. 263
Kidnap or Un.Im. 1°, 2°	§ 135.05 -.10.20.25
(CW<17 y.o. & D not parent)	
Patronizing 3°	§ 230.04(CW<17yo)
Patronizing 1°, 2°	§ 230.05-.06
Promoting 1°, 2°	§ 230.30(2), .32
Dissem. Indec. Mater.	§ 235.22

Any Sexually Motivated Felony	§ 130.91
Predatory Sexual Assault (eff 6/23/06)	§ 130.95
Pred. Sexual Assault Ag. a Child	§ 130.96
Sex Trafficking (eff 11/1/07)	§ 230.34

Duties SORA Level 1 & 2:
Annual regis., notify of change, photo & fingerprint ea. 3 yrs.
Duties SORA Level 3:
Above + personally rpt. Ea. 90 days
Level 2 & 3 on Internet:
www.criminaljustice.state.ny.us.gov

GEN. IMPORTANT EFFECTIVE DATES:
SOL Child Extender: 8/1/96
Course 1 & 2 Enacted: 8/1/96
SARA: 2/1/2001
Sod Becomes CSA: 11/1/03

SOL removed Rape 1, Sod 1, etc: 6/23/06

Spoliation of Evidence by Prosecutors in Federal Criminal Cases

By Thomas F. Liotti and Drummond C. Smith

This article focusing on discovery and the government's violations under *Brady v. Maryland*[1] and its progeny seeks to address the issue of spoliation of evidence. Spoliation, or the destruction of evidence, constitutes the most egregious violation under the ambit of discovery and it certainly can be the most damaging to a defendant. Accordingly, in a criminal context, prosecutorial spoliation violations should carry with them severe consequences. The Supreme Court supported and enforced defendants' rights to spoliation remedies for 25 years post-*Brady*. In 1988, the Supreme Court decided *Arizona v. Youngblood*,[2] wherein a significant obstacle to obtaining remedies for spoliation abuses was imposed upon defendants which still presents issues for courts and defendants today.

"Spoliation, or the destruction of evidence, constitutes the most egregious violation under the ambit of discovery and it certainly can be the most damaging to a defendant."

In *Brady v. Maryland*, the Supreme Court considered the question of what constitutes what might loosely be called the area of "constitutionally guaranteed access to evidence."[3] *Brady* created a three-part test employed when reviewing compliance with discovery: (1) "All the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching@; (2) "the evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued."[4] A *Brady* violation therefore does not result from the mere failure to turn over evidence to the defense, but requires a negative effect as a result of the suppression.

The Court then set about buttressing this protection for defendants over the next 25 years, readily dismissing the idea a defendant would be required to make a showing of bad faith. The Court further endorsed that the importance of materiality and justice in finding the defendant's guilt were the crucial factors in spoliation determinations, casting aside prosecutorial intent as an unimportant factor, in *United States v. Agurs*.[5] In *California v. Trombetta*,[6] the Supreme Court held "irrespective of the good faith or bad faith of the prosecution," the suppression of evidence favorable to a defendant violates due process where the evidence is material to guilt or to punishment. In *United States v. Bagley*,[7] it was held prejudice ensues where there is a "reasonable probability that, had the evidence been discharged to the defense, the result . . . **would have been different**." [emphasis added]

Decades of law predated the Rehnquist Court, holding sacrosanct a defendant's right to a remedy for withheld or destroyed exculpatory evidence by the prosecution. Despite precedent, in *Arizona v. Youngblood*, the majority, led by Chief Justice Rehnquist, asserted the state had complied with *Brady* requirements in the underlying sexual assault case by providing semen samples to the defense, which were not preserved and were therefore not available at the time of trial. The Court held because there was no allegation of bad faith on the part of the police in not preserving the evidence, at worst the police conduct could be described as negligent. In contrast to precedent, the majority in *Youngblood* adds into the *Brady* standard a new and seemingly insurmountable burden "that unless a criminal defendant can show bad faith on the part of the Government, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

Youngblood's good-faith / bad-faith burden represented a little-noticed tectonic shift in the protections affecting defendants which has been challenged as having no precedential basis and being inconsistent with pre-existing legal standards. In his dissent, Justice Blackmun speculated as to how the majority came to its conclusion, noting a curious disregard for the Court's prior holdings on the subject of spoliation. "*Brady* and *Agurs* could not be more clear in their holdings that a prosecutor's bad faith in interfering with a defendant's access to material evidence is not an essential part of a due process violation." *See also Napue v. Illinois*,[8] *Giglio v. US*[9] and *Rovario v. US*,[10] all standing for the pre-*Youngblood* bright-line rule that the good or bad faith of the prosecution is irrelevant to any discussion of a defendant's due process rights.

As a result of the evolution of the case law involving instances of spoliation, it becomes clear proving bad faith under *Youngblood* remains a high burden for a defendant to prove. But once the defendant does prove bad faith, what does that mean for the prosecutor? Federal law criminalizes the act of destroying evidence as an aspect of obstruction of justice. The omnibus clause of 18 U.S.C. § 1503 penalizes "whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." This crime requires specific intent to impede justice.[11]

The authors of this article recently had a personal experience with the spoliation of evidence issue. In a

recent federal case, Thomas Liotti represented an individual who was charged in federal court with a gambling conspiracy. Defense counsel, after jury selection but before the actual commencement of the presentation of evidence, became involved in a two-day spoliation hearing. The issue involved the destruction of two key pieces of evidence by the Nassau County Police Department as agents of the United States government and the custodian of evidence intended to be used at a federal trial. The hearing had as its focus the question of bad faith as it related to the destruction of potentially exculpatory gambling machines. Factually, the Nassau County Police Department seized two video poker machines from the premises of the Delta 7 Social Club in West Hempstead, New York on or about December 2003. After the state case was disposed of with a disorderly conduct violation, the evidence was purportedly held by the Nassau County Police Department as the custodian of evidence and used to obtain a federal indictment under 18 U.S.C. § 1955 for gambling conspiracy. Defense counsel had learned for the first time in the midst of trial the two "joker poker machines" at the heart of the indictment had in fact been destroyed many months before the start of trial.

Pursuant to the requirements of *Youngblood*, it was felt the defendant satisfied elements one and two by demonstrating the government destroyed evidence that possessed an apparent exculpatory value, and the destroyed evidence could not be replaced. The defense also made a compelling case the destruction by agents of the government was done with bad faith, thereby purportedly satisfying *Youngblood*'s third element. It was further alleged by the defense the machine was in fact inoperable and as such incapable of being used by the defendant or anyone else to commit the alleged gambling conspiracy. It was further posited a defense expert could have testified the machines were in fact inoperable, or had never been used for a "pay out" of winnings and were merely video games. Curiously, the government was allegedly unaware of even a manufacturer's name or a serial number. Remarkably, even though the defendant demanded this and other discovery information, the government concealed the fact they knew the evidence had been destroyed. This incredible fact came out on the eve of trial during the spoliation hearing. The government had actual knowledge from state authorities the machines were going to be destroyed and yet did nothing to preserve or protect them.

The Court, however, evidently not wanting to punish the government, found the government did not act in bad faith, even though the testimony by Nassau County Detectives and property clerks as custodians of the evidence revealed the government was aware and had been aware for several months of the destruction. Furthermore, the government had been informed by Nassau County the machines were due to be destroyed, yet they did nothing. The Court then determined it would permit introduction of photographic evidence relating to the two alleged video poker machines. As a result, Mr. Liotti's client determined it was in his best interest to accept the government's plea offer, as he was being threatened with a lengthy sentence as well as deportation were he to lose at trial.

The above scenario serves as a clear example of the extreme difficulty a defendant faces when attempting to meet the onerous bad-faith requirement set forth under *Youngblood*. Demonstrating bad faith is potentially an insurmountable challenge which should be eliminated. Despite the Rehnquist Court's determination in *Youngblood*, lower federal courts have attempted to keep the spirit of *Brady* alive by remedying prosecutorial spoliation violations. In *United States v. Yevkapor*,[12] the District Court for the Northern District of New York ruled the destruction of evidence warranted exclusion of that evidence, and subsequently dismissed the case. The Court further acknowledged precedent in the Court of Appeals for the Second Circuit establishing an affirmative duty on the part of prosecutors to instruct governmental agencies to preserve evidence. *See United States v. Gil*, *supra*.

In the federal case which was handled by Mr. Liotti and which was discussed above, the absence of the gambling machines also meant an absence of serial numbers, manufacturer information, and proof the machines were actually operational. All of this information would have been utilized to exonerate the defendant. A determination should have been made as to whether the spoliated gambling machines were prejudicial to the defense.

Such a determination could have been made at the spoliation hearing. In such a hearing, the court could also implement a two-tier standard to determine the prejudicial effect of the spoliated evidence. First the court would determine whether the defense could have utilized the destroyed evidence in preparing its defense. Upon a sufficient showing of the first tier, the second tier would involve a determination as to whether the destroyed evidence would have made a difference to the outcome if available to the defense. Such a finding would rely upon a preponderance of the evidence standard, because it was the defense's contention all along the machines were inoperable.

Upon a satisfactory determination that both tiers of the standard have been met, the court would grant one of three suggested remedies. First, the court could dismiss the charges against the defendant. Second, the court could grant a curative instruction to the jury regarding prosecutorial misconduct. Third, the court could charge the jury to consider the destruction of evidence in order to determine what, if any, prejudicial effect it may have had.

The question also arises as to the fate of the prosecutor. Because under *Youngblood* a defendant must demonstrate bad faith which, in effect, rises to a level commen-

surate with obstruction of justice, penalties against individual prosecutors must be severe.[13] If the court does find bad faith / obstruction of justice, the court should immediately appoint a special prosecutor. The subject prosecutor would also have to be advised of his or her Fifth and Sixth Amendment rights. Further, the prosecutor should be reported to the appropriate grievance committee and the Department of Justice for disciplinary action.

The Rehnquist Court's *Youngblood* decision has placed an undue burden on defendants in criminal cases and in so doing the Court has further trampled the due process rights of defendants. What was once a venerated protection of defendant's rights in the event of spoliation of evidence has become an ominous mountain to surmount. Corrective measures must be taken by our highest court to rebuild the rights gradually degraded over the last several decades, lest our notion of "due process" becomes extinct. As a corollary, action must be taken to prevent the obstruction of justice. Ultimately, the availability of a spoliation hearing to determine the prejudicial effect of spoliation of evidence would seek to level the playing field between the prosecution and defense.

Endnotes

1. 373 U.S. 83, 87 S. Ct. 1194 (1963).
2. 488 U.S. 51, 109 S. Ct. 333 (1988).
3. *United States v. Valenzuela-Gernal*, 458 U.S. 858, 102 S. Ct. 3440 (1982).
4. *Leka v. Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001) (*ref. Strickler v. Greene*, 527 U.S. 236 (1999)).
5. 427 U.S. 97, 96 S. Ct. 2392 (1976).
6. 467 U.S. 479, 104 S. Ct. 2258 (1984).
7. 473 U.S. 667 (1985).
8. 360 U.S. 264 79 S. Ct. 1173 (1959).
9. 405 U.S. 150, 92 S. Ct. 763 (1972).
10. 353 U.S. 53, 77 S. Ct. 623 (1957).
11. *See United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983).
12. 419 F. Supp. 2d 242 (N.D.N.Y. 2006).
13. *United States. v. Quattrone*, 441 F.3d 153 (2d Cir. 2006).

Thomas F. Liotti, Esq., has practiced law for over thirty years in Garden City, New York. He is the former Chair of the Criminal Justice Section of the New York State Bar Association and former Editor of the Section's *Newsletter*. Drummond C. Smith, Esq., is an Associate in Mr. Liotti's firm, a former Assistant District Attorney in Niagara County, New York and a former Legal Aid Attorney in Suffolk County, New York. Messrs. Liotti and Smith gratefully acknowledge their Law Clerk, Michael P. Hilferty, a third-year student at Hofstra University School of Law, for his indispensable work in the research and drafting of this article.

New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from February 4, 2008 to May 2, 2008.

Failure to Impose Post-Release Supervision

***People v. Cumberbatch*, decided Feb. 7, 2008 (N.Y.L.J., Feb. 8, 2008, p. 26)**

In yet another case involving the failure of a Trial Court to discuss and impose a period of post-release supervision as part of the determinate term, the New York Court of Appeals vacated a defendant's plea and remitted the matter back to the New York County Supreme Court for further proceedings. Based upon several recent Court of Appeals decisions, the failure to advise a defendant regarding the imposition of a period of post-release supervision requires the vacation of a plea. The Court of Appeals reiterated the entry of a plea of guilty requires a knowing and voluntary consent with respect to all of the conditions involved. In rendering its most recent decision, the Court of Appeals cited to its 2007 ruling in *People v. Louree*, 8 N.Y.3d, 541.

What Constitutes Testimonial Evidence under *Crawford*

***People v. Rawlins* and *People v. Meekins*, decided Feb. 19, 2008 (N.Y.L.J., Feb. 20, 2008, pp. 1 and 6 and 27)**

The New York Court of Appeals, in a decision covering two cases, determined the analytical analysis of fingerprint or DNA evidence is testimonial, requiring analysts to be subject to cross-examination on the witness stand if the evidence is prepared for prosecutorial purposes and offered to establish a defendant's identity. The ruling involves an issue of first impression and continues the Court's effort to determine the various aspects of the United States Supreme Court ruling in *Crawford v. United States*, 541 U.S. 42 (2004).

The defendants in the case at bar claimed they were denied their rights to cross-examine accusers who helped assemble scientific evidence against them. The Court of Appeals, after establishing the principle set forth above, determined with respect to defendant Meekins that no constitutional rights were violated. The *Meekins* case involved DNA evidence and the Court held the information which was gathered by the technicians was not testimonial because the analysts did not know the identity of the defendant or his link to possible crimes. Judge Jones, who wrote the decision, stated the mechanical anonymous nature of the analysis of evidence by technicians means the scientific profiling data was not testimonial.

With respect to the defendant Rawlins, the Court ruled the linking of the defendant's fingerprints from two crime scenes was testimonial because it was done intentionally by police to tie him to both crimes. The Court, however, concluded the error was harmless under the circumstances of the case. Another detective, who had testified at the trial, had reached the same conclusion about the same fingerprint evidence and the defendant had an opportunity to cross examine that witness regarding the evidence in question.

The Court voted unanimously to uphold the defendants' convictions in both cases. However, Judge Read issued a concurring opinion in which she stated she believed the scientific evidence in both cases should be treated as business records, which by their nature are non-testimonial. She concluded neither the DNA nor the fingerprint report resembled the evils which the confrontation clause sought to address.

Right to Confrontation

***People v. Leon*, decided Feb. 19, 2008 (N.Y.L.J., Feb. 20, 2008, pp. 6 and 29)**

In a unanimous decision, the Court of Appeals ruled the defendant had no right to confront the author of a report matching him to fingerprint cards on file from 1976 and 1983. The defendant had been convicted of sexual abuse of a 13 year old. After his conviction, a hearing was conducted at which the defendant was sentenced as a persistent violent felony offender on a finding he had previously been convicted of two violent felonies, one in 1976 and one in 1983. The defendant contended the *Crawford* decision applies to a predicate sentencing hearing and his rights were violated because he was not allowed to confront the author of a report certifying the two prior convictions belonged to him. The Court of Appeals specifically held predicate sentencing hearings are not trials for purposes of the confrontation clause and the *Crawford* ruling would not be applicable to such proceedings.

Right to Jury Trial

***People v. Urbaez*, decided March 13, 2008 (N.Y.L.J., March 14, 2008, p. 28)**

In a unanimous decision, the New York Court of Appeals held a defendant whose misdemeanor charges were reduced from a Class A misdemeanor to a Class B misdemeanor was not entitled to a jury trial. In the case at bar, the prosecution moved on the date of trial, several months after the defendant was initially charged, to reduce the A misdemeanor of aggravated harassment in the second degree to attempted aggravated harassment in the second degree, a B misdemeanor. The defendant objected to the People's request and stated the People were simply reducing the charge to deny him his right to a jury trial. After granting the People's request for a reduction and commencing a bench trial, the defendant was convicted.

The Court of Appeals determined a defendant's right to a jury trial attaches only to serious offenses and not to petty crimes and no jury trial right attaches when the maximum incarceration is 6 months or less. Thus in the case at bar, since the defendant following the reduction of the charges, faced only a 3-month sentence, no jury trial was required. In upholding a procedure which is used regularly in the New York City Criminal Courts, the Court of Appeals recognized that the ability to proceed with bench trials rather than lengthy jury trials furthers the public interest of efficient and effective judicial administration. The issue in this case was one which has often been raised by experienced defense counsel and although logically the defendant's argument makes sense, the practical concerns of the court system prevailed. The unanimous decision of the New York Court of Appeals upholding the prosecutor's reduction practice to avoid jury trials thus appears to have been firmly upheld.

Dismissal of Fugitive Appeals

***People v. Tavares* and *People v. Jones*, decided Mar. 18, 2008 (N.Y.L.J. Mar. 19, 2008, p. 28)**

In two companion cases, the New York Court of Appeals held the appeals of two defendants who were fugitives for many years while their appeals were still pending in the Appellate Courts did not necessarily require automatic dismissal. In the case at bar, each of the two defendants had absconded. While their appeals were pending in the Appellate Division, the prosecutors had failed to move for dismissal. It was only after the defendants were captured and returned to the jurisdiction and continued to seek appellate redress that the prosecution argued their appeals should be dismissed because of their fugitive status. The Court of Appeals determined neither of the two appeals implicated the so-called fugitive disentitlement doctrine which allows appellate courts to dismiss appeals of fugitive defendants who are at large while their appeals are pending. The Court of Appeals found that although the People clearly had an opportunity to move for dismissal of the appeals while the defendants were still at large, they failed to do so. As a result an automatic forfeiture of the right to appeal did not arise.

The Court of Appeals then went on to consider whether the appeals in question could be dismissed by the Appellate Divisions in the exercise of their discretion. The Appellate Divisions in both matters had proceeded to dismiss the appeals after the defendants had been returned to the jurisdictions, basically finding the defendants' absences had so delayed the appellate process the People were prejudiced thereby. Using this standard, the Court of Appeals proceeded to determine the Appellate Divisions had not abused their discretion in dismissing the appeals in question. As a result, the Orders of the Appellate Divisions with respect to the dismissal motions were affirmed in both matters.

Miranda Warnings

***People v. White*, decided Mar. 20, 2008 (N.Y.L.J., Mar. 21, 2008, pp. 1 and 7 and 26)**

In a 6-1 decision, the New York Court of Appeals upheld the use of a defendant's admissions which were taken after a period of time in which he had made statements prior to the reading of Miranda warnings. In the case at bar, the defendant had made initial remarks regarding a shooting. These initial remarks were made prior to the giving of any of the Miranda warnings. However, he was thereafter given a 20-minute break to smoke a cigarette and drink soda. After this break, he was again questioned after the Miranda warnings were administered. The Court of Appeals majority found the 20-minute break was sufficient to dissipate the taint of any prior Miranda violation which had occurred. Judge Ciparick, writing for the majority, noted there was not a continuous chain of events between the Miranda violation and the defendant's confession which would warrant suppression as defined by the Court in *People v. Chapple*, 38 N.Y.2d, 112 (1975). The Court also noted as important factors to be considered that the initial exchange between the detectives and the defendant was quite brief and the defendant really made no inculpatory statements until after his Miranda warnings were actually read.

Judge Pigott dissented and noted the New York State Constitution affords greater protection to suspects than the federal Constitution and under New York law the defendant was subjected to a single, custodial police interrogation that began before warnings were administered and continued without a pronounced break. The Order of the Appellate Division, Second Department, which upheld the use of the defendant's statements and thereby upheld his conviction, was therefore affirmed.

Post-Release Supervision

***People v. Sparber*; *People v. Thomas*; *People v. Lingle*; *People v. Rodriguez*; *People v. Ware*; *In re Garner*; decided April 29, 2008 (N.Y.L.J. April 30, 2008, pp. 1 and 7 and 26 and 27)**

In a group of cases involving the failure of the sentencing court to impose the required period of post-release supervision, the New York Court of Appeals held that any attempt to remedy the deficiency by having either a court clerk or the Department of Corrections administratively impose the post-release supervision period was flawed, and only a sentencing court could impose the required period as part of the stated sentence and judgment. The group of cases, which was argued on March 12, 2008, continued a long line of Court of Appeals pronouncements seeking to deal with a significant lapse by many sentencing courts in failing to impose the statutorily required post-release supervision as part of any determinate term. The Court of Appeals in *People v. Catu*, 4 N.Y.3d, 242 (2005), held a defendant's due-process rights were violated when he was unaware the imposed

sentence also included a period of post-release supervision. Most recently, in *People v. Hill*, 9 N.Y.3d 189 (2007), the court determined where a guilty plea was entered without any mention of the post-release supervision requirement, a vacatur of the plea was required. In *Hill*, the court split 4-3, and in the latest decision regarding the group of six cases discussed above, the court continued to grapple with the issue. The Court in the instant matters rejected the defendants' claim they were exempt from the post-release supervision period and instead remitted the cases back to the sentencing judges for the proper judicial pronouncement of the relevant post-release supervision terms.

Warrantless Searches of Body Cavities

People v. Hall, decided Mar. 25, 2008 (N.Y.L.J., Mar. 26, 2008, pp. 1 and 14 and 27)

In a 4-3 decision, the New York Court of Appeals held that absent exigent circumstances, police must obtain a warrant before removing suspicious objects from the body cavities of suspects. The majority decision, which was written by Judge Graffeo, relied heavily upon the United States Supreme Court decision in *Schmerber v. California*, 384 U.S. 757 (1966). The four-judge majority found that because a manual cavity search is more intrusive and gives rise to heightened privacy and health concerns when weighed against the legitimate needs of law enforcement, it should be subject to a stricter legal standard. The Court further stated a visual body inspection may be conducted if the police have a factual basis supporting a reasonable suspicion the arrestee has evidence concealed inside a body cavity and the search is conducted in a reasonable manner. If the visual inspection reveals the presence of a suspicious object, the police must then obtain a warrant authorizing the object's removal unless there are exigent circumstances. Judge Graffeo was joined in her opinion by Chief Judge Kaye. Judge Ciparick and Judge Jones concurred in a separate opinion.

The three judges dissenting warned the Court's decision would create new burdensome requirements for drug investigators. Judge Robert S. Smith, in a vigorous dissent, called the requirement of securing a warrant a "pointless exercise" that was not required by either the state or federal constitutions. Judge Smith wrote, "I do not see why it is unreasonable for officers to take with minimal force what they already have lawfully seen." Judge Smith further predicted the majority's ruling would unnecessarily add to the many problems faced by police officers trying to make headway against street drug dealers. Judge Smith's dissent was joined in by Judges Read and Piggot.

Sex Offender Registration

People v. Windham, decided Mar. 25, 2008 (N.Y.L.J., Mar. 26, 2008, p. 29)

In a unanimous decision, the New York Court of Appeals affirmed an appellate division ruling that a defendant's claim he was ineligible for registration under the sex offender registration act was not preserved because the issue had not been raised at his 2005 hearing in the Supreme Court. The defendant argued he was not subject to the registration act because he had already finished serving his sentence prior to the effective date of the act. Although he was still on parole when the act went into effect, he claimed the provisions of the act could not apply to him.

The New York Court of Appeals affirmed the denial of the defendant's appeal on the grounds of lack of preservation and specifically stated it was expressing no view on the merits of the issue. It reiterated that defendants are required to contest their registration eligibility before the original hearing court and not for the first time on appeal.

Lack of Preservation

People v. Mitchell, decided April 24, 2008 (N.Y.L.J., Apr. 25, 2008, p. 29)

In a unanimous decision, the Court of Appeals affirmed a defendant's burglary conviction and rejected his claim that the underlying indictment was jurisdictionally defective. In the case at bar, the defendant was accused of entering a building and burglarizing the premises on two separate occasions during the same day. The indictment which was issued charged only one count of burglary and one count of burglar's tools. During the trial, however, the jury was allowed to hear evidence regarding both alleged illegal entries. The defendant claimed that under such circumstances, his conviction should be reversed because he was indicted only on one count and the jury was able to consider two alleged entries, thereby making it unclear which of those actually resulted in the conviction.

The Court of Appeals found there was no jurisdictional error in the indictment since the indictment properly charged a crime of burglary committed on a specified date at a particularized location. Since there was no jurisdictional defect, the defendant was required to object to the judge's instructions regarding the jury's consideration of the two entries submitted. The defendant's failure to do so was deemed to constitute a waiver, making his appellate claim unpreserved. Under these circumstances, the defendant's conviction was affirmed.

Criminally Negligent Homicide

People v. Cabrera, decided May 1, 2008 (N.Y.L.J., May 2, 2008, pp. 1 and 4 and 27)

In a 4-3 decision, the New York Court of Appeals dismissed three counts of criminally negligent homicide and an assault charge against a defendant who was convicted

in 2004 in Sullivan County during an accident in which 3 teenage passengers were killed. The prosecutor had charged that a finding of criminally negligent homicide was justified based upon the fact the defendant had violations on his junior driving license, the passengers were not wearing seat belts and there were too many non-adults in the vehicle. The four-judge majority concluded these vehicle and traffic violations did not establish the morally blameworthy conduct needed to elevate simple speeding to dangerous speeding for purposes of sustaining a criminally negligent homicide charge. The majority also concluded the vehicle traffic violations in question did not cause or contribute to the crash. The majority opinion was written by Judge Read and joined by Chief Judge Kaye and Judges Pigott and Jones.

A vigorous dissent written by Judge Graffeo argued there was ample evidence for the jury to find the defendant was engaging in a racing car type of stunt, and the vehicle and traffic violations in combination with the speed constituted conduct which met the criminally negligent standard. Judge Graffeo was joined in dissent by Judges Robert S. Smith and Judge Ciparick.

Recent United States Supreme Court Decisions Dealing With Criminal Law

During the last several months, the United States Supreme Court has begun issuing a series of important decisions in the area of criminal law as follows:

***Wright v. Van Patten*, 128 S. Ct. 743 (Jan. 7, 2008)**

In a unanimous decision, the United States Supreme Court held that a procedure by which defense counsel had appeared by speaker-phone at a plea hearing, rather than in person, did not automatically constitute an ineffective assistance of counsel. In the case at bar, pursuant to a procedure utilized in the State of Wisconsin, a defendant who was charged with first-degree intentional homicide pleaded to a reduced charge in a situation where his counsel was not physically present during the plea colloquy but was linked to the courtroom by speaker-phone. The Washington courts had determined the plea-hearing transcript did not indicate any deficiency in the plea colloquy or did it suggest the attorney's participation by telephone interfered in any way with the defendant's ability to communicate with his attorney about the plea. The defendant confirmed he had thoroughly discussed the case and plea decision with his attorney and was satisfied with the legal representation he received.

Under these circumstances, the United States Supreme Court determined that in a federal *habeas corpus* proceeding, no presumption of ineffective assistance of counsel would arise from the mere participation by speaker-phone. Rather, the various circumstances of the situation would be examined and under the circumstances in the case at bar, it could not be said the state court unreasonably applied federal law. The defendant's conviction based upon his plea would therefore be allowed to stand.

***Danforth v. Minnesota*, 128 S. Ct. 1029 (Feb. 20, 2008)**

In a 7-2 decision, the United States Supreme Court ruled state courts are free to give criminal defendants the benefit of new constitutional developments, even when federal courts would be foreclosed from doing so. As a result, state courts may apply certain decisions retroactively even though the United States Supreme Court has refused to apply those rulings retroactively as they pertain to the federal system. In the case at bar, the courts in Minnesota attempted to apply the 2004 decision in *Crawford v. United States* retroactively. The Supreme Court subsequently held *Crawford* was not retroactive. Justice Stevens, speaking for the majority, held that in administering their own criminal justice systems, states are free to be as protective of federal constitutional rights as they care to be. "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees."

Chief Justice Roberts dissented from the majority ruling and warned the decision undermined the role of the United States Supreme Court under the Constitution as the final arbiter of federal law. Justice Anthony Kennedy joined Justice Roberts in dissent. This interesting case saw one of the few divisions within the usually solid pro-prosecution block. Justices Scalia, Alito and Thomas, who usually vote with Chief Justice Roberts, this time sided with the so-called "liberal" block.

***Snyder v. Louisiana*, 128 S. Ct. 1203 (Mar. 19, 2008)**

In a 7-2 decision, the United States Supreme Court reversed a defendant's conviction and ordered a new trial, finding racial bias had infected the selection of the jury panel which considered his case. Relying on the historic *Batson* decision, the Supreme Court found the prosecutor had removed all five prospective black jurors and his expressed reasons for doing so appeared implausible and suspicions of racial bias were raised.

As one example, the Supreme Court panel pointed out that one white juror who was retained on the panel was a self-employed contractor who had two houses nearing completion and a wife who had just undergone surgery and when he indicated he might have trouble serving, he was nonetheless retained. In contrast, a black juror who was a college student and indicated he might miss a few days of class if he were selected was removed by the prosecutor, who stated he might not be comfortable serving because he would miss a few days of class. Judge Alito wrote the majority opinion overturning the conviction. A dissenting opinion was issued by Justice Scalia and Justice Thomas.

***Medellin v. Texas*, 128 S. Ct. 1346 (Mar. 24, 2008)**

In a 6-3 decision, the United States Supreme Court held President Bush had exceeded his authority in ordering the State of Texas to grant a new hearing to the defendant who was facing a death penalty for killing two teenagers almost 15 years ago. The defendant, who is a Mexican national, had claimed the State of Texas violated his rights under an international treaty. An international court had held in 2004 the convictions of Medellin and 50 other Mexicans who were on death row in the United States 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. President Bush, although announcing he disagreed with the international court decision, stated it had to be carried out by the state courts because the United States agreed to abide by the World Court's ruling in such cases.

After hearing the appeal commenced by the State of Texas, the United States Supreme Court, however, determined President Bush had no authority to order the state to reopen the case of the Mexican defendant. Chief Justice Roberts, who wrote the majority opinion, stated the U.S. Constitution allowed the President to execute the laws but not to make them. The six-judge majority also specifically held the State of Texas was not bound by the international court ruling and could ignore its directive. Justice Breyer issued a dissenting opinion in which he stated the Court's majority was calling into question U.S. obligations under international treaties and would make it very difficult for the federal government to negotiate future treaties. Justices Souter and Ginsburg joined Breyer's dissent.

***Baze v. Rees*, 128 S. Ct. 1520 (Apr. 16, 2008)**

In a 7-2 decision the United States Supreme Court upheld the constitutionality of the use of lethal injections as a means of implementing the death penalty. The case concerned the procedures used in the State of Kentucky and the defendant had argued the use of lethal injections amounted to cruel and unusual punishment. Seven members of the Court agreed on the result reached, but relied upon concurring opinions outlining different reasons for the result. A dissenting opinion was joined in by two of the Justices, to wit, Ginsburg and Souter.

The Court's main decision was written by Chief Judge Roberts addressing the argument that the use of a lethal injection inflicted unnecessary pain and was therefore cruel and unusual. Justice Roberts stated the use of capital punishment had previously been held to be constitutional. Therefore, it necessarily followed there must be a means of carrying it out and some risk of pain is inherent in any method of execution. The Constitution does not demand the avoidance of all pain in carrying out all executions. Justices Alito and Kennedy joined in Roberts' opinion.

Justice Stevens wrote an interesting decision—although he concurred in the judgment based upon past precedents of the Court, he specifically stated his own opinion that capital punishment was violative of the Eighth Amendment and should no longer be utilized. Justice Breyer joined Stevens' decision on the grounds there was no evidence the Kentucky approach was constitutionally flawed. Justice Scalia and Justice Thomas also issued separate concurring opinions in which they specifically rejected Justice Stevens' attack on the constitutionality of the death penalty.

Many states utilize the lethal-injection method and the Supreme Court had issued stays pending the outcome of its decision. Now that a decision has been issued, it appears likely several executions will again proceed in the next few months. The death penalty continues to be a controversial issue and the Supreme Court will continue to address the matter in the coming years.

***Crawford v. Marion County Election Board*, 128 S. Ct. ____ (April 28, 2009)**

In a 6-3 decision, the United States Supreme Court upheld Indiana's voter identification law. Some 25 states, including Indiana, currently require voters to show some form of identification at the polling place before being allowed to vote. Indiana had one of the strictest voter I.D. requirements. The Indiana statute was challenged on the grounds it would deprive many people, including the elderly and poor who were less likely to have state identification cards and would be prohibited from voting.

The six-judge majority, however, found states have a legitimate interest in protecting the integrity and reliability of the electoral process. The decision noted not a single plaintiff had been identified who was actually barred from voting because of the Indiana statute. It was also mentioned in the decision that about 99 percent of Indiana's voters had a driver's license or other identification that would qualify under the state's statute. In addition, a disputed voter could cast a provisional ballot and then show up with proper identification within 10 days. Under all these circumstances, the majority opinion concluded there was no constitutional infirmity in requiring voter identification and, therefore, the Indiana statute and similar statutes throughout the country were valid. Justices Souter, Ginsberg and Breyer dissented. The dissenting opinion argued the Indiana statute imposed a burden on the voting rights of tens of thousands of Indiana citizens and a significant percentage were likely to be deterred from voting.

Although not a criminal justice decision, this ruling from the United States Supreme Court should have an important impact on future political proceedings in our nation and we therefore feel it important enough to report the matter to our readers.

***Virginia v. Moore*, 128 S. Ct. ____ (April 29, 2008)**

In a unanimous decision, the United States Supreme Court held Virginia police did not violate the Fourth Amendment when they made an arrest which was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest. In the case at bar, rather than issuing a summons for the misdemeanor charge of driving on a suspended license, Virginia police arrested the defendant and after searching him discovered crack cocaine. The Virginia High Court had ordered suppression of the evidence on the grounds the Fourth Amendment had been violated because the arresting officers should have issued a citation under state law.

The United States Supreme Court held while states are free to require their officers to engage in nuanced determinations of the need for arrest as a matter of their own law, the Fourth Amendment should reflect administratable bright-line rules. Incorporating state arrest rules into the Constitution would make Fourth Amendment protections as complex as the underlying state law and

variable from place to place and time to time. Justice Scalia delivered the opinion for the Court in which seven other justices concurred. Justice Ginsburg concurred in the judgment but filed her own opinion.

U.S. Supreme Court Declines to Review Warrantless Wiretap Decision

On February 19, 2008, the United States Supreme Court declined to review a case which involved a challenge to the National Security Agency's program of electronic surveillance without warrants. The Supreme Court decision left standing a ruling from the United States Court of Appeals for the Sixth Circuit which held the plaintiffs who had commenced the suit lacked standing to bring the case. In addition, the program which was being attacked in the lawsuit had effectively been discontinued.

The controversy surrounding the use of electronic surveillance under the Foreign Intelligence Surveillance Act and the Patriot Act continues with recent congressional legislation having renewed the acts in question, with some additional modifications and additional extensions still pending. Some have speculated that in light of the continuing legislative activity in this area, the Justices of the Supreme Court are reluctant to enter this debate at the present time.

Justices Will Hear Significant Evidence Suppression Case

In late February, the United States Supreme Court granted *certiorari* in a case which offers the possibility for additional modifications of the search and seizure exclusionary rule. The case in question, *Herring v. United States*, involves the question whether the list of exceptions to the exclusionary rule should be expanded to include evidence obtained from a search undertaken by police officers who relied on a careless record-keeping error by the police. In the case at bar, the defendant had been arrested after information was received from the sheriff's department in a neighboring county that he was the subject of an outstanding warrant. In fact, the warrant had been withdrawn. When the police officers stopped the defendant and searched his truck, pursuant to the alleged outstanding warrant, they discovered drugs and an unloaded pistol.

It was undisputed that under the circumstances, the defendant's arrest and subsequent search were unconstitutional. The lower courts, however, relying upon a decision by the United States Supreme Court in 2006 which somewhat modified the exclusionary rule, refused to suppress the evidence in question. The Supreme Court's acceptance of the *Herring* case offers yet another opportunity by the High Court to comment upon and possibly further limit the use of the exclusionary rule. We shall keep our readers advised of any eventual decision on this case which will probably not occur until October 2008.

U.S. Supreme Court Hears Handgun Ban Case

On March 17, 2008, the United States Supreme Court heard oral argument in the matter of *District Court of Columbia v. Heller*. This case involves the constitutionality of the District of Columbia's ban on handguns. The D.C. law, which went into effect in 1976, is one of the toughest gun laws in the country and essentially outlaws private ownership of handguns within the District of Columbia. This case offered the Supreme Court the opportunity to comment on the extent of the Second Amendment and whether any reasonable restrictions can be placed on a citizen to possess firearms. The District of Columbia argued their tough gun law has been greatly responsible for reducing violent crime and its attorneys argued before the High Court the ban was within their statutory authority. Opponents of the gun law, on the other hand, argued it violated the Second Amendment guarantees regarding the right of citizens to bear arms and the statute was too broad in its application. This case has generated much public interest and attention and it is expected the Supreme Court will issue its decision some time soon. Commentators who viewed the oral argument reported the Court appeared to be somewhat split and it is possible another 5-4 decision will result.

Supreme Court Limits *Pro Se* Representation by Schizophrenic Defendant

Indiana v. Edwards, 128 S. Ct. ____ (June 19, 2008)

On March 26, 2008, the United States Supreme Court heard oral arguments in a case where a defendant insisted on proceeding *pro se*, even though it was acknowledged he suffered from delusional and schizophrenic episodes. In the case at bar, the defendant in 2002 fired a gun outside an Indianapolis department store. After a long delay and several hearings, he was finally found competent to stand trial. On the day of trial, however, he decided he wanted to act as his own attorney. The Trial Court, however, insisted on having an attorney represent the defendant because of his previously determined mental status. In the United States Supreme Court, the defendant argued he was denied his right under the Sixth Amendment to represent himself. The State of Indiana argued before the Court that states have an interest in ensuring trials are orderly processes, fair to both sides and they should not be allowed to deteriorate into incoherent proceedings. The defense argued, on the other hand, that once the defendant is found competent to stand trial, he must also logically be allowed to represent himself if he so chooses.

This case generated much interest with the federal government, and 19 states joined Indiana in urging the Court to find the government should be able to set a higher standard for whether a defendant may represent himself, than simply whether he has been judged competent to stand trial. The Supreme Court in June issued its ruling in and held 7-2 that the trial court was within its prerogative to assign counsel.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from Feb. 4, 2008 to May 2, 2008.

People v. Packer **(N.Y.L.J., Feb. 4, 2008, pp. 18 and 22)**

In a 3-2 decision, the Appellate Division, First Department, ordered the suppression of a knife which was found in a defendant's bag after the vehicle in which he was driving was stopped and he was ordered out of the car. The police officers had requested the defendant to produce identification and when he indicated his ID was in the backpack, the officers said they would get the bag and once retrieved, the defendant opened it, at which time the officers observed a knife inside the bag. The defendant was subsequently charged with attempted possession of a weapon. The three-judge majority in the First Department concluded the search of the defendant's backpack was not in reality based upon voluntary consent, but rather the coercive product of an improper "stop and frisk."

Justices Malone and Marlow dissented. The dissenters expressed the view that the totality of the circumstances had to be considered and that under the circumstances, the conduct of the police in asking the defendant to present identification and the subsequent viewing inside the backpack was reasonable and justified. Based upon the sharp split in the Appellate Division, and the continuing difficulty Appellate Courts still seem to have with search and seizure issues, it appears probable this case will eventually wind up in the New York Court of Appeals.

People v. Gray **(N.Y.L.J., Feb. 27, 2008, pp. 1 and 4 and Mar. 3, 2008, p. 26)**

In a unanimous decision, the Appellate Division, First Department, rejected a defendant's claim that his written murder confession should have been suppressed. The defendant had originally made an oral statement before he waived his Miranda rights. He subsequently gave a written statement after having been properly advised. The Appellate Division determined the written statement was sufficiently attenuated from the prior oral statement. The Appellate Division ruling overturned a prior decision of the Bronx Supreme Court, which had ordered suppression of the statement. The Appellate Division in rendering its decision determined the 45-minute interval between the oral and written statements effectively dissipated any taint after the defendant initially said he was involved in the murder. The Appellate panel also noted the defendant's 10-year criminal history reinforced the conclusion he made a calculated and voluntary waiver of his rights.

People v. Lewis **(N.Y.L.J., Feb. 22, 2008, pp. 1 and 2 and Feb. 27, 2008, p. 26)**

In a unanimous decision, the Appellate Division, Third Department, held a defendant need not move for a conviction's vacatur in order to preserve his claim that a waiver of appeal was deficient. The Appellate Division ruling was a departure from prior statements made by the Third Department and the Court specifically announced its prior position would no longer be observed. The Third Department relied upon the recent Court of Appeals decision in *People v. Lauree*, 8 N.Y.3d 541 (2007) which held when an error or omission is clear from the face of the record, a CPL Article 440 motion is not necessary. Following the Court of Appeals logic, the Third Department concluded that since an appeal waiver is valid only if the record demonstrates it was knowingly, intelligently and voluntarily made, a 440 motion is not necessary to preserve a facial attack on the waiver. After making this determination, the Appellate panel nevertheless found the defendant Lewis had entered a valid waiver of appeal and his guilty plea was upheld.

People v. Fredericks **(N.Y.L.J., Mar. 3, 2008, pp. 1 and 2 and 36)**

The Appellate Division, Second Department, unanimously determined a defense attorney had failed to provide meaningful representation to the defendant because he neglected to argue that the first-degree robbery charges filed against the defendant could not stand because he was accused of carrying only a BB gun and not a weapon capable of producing death or serious physical injury. The Appellate panel found that under the circumstances, the record demonstrated defense counsel's representation was "less than meaningful." Based upon its ruling, the Appellate Division reduced the robbery charge to the second-degree level and remitted the matter back to the Trial Court for re-sentencing.

People v. Corliss **(N.Y.L.J., Mar. 5, 2008, pp. 1 and 2 and Mar. 7, 2008, p. 26)**

The Appellate Division, First Department, in a unanimous decision reinstated an indictment against a professional parachute jumper who had attempted to leap off the Empire State Building. Defendant had been charged with reckless endangerment in the first degree. Although the Appellate panel found the Trial Court had properly held a defective grand jury instruction warranted dismissing the first degree reckless endangerment charge, it concluded the evidence supported the lesser included

offense of reckless endangerment in the second degree, which had also been charged to the original grand jury. The Appellate panel therefore reinstated the second-degree reckless endangerment charge and ruled a trial could proceed on that count. The defendant thus now faces a misdemeanor charge rather than the original Class D felony which involved the element of depraved indifference.

***People v. Hilliard* (N.Y.L.J., Mar. 10, 2008, pp. 1 and 8 and Mar. 12, 2008, p. 26)**

In a unanimous decision, the Appellate Division, Third Department, ordered the reduction of a defendant's sentence which had been imposed after a murder retrial. The Appellate Court found that a judge's decision to sentence the defendant after a retrial to 15 more years in prison following his original conviction on identical charges gave the appearance of judicial vindictiveness due to the defendant's successful appeal. The defendant had originally been sentenced to 26 1/3 years to life after his first trial. After his conviction had been reversed and a retrial was ordered, he was then sentenced by the same judge to 41 1/3 years to life following the second conviction. The Third Department noted the trial court offered no explanation to justify the imposition of the additional 15-year sentence and therefore the presumption of vindictiveness could not be overcome. Under these circumstances, the Appellate Panel determined the defendant's due-process rights were violated by the imposition of the more severe sentence.

***Leopold Siao-Pao v. Dennison*, (N.Y.L.J., Mar. 13, 2008, pp. 1 and 4 and 26)**

In a 3-2 decision, the Appellate Division, First Department, upheld the Parole Board's denial of early release for a defendant who claimed the Parole Board gave undue weight to the severity of his crime and did not fully consider other factors such as a clean disciplinary record and evidence of rehabilitation. The majority opinion, which included Justices Buckley, Friedman and Williams, concluded the State Division of Parole has substantial discretion and need not explicitly discuss or accord equal weight to the various factors in its determination of the Parole guidelines as set forth in the Executive Law. In the case at bar, the defendant had been convicted of felony murder and received a prison sentence of 18 years to life. The Parole Board rejected his application for early release in a one-paragraph decision which, while noting the prisoner's institutional achievements and positive disciplinary record, nonetheless concluded the circumstances of his crime indicated a propensity for violence and indifference for the law. The three-judge panel held this was sufficient to uphold the Parole Board's discretionary authority and the Board was not compelled to expressly discuss in detail its determination or give equal weight to the different factors which it considered.

Justices Sweeney and Andrias dissented, basically arguing the Parole Board in its decision should have provided some additional factual basis for its denial so the Appellate Division could determine whether its decision was rational and not arbitrary. The dissenters specifically argued that while no ritualistic language was needed to demonstrate each of the statutory factors in the Executive Law was considered, some factual basis should have been articulated by the Board, especially with regard to the defendant's progress toward rehabilitation since the date of his last parole hearing.

***People v. Fardan* (N.Y.L.J., Mar. 20, 2008, pp. 1 and 2)**

In a unanimous decision, the Appellate Division, Fourth Department, reversed a Trial Court's denial of a motion to vacate a murder conviction on the grounds the judge in question should not have ruled on the motion since he served as the County's District Attorney during the time of the defendant's prosecution. The case involved the former District Attorney of Oneida County. After being convicted in 1990 of a brutal stabbing, the defendant in July 2005 brought a post-conviction motion to overturn his conviction. The judge who heard the matter at the time had previously served as District Attorney of the county. The defendant argued on appeal that this situation disqualified the judge from ruling on the motion. The Fourth Department panel agreed with the defendant's argument and remitted the matter back to the Oneida County court for further proceedings before a different judge.

***People v. Baptiste* (N.Y.L.J., Mar. 28, 2008, pp. 1 and 7 and April 2, 2008, p. 29)**

In a unanimous decision, the Appellate Division, Third Department, held the Court of Appeals made new law with respect to the determination of the depraved-indifference standard as of October 19, 2004 with its ruling in *People v. Payne*, 3 N.Y.3d 266. In the case at bar, the defendant had been convicted of two counts of depraved-indifference murder for shooting his former girlfriend and a passenger in her car in 1998. The defendant's direct appeal did not become final until April 25, 2004, 90 days after the Court of Appeals declined to hear his case. He then moved, in 2006, in a 440 Motion, stating the law had changed as a result of the *Payne* ruling and the changes should be applied to him. The Appellate Division determined, however, that the defendant's conviction had become final six months before the cutoff date established as a result of *Payne* and therefore the Trial Court had properly denied his post-conviction motion.

***People v. Alvarez* (N.Y.L.J. Mar. 31, 2008, p. 4 and April 2, 2008, p. 26)**

In a unanimous decision, the Appellate Division, First Department, held a defendant's Sixth-Amendment right to a public trial was not violated by his girlfriend's exclusion from the courtroom. In the case at bar, the pros-

ecution wished to protect the identity of two undercover officers who were involved in the drug investigation. The defendant had told the officers during the sale transaction that his girlfriend had cut him out of another drug deal. The girlfriend also worked in the area where the undercover officers operated. After initially denying the prosecution's request to exclude the girlfriend from the courtroom during the officers' testimony, the trial judge reopened the Hinton hearing and subsequently decided to grant the prosecution's request for exclusion.

The Appellate Division held the Trial Court was within its discretion to hear additional testimony relating to the particularized threat posed by the girlfriend's proximity to the area where the undercover officers operated and was within her prerogative to ultimately determine exclusion was proper. The defendant's conviction for sale of a controlled substance in the second degree was therefore affirmed.

***People v. Mattocks* (N.Y.L.J. April 14, 2008, p. 18 and 31)**

In a unanimous decision, the Appellate Division, First Department upheld a defendant's conviction for criminal possession of a forged instrument in the second degree. In the case at bar, the defendant had bent a MetroCard so as to allow free entry into the subway. He thereafter sold the card to other passengers. The Court determined the bent MetroCard constituted a forged instrument under Penal Law section 170.00. The Court found that under the definition of a written instrument and with reference to Penal Law section 170.00(6), the bending of the MetroCard constituted a false alteration so as to sustain the conviction in question.

***People v. Byrd* (N.Y.L.J. April 16, 2008, p. 1 and 2, April 21, 2008, p. 18)**

In a unanimous decision, the Appellate Division, First Department upheld the use of a witness's grand jury testimony at a trial following a determination that battered-person syndrome had rendered her unavailable to testify against the defendant. It was determined the defendant had placed some 400 telephone calls to the defendant in violation of an order of protection and he therefore exerted "coercive control" over her. As a result the Appellate panel found that because of the defendant's misconduct, the prosecution had demonstrated by clear and convincing evidence that the defendant had forfeited his constitutional right to confrontation. Based on the Appellate Court's ruling the defendant's conviction of first and second degree assault and the sentence imposed of 25 years was affirmed.

***People v. Henderson* (N.Y.L.J. April 17, 2008, pp. 1 and 2 and 37)**

In a 4-1 decision, the Appellate Division, First Department, affirmed the conviction of a defendant inmate who had stabbed a fellow inmate on Riker's Island. During the trial the prosecutor had made statements and had asked questions on cross-examination as to whether a witness had been intimidated by the defendant. The four-judge majority found the prosecutor's statements did not violate the defendant's right to a fair trial. Judge Catterson issued a dissent stating the People's unfounded comments and insinuations about the intimidation of the victim witness substantially prejudiced the defendant and a new trial was required.

***People v. Boyd* (N.Y.L.J. April 18, 2008, p. 1 and 4 and April 24, 2008, p. 18)**

In a 3-1 decision, the Appellate Division, First Department, allowed a defendant to withdraw his guilty plea and remanded his sentence for first-degree robbery back to the Trial Court, because the defendant was not advised as to how long his period of post-release supervision would be. The Appellate Division—dealing with a series of cases which have come about because of the failure of many sentencing judges to fully comply with the post-release supervision requirements—again relied upon the recent Court of Appeals decisions on this issue. The Court of Appeals had recently ruled in *People v. Catu*, 4 N.Y.3d 242 (2005) and subsequent decisions that the failure to advise the defendant regarding the imposition of the post-release supervision term nullifies any guilty plea. The instant matter presented somewhat of a new scenario for the Appellate Division since the Trial Court did advise the defendant a period of post-release supervision would be part of the sentence, but failed to specify the exact time of the term. Under these circumstances, the three-judge majority in the Appellate Division concluded the case had to be restored to its pre-plea stage. Justice McGuire dissented, stating the voluntariness of the defendant's plea was really not at issue and the defendant had not adequately preserved the issue in question.

***People v. Martinez* (N.Y.L.J. April 18, 2008, pp. 1 and 2 and April 23, 2008, p. 18)**

In a unanimous decision and one which was deemed to be of first impression, the Appellate Division, First Department, unanimously upheld a conviction of a defendant who had been referred in the indictment merely as "John Doe." The case in question involves a rape conviction and addressed the constitutionality of numerous John Doe indictments that have emanated from various district attorneys' offices in the last few years. The indictment had identified the defendant only by his DNA markers and the defendant claimed he was never afforded reasonable notice of the charges against him. Although he was arrested for the rape years after the indictment, the Court rejected his constitutional attack and in effect upheld this recent prosecutorial technique to avoid the statute of limitations problem. Because of the novel nature

of this issue it appears likely the matter will be addressed by the New York Court of Appeals.

***People v. Candelaria* (N.Y.L.J. April 21, 2008, pp. 1 and 7 and 30)**

In a unanimous decision, the Appellate Division, Second Department, reversed a Trial Court's dismissal of an indictment in the interest of justice and remanded the matter back to a new judge for sentencing. In the case at bar, the defendant had been convicted for possessing 33 vials of crack-cocaine in 1998. The judge, thereafter, postponed his sentencing for six years and subsequently granted the defendant's motion to dismiss in the interest of justice. The Appellate Division found the case lacked the compelling factor to dismiss a case in the interest of justice and the trial judge had committed reversible error in granting the motion.

***People v. Dean* (N.Y.L.J. April 28, 2008, pp. 1 and 2 and 32)**

In a unanimous decision, the Appellate Division, Second Department, ordered a new trial because defense counsel had rendered ineffective assistance of counsel when he told the jury in his opening statement he intended to prove the defendant's innocence. The Appellate Division found that by making such a claim, defense counsel, in effect, reversed the burden of proof and erroneously placed the burden of proof on the defendant, thereby violating the defendant's constitutional presumption of innocence. The Court also found that numerous other actions of defense counsel during the course of the trial further compromised the fairness of the trial process and that the interests of justice required a reversal and a new trial.

***People v. Raosto* (N.Y.L.J., April 28, 2008, pp. 1 and 4 and 26)**

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction and ordered a new trial, finding that the combination of errors by the trial judge, the prosecutor and defense counsel all contributed to denying the defendant a fair trial. The Court criticized the trial judge for improperly interjecting himself into the proceedings. It also found the prosecutor's cross-examination in several instances was prejudicial and defense counsel throughout the trial displayed a general carelessness and inattention to details. Under these circumstances, the Appellate Panel found the errors in question were highly prejudicial and not harmless and therefore a new trial was required.

For Your Information

New York City Sets 2009 Budgets for Prosecutors and Legal Aid

In July 2008, the Mayor and City Council finalized budget allocations for fiscal year 2009 with respect to the various prosecutors' offices in the City as well as the Legal Aid Society. Because of the pending economic downturn, the Mayor's Office had originally proposed a budget cut of 6% for the District Attorneys and a cut of 12% for the Legal Aid Society. In the year 2008, the Legal Aid Society budget had been established at $85.4 million and the total budget for all the City Prosecutors had been set at $253.3 million. Based upon further negotiations and modifications which occurred between the Mayor's Office and the City Council, the final budgetary figures for fiscal year 2009 were set at roughly the same level as for 2008.

Additional Justices Named to Appellate Divisions

Continuing his steady stream of new appointments and reshuffling in the various Appellate Divisions, former Governor Spitzer had announced in early February he was appointing Justices Michael Cavanaugh and Bernard J. Malone, Jr. to the Appellate Division, Third Department. These two justices were in effect transferred from the First Department, where they have been sitting for several years, to the Third Department, which covers the counties of their original residence. Governor Spitzer also announced he was making an additional new appointment to the Appellate Division, Third Department, in the person of Supreme Court Justice Leslie E. Stein. Justice Stein has been sitting in Albany County and is 51 years old. Justice Cavanaugh and Justice Malone are both 64 years old, with Justice Cavanaugh being a former Ulster County District Attorney and Supreme Court Justice. Justice Malone is also from Albany and served in that county as a Supreme Court Justice prior to his elevation to the Appellate Division.

The volume of cases in the Appellate Division, Third Department, has been increasing rapidly during the last few years, and as a result the number of justices assigned to that Court has also been increased. The current allotment of justices assigned to the Third Department is 12, with 1 existing vacancy. Newly designated Governor Paterson is expected to fill that vacancy within the next few months. The Third Department geographically covers 28 counties between the Pennsylvania border to Canada.

The shifting of Justices Malone and Cavanaugh to the First Department created additional openings in the Appellate Division, First Department, which has a complement of 18 justices. Upon assuming office, Governor Paterson quickly moved to fill these positions. On April 11th, the governor appointed Supreme Court Justice Leland G. DeGrasse and Justice Dianne T. Renwick to the Appellate Division, First Department. Justice DeGrasse had been sitting in Manhattan and Justice Renwick had been serving in the Bronx. Justice Renwick is the wife of Bronx District Attorney Robert T. Johnson and the question has been raised whether she will be sitting on any criminal appeals that come from the Bronx.

Taking into consideration Governor Paterson's recent appointments, the *New York Law Journal*, in an analysis of the present composition of the Appellate Division, First Department, has reported six of the current 17 members are members of minority groups, and in terms of gender, 15 are men and two are women. There still currently exists one vacancy in the First Department and one vacancy in the Third Department and Governor Paterson is expected to fill these vacancies within the next few months.

Nebraska Outlaws Use of Electric Chair as Means of Imposing Death Penalty

The changing public attitude toward the imposition of the death penalty and the various means to carry out its execution was recently illustrated when it was announced in early February the Supreme Court of Nebraska had ruled the method of electrocution constitutes cruel and unusual punishment and therefore the use of the electric chair should be outlawed. Nebraska was the only state that still utilized the electric chair as its sole means of execution. The Nebraska Supreme Court rendered its opinion in a 6-1 ruling and held condemned prisoners must not be tortured to death regardless of their crimes. Nebraska's governor and other political leaders expressed dissatisfaction with the Court's ruling and indicated they may seek corrective legislation. The use of another means of carrying out the death penalty, to wit: lethal injection, has also been challenged in the United States Supreme Court and the Court recently upheld that method of execution.

U.S. Attorney General Seeks Legislation to Limit Crack-Cocaine Sentencing Reductions

In early February, U.S. Attorney General Michael Mukasey announced he would request Congress to act in order to prevent the release of thousands of violent criminals from federal prisons under the new crack-cocaine sentencing rules. Several months ago the U.S. Sentencing Commission reduced the federal sentencing guidelines for crack-cocaine convicts. It further made these guidelines retroactive. As a result, it is expected almost 20,000 federal inmates would seek reductions in their crack-cocaine sentences within the next several months. The guideline rulings have created a great deal of confusion within the various District Courts, with no clear direction as to how the proposed reductions would be handled, to wit: whether each defendant would have to make an individual application or whether a general court directive can be issued to cover all similarly situated defendants. In addition, the large number of federal prisoners who could be released in a short period of time has alarmed law enforcement officials who feel an increase in violent crime will occur as a result of the reductions.

The Justice Department, in fact, estimates that two-thirds of the Federal inmates serving time for crack-cocaine also have violent criminal histories or gun charges in their pasts. Attorney General Mukasey's request to Congress for quick action to either limit or slow the release of defendants convicted of federal crack-cocaine crimes is an effort to bring some order to a potentially problematic and confusing situation.

Despite Attorney General Mukasey's urgent request for corrective legislation, the Senate Democratic leadership announced in late February it would not seek legislation to overturn the Sentencing Commission's sentence reductions. As a result, thousands of federal defendants will soon be applying for sentence reductions, with an estimated 1,600 inmates expected to be released by the end of 2008. It was recently estimated that some 295 defendants may be immediately eligible for resentencing in the Southern District of New York and another 146 in the Eastern District of New York. The federal district courts in New York state have been reviewing possible procedures in order to handle most expeditiously the resentencing of eligible crack-cocaine defendants. Any further developments on this issue will be reported immediately to our readers.

Extension of FISA and Patriot Act Wiretapping Law Delayed

Although the Senate in early February approved by a 68-29 vote the reauthorization of the FISA law and extension of the Protect America Act of 2007, which would give the government greater powers to eavesdrop in terrorism and intelligence cases without obtaining a warrant from a secret court, the Democratic House leadership refused to extend the law as passed by the Senate. The House leadership basically objected to the retroactive immunity given to telephone communications companies that cooperated with the program in the past. As a result of the House's failure to act, the law itself expired on February 16, 2008 and consequently a large gap in the ability to use wiretapping existed for a substantial period of time before a compromise was reached between the House and Senate.

President Bush strongly supported the Senate version of the bill and he strongly condemned inaction by the House in failing to promptly approve the Senate bill. The key features of the Senate bill, as summarized by the Associated Press, are as follows:

1. Gives retroactive immunity to the telecommunication companies that cooperated in the program of wiretapping without warrants that President Bush approved after the Sept. 11 attacks.
2. Allows the Attorney General to authorize broad searches of groups of targets who are "reasonably believed" to be outside the United States, rather than going to a court for individual warrants on each one.
3. Sets up an after-the-fact procedure for the Foreign Intelligence Surveillance Court to review the targeting procedures established by the Executive Branch and to protect the rights of American citizens.
4. Requires periodic views into possible abuses by Congress and other government agencies and that the legislation expires in six years unless Congress acts to reauthorize it.

Senate Votes to Prohibit Waterboarding

As a result of the controversy regarding the use of waterboarding techniques by the CIA, the Senate voted to restrict the CIA to the 19 interrogation techniques outlined in the Army Field Manual. The Army manual specifically prohibits waterboarding. The Senate action was taken in a provision which was attached to a larger bill which authorized intelligence activities for the current year. The House had already passed a similar measure in December. In early March, however, President Bush vetoed the waterboarding measure, stating it unnecessarily placed unwarranted restrictions on the CIA and the restrictions in the Army manual should not necessarily apply to another agency which operates under different procedures. The House of Representatives, in early March, attempted to override President Bush's veto of the waterboarding restrictions but the effort failed by a wide majority, falling 51 votes short of the 2/3 majority required to overturn a veto.

In response to the Congressional action, CIA Director Michael Hayden stated that since current law and court

decisions have cast doubt on whether waterboarding would be legal, the CIA has prohibited its use in 2006 and it was only utilized on a very limited basis in the years immediately following the 9/11 attack. As a result of the increasing controversy over the use of severe interrogation techniques against terrorist suspects, it was also revealed in early April a secret memo had been issued in the early months after the September 11th attack advising the Bush administration that constitutional protections against unreasonable searches and seizures on U.S. soil didn't necessarily apply to efforts to protect the public against terrorism. The secret Justice Department memo was dated October 23, 2001 and written at the request of the White House by John Choo, who was then Deputy Assistant Attorney General. The 37-page memo is still classified and its existence was only mentioned in a footnote in a document which was released by the Pentagon in response to a lawsuit commenced by the American Civil Liberties Union. The memo appears to relate to the National Security Agency's terrorist surveillance program, which was ended as of January 17, 2007. The extension and overall scope of the various anti-terrorism acts is still being hotly debated. We shall report on any further developments on the use of the waterboarding technique as they occur.

Immigrant Population Continues to Boost U.S. Population

A recent study by the Washington-based PEW Research Center reported the overall U.S. population is expected to increase by 47% from 296 million in 2005 to 438 million by 2050. The major factor in this population increase is attributed to the arrival of new immigrants. For example, it is estimated the number of Hispanics in the U.S. will triple by 2050 and at that time will represent nearly 30% of the population. Asian Americans are expected to increase their percentage of the total population from 5% to 9%. The study also estimates that by 2050, nearly 1 in 5 Americans will be foreign-born. According to the study, the number of non-Hispanic Whites, although still comprising the largest group in the country, will drop from 67% of the U.S. population to roughly 47%. The number of blacks is expected to remain roughly the same, to wit: 13% of the total population.

Confirming the projections of the PEW study are the recently released figures from the U.S. Census Bureau which show the nation's Hispanic population grew by 1.4 million in 2007 to reach 45.5 million people, or 15.1% of the total U.S. population of 301.6 million. According to the Census Report, blacks ranked as the second largest minority group at 40.7 million. Overall, the nation's 102.5 million minorities accounted for 34% of the U.S. population. The minority population in the United States has now reached its highest percentage in the history of the country, clearly indicating the greater diversity of the nation.

Government Benefits for Seniors Reaching Alarming Levels

A recent U.S. report which was based upon an analysis of data from the Bureau of Economics revealed in 2007 the cost of government benefits for seniors soared to a record $27,289 per person. This constituted a 24% increase above the inflation rate since 2000. The report cited increasing medical costs as the biggest reason for the sharp rise. The average Social Security benefit for a senior in 2007 was placed at $13,184. Overall, the federal government in 2007 spent $952 billion on benefits, up from $601 billion in 2000. All three major Senior Citizen programs, to wit: Social Security, Medicare and Medicaid, experienced dramatically escalating costs.

As the number of Baby Boomers begins to enter the senior group, even greater increases in the benefits costs for seniors is expected and the report highlights the situation as one of the major critical problems the country will be facing in the coming years.

State Senate Proposes Bill to Limit Release on Parole

The debate over how and whether defendants should be released on parole continues at a rapid pace. During the last several years of the Pataki administration, it was claimed a policy had been instituted to severely restrict release on parole, particularly for defendants convicted of violent crimes. As a result, lawsuits were commenced by defendants and various civil liberties organizations. Several months after Governor Spitzer assumed office, it appeared a settlement of these lawsuits would occur and significant changes in the procedures utilized to grant release on parole would be instituted. Subsequently, however, Governor Spitzer decided not to accept the proposed settlement and the decision was made to continue to contest the lawsuits which were instituted.

However, as a result of significant personnel changes in the Board of Parole, the year 2007 showed a vast increase in the number of defendants being released on parole, including those designated as violent felony offenders. As a result, the claims made in 2006 that the Parole Board was too restrictive have changed in 2007 to cries the Parole Board had become too lenient.

Recent statistics released by the Division of Parole reveal that in 2007, 235 violent A-1 felons were paroled—compared with 148 such felons who were paroled in 2006 and with only 73 paroled in 2005. On a percentage basis, the number being granted parole in 2007 jumped from 6% to 17% in 2005. The state Senate in a response to these developments introduced bills in early February to make it harder for inmates to win parole. The Republican-sponsored bill would require three members of the Parole Board considering the cases of violent A-1 felons to agree on granting parole, rather than a majority vote which currently exists. The bill would also provide for greater and

earlier notice with respect to the parole hearing dates of scheduled inmates. The change in the notification provisions is designed to enable crime victims to more easily communicate with the Parole Board regarding their views.

Democrats in the state Assembly have indicated they would oppose the provisions of the state-sponsored bill, and the issue of early release on parole continues to be a hot political item. Denise A. O'Donnell, the State Criminal Justice Service Commissioner, denied there was any policy in effect regarding release on parole and she that parole commissioners are simply advised to follow the law and to exercise great care in making their decisions. We shall continue to follow this controversial issue and report on whether newly designated Governor Paterson will be taking a different position on this issue.

Increase in Violent Crime Forecast as Jail Population Continues to Grow

With recent upticks throughout the nation in the level of violent crime, forecasters are beginning to predict that a dramatic increase in violent crime may once again sweep the nation in coming years. These forecasts are based upon the huge increase in the number of criminal defendants who are due to leave prison in the next 5 years and who unfortunately are viewed as potential repeaters of their criminal acts. Based upon past trends, nearly two-thirds of criminal defendants are re-arrested within a few years after their initial release. Only recently, changes in the federal sentencing guidelines anticipate that some 19,000 defendants convicted in the federal courts of crack-cocaine possession will be subject to earlier release within the next year or two. It is also estimated that almost 500,000 prisoners will be released from state facilities over the next year.

Another factor which may increase the crime rate is the increase in our teenage population, which traditionally has led to an upturn in drug and larceny crimes. As forecasters predict a worsening scenario, let us hope this does not occur and solutions are found to this potential problem. The importance of finding a quick solution to any anticipated increase in the national crime rate is highlighted by the fact that the jail population in the United States continues to grow. A recent study conducted by the PEW Center reveals that at the beginning of 2008, some 2,320,000 Americans were incarcerated. This accounts for 1 in every 100 adults in the United States, making this country the world leader in total prison population.

The report found the inmate population during the last year increased in 36 of the 50 states as well as within the federal prison system. The largest percentage interest occurred in the State of Kentucky. In terms of ethnic and gender breakdown, the report also found that 1 in 36 adult male Hispanics is behind bars as well as 1 in every 15 adult black males. The number of women in prison has also increased. For women between the ages of 35 to 39, 1 in every 355 white women are incarcerated and 1 in every 100 black women are also behind bars. The huge increases in our jail population has required huge additional governmental expenditures and both the state and federal prison systems are examining alternative measures to incarceration, especially for non-violent offenders as a means of controlling both the number and cost of prison inmates. In 2007 it was estimated that nearly $49 billion was spent collectively by the 50 states with respect to the incarceration of prison inmates. This represents an increase of $38 billion since 1987. Currently, the average annual cost per prisoner in the United States has been estimated at $23,876. Within our own State of New York, the Sentencing Commission has been examining changes in New York's sentencing structure and a report with their recommendations is expected in the fall.

Survey Reveals Top Law Schools with Respect to Donations

A recent report listed the amount of contributions received by various law schools throughout the country and within New York state in 2007. On a national level, Harvard Law School continues to be at the top of the list with donations of $48 million. New York law schools are also at the top of the list, with New York University School of Law topping the list in New York at $46.1 million. Columbia Law School was second with $23.8 million. Fordham Law School was third with $12 million collected. Almost all schools reported significant increases from 2005 with N.Y.U. seeing a 34% increase, Columbia experiencing a 21% increase and Fordham increasing its level by 71%. Even CUNY Law School, which was on the bottom of the list, nonetheless reported a 100% increase, raising $1 million in 2007, up from $500,000 in 2005. One of the few law schools to report a drop in its donation level was Brooklyn Law School, which received $4.4 million in 2007, down from its 2005 level of $5.5 million, a 20% decrease. The amount of fundraising overall by the various law schools continues to grow as they enlarge their fundraising efforts and expand their alumni outreach.

Percentage of Women in the Labor Force Declines for First Time in Nine Years

It was recently reported by a Labor Department study that the percentage of women in the United States work force has declined after reaching a high point in 1999. The study reported that from 1948 to 1999, the percentage of women in the work force climbed from 32.7% to 60%. Since 1999, however, the increase basically leveled off and as of January, 2008, there are 59.2% of women in the labor force. The Labor Department study attributed the slight decline in the last few years to the fact that more women are choosing to stay at home and take care of their children, rather than embarking on a full-time career. The study also pointed out, however, that deteriorating eco-

nomic conditions might once again force more women to re-enter the labor force.

Get Rich and Live Longer

A recent study conducted by the U.S. Department of Health and Human Services reported there is a large and growing disparity in the life expectancy for richer and poorer Americans. Although the life expectancy for the nation as a whole has increased over the last 25 years, the study found affluent people have experienced greater gains and the life-expectancy gap between rich and poor is continuing to widen. The report found that in the years 1980–82, the most affluent group of Americans were expected to live 2.8 years longer than people in the most deprived group. In the period 1998–2000, the difference in life expectancy had increased to 4.5 years. In 2000, the most affluent group of Americans had a life expectancy of 79.2 years while the poorest group had a life expectancy of 74.7 years. According to the report, the gap has continued to widen during the last 8 years.

The report attributed several reasons for the widening gap. These included the fact that wealthier and more educated people are more likely to seek and receive better medical care and treatment. There has also been a greater decline in smoking among the wealthier group of Americans. The report also cited the fact that lower income groups are less likely to have health insurance and are less likely to receive periodic medical checks and screening.

Income Gains Affected by Slowing Economy

Although personal income has risen during the last few years, the current economic downturn has begun to have a serious effect on per capita personal income. A report issued by the United States Bureau of Economic Analysis and the Bureau of the Census indicated the rate of income growth has dramatically slowed and a large gap exists between some of our richest states and some of our poorest. After reporting that the average per capita personal income in the year 2007 was $38,611, the report indicated that the 5 wealthiest states in the country were Connecticut, New Jersey, Massachusetts, New York and Maryland. Connecticut ranks first with a per capita personal income in 2007 of $54,117. Our own state of New York ranks fourth with a per capita personal income of $47,385. From the period 2006 to 2007, the fastest growth rate in personal income occurred in Louisiana, New York, Mississippi, Connecticut and North Dakota. The five poorest states were Kentucky, South Carolina, Arkansas, West Virginia and Mississippi. The per capita personal income in 2007 for Mississippi was listed at $28,845, just slightly more than half of the personal income in Connecticut.

Further, in a separate report issued by the Commerce Department, it was revealed that as a result of the recent economic downturn Americans are saving at the lowest rate since the Great Depression. About 40% of Americans also reported they are saving nothing for retirement and more and more Americans are retiring at a later age. The percentage of Americans 55 or older working full time increased from 54.2% in 1993 to 64.4% in 2005. In addition, nearly one in four people between 65 and 74 were still in the labor force in 2006, compared with just 1 in 5 in 2000.

The economic situation is also affecting the younger population. Tuition costs for students have climbed 60% since 2000 and student debt is piling up. The average graduating senior now owes more than $20,000, twice as much as what graduates owed a decade ago. A possible bright spot for the legal profession was the report's conclusion that in the area of law economic opportunities are still somewhat brighter than in the general population. The report stated lawyers are still in high demand in such areas as intellectual property, corporate law and litigation. The average starting salary for first-year attorneys was placed at about $72,000 for small firms with the average starting salary at large firms being well over $100,000. Legal support workers such as paralegals, legal librarians and calendar clerks were also viewed to be doing fairly well, with salaries ranging from $40,000 to $70,000.

Labor Unions Continue to Decline

The number of workers in the United States labor force who are members of unions continues to decline. The most recent example of the decline of major labor unions was noted in a report regarding the United Auto Workers. This union, which had a peak membership in 1979 of 1.5 million members, has seen its current membership fall below 500,000 members for the first time since World War II. The union itself reported last March in a filing with the United States Labor Department it had 464,910 members at the end of 2007. This was a drop of approximately 74,000 members from the previous year. Auto workers have been severely impacted due to the drop in auto sales experienced by the three major American car manufacturers, and the prospects for a continuing decline appear inevitable.

Update on Judicial Pay Raises

On April 9, 2008 the state legislature approved a $121 billion state budget which did not provide for judicial pay increases. As a result, Chief Justice Kaye authorized the institution of a lawsuit which names the state legislative leaders and the governor as defendants. The Chief Judge and the Unified Court System has been designated as plaintiffs. The lawsuit is being handled by Bernard Nussbaum. The suit is seeking retroactive pay raises to April 1, 2005 at an estimated cost of $148 million. There is still some hope the legislature may be able to approve some monies for pay increases—retroactive to January 1, 2008—before the end of the year and continuing litigation

may be avoided. Some commentators have also raised the question of a judicial conflict in having the state court system hear a case which affects the judges within the system. We shall keep our readers advised of further developments on the judicial pay issue.

U.S. Attorney's Office Appoints New Organized Crime Chief

In early April, the United States Attorney for the Eastern District of New York announced he had appointed John Buretta as the new Chief of the Organized Crime and Racketeering Bureau. Mr. Buretta has served in the U.S. Attorney's office since 2002 and has handled many difficult and high-profile matters while serving in that office.

Attorney General Cuomo Appoints Special Advisors Regarding State Police Investigation

On April 10, 2008, Attorney General Andrew Cuomo announced he was naming Robert Fiske and Michael Armstrong as Special Advisors to his office with regard to an investigation of the New York State Police. The investigation arises from the claim the State Police may have been subject to political influence from the Governor's Office during prior administrations. Mr. Fiske is a former U.S. Attorney for the Southern District of New York and is a partner at the firm of Davis-Polk. Mr. Armstrong is a former Chief Counsel of the Knapp Commission and a former District Attorney of Queens County.

New Chief of State Police Appointed

On April 16, 2008, Harry J. Corbitt was confirmed by the state Senate to serve as the new Chief of the New York State Police. Mr. Corbitt had been nominated by Governor Paterson. He is a Vietnam Veteran and had joined the State police in 1978, rising steadily in the ranks. His new salary will be $136,000 a year. Mr. Corbitt assumes the leadership of the State Police at a time when several investigations regarding purported political influence in the operation of the agency are underway. In assuming his new office, Mr. Corbitt stated the abuse of power is a terrible thing and he views his current mission as basically to restore confidence in the agency, not only among the political leadership, but among the citizens of the state.

Federal Government Expands Use of DNA

Following the lead of New York and several other states, the Justice Department recently announced that it will soon be collecting DNA samples from all citizens arrested for any federal crime and from many illegal immigrants detained by federal authorities. Currently DNA samples are collected only from those convicted of federal crimes. The new policy is scheduled to go into effect on December 31, 2008 after a comment period and sufficient time to implement the new procedures. It has been reported the Bureau laboratory which processes the DNA samples already has a substantial backlog and it has been questioned by some as to whether the new regulations can be fully implemented without the addition of large sums of new monies and personnel. It appears Congress will have to soon weigh in on the proposed new regulations and we shall keep our readers advised of new developments.

New York City Graffiti Again on Increase

After many years of bringing a critical graffiti problem in the city of New York under control, the situation once again appears to be reaching epidemic proportions. It was recently reported by the New York City Police Department that graffiti complaints and arrests have skyrocketed. From 2006 to 2007 graffiti complaints rose by 81.5% throughout the city and arrests went up by 28%. Various precincts throughout the city have reported alarming increases in graffiti-related matter with complaints in Manhattan North jumping by 94% and in Queens by over 80%. Police officials and members of the City Council have attributed the increase in graffiti complaints to a lack of police officers who have been assigned to other duties and to a reassertion of a teenage culture that views graffiti as a legitimate form of art. It is hoped the graffiti, which was viewed as a symbol in the 1980s and 1990s of the City's decline, can once again be reduced and controlled so the numerous gains that the City has made in the quality of life in recent years will not be lost.

Creation of State Agency for Criminal Defense Services Put on Hold

During the current session of the state legislature, the concept of creating an independent statewide commission to oversee criminal defense services for the indigent and provide adequate funds to operate the agency was essentially cast aside and put on hold for an indeterminate period of time. The deteriorating economic situation and the need to reduce the state budget made it difficult for the governor and legislative leaders to support additional funding for a new agency. In addition, some critics have raised questions regarding how the agency would be staffed and operated and whether political considerations would play a role in the operation of the program. Despite strong support for the creation of a statewide agency to oversee criminal defense services from the New York State Bar Association and numerous other groups, it now appears highly unlikely any further steps in this direction will be taken in the near future.

About Our Section and Members

State Bar Recommends Town and Village Courts Be Staffed by Judges Who Are Also Attorneys

On February 1, 2008, the New York State Bar Association's House of Delegates approved a task force report which recommended various changes in the operation of town and village courts. Among the chief recommendations was that only attorneys be allowed to serve as judges on these courts. Currently, approximately two-thirds of all of the justices in the various town and village courts outside New York City are non-attorneys. Recently, there has been substantial criticism regarding the operation of these courts and the recommendations state the presence of legally trained attorneys, rather than lay judges, would promote greater efficiency and better dispositions in the town and village courts.

An additional recommendation voted upon by the House of Delegates was the consolidation of several town and village courts in order to make it more efficient and increase the chances of attracting attorneys to sit on these courts. In addition to the action taken by the House of Delegates, a report is also expected shortly from a commission appointed by Chief Justice Kaye to study ways to improve the various town and village courts. Our Criminal Justice Section supported the task force report and included its recommendation to the House of Delegates prior to the February 1 vote.

Bar Association Annual Meeting a Huge Success

The New York State Bar Association recently issued an analysis regarding the Annual Meeting which was held from January 28 to February 1 at the New York Marriott Marquis. It was reported 4,300 registrants attended the 2008 Meeting. This was approximately 1,300 more than last year. We are also pleased to report our Criminal Justice Section programs were well attended. Approximately 115 people attended our luncheon and awards ceremony and the CLE program had 70 participants. Several complimentary comments were received regarding our program. We thank all who participated and attended.

Special Committee Report Promotes Proper Work-Life Balance for Attorneys

A special committee of the New York State Bar Association, which was chaired by former President Catherine Richardson, recently issued its final report on the subject of what could be done to more properly balance the family lives of attorneys against their heavy work schedules. The Committee identified 12 top-stress factors which adversely impact on the lives of attorneys, and the report concluded that means should be examined to allow attorneys to spend more free time with their families and avoid the hazards of ongoing stress. The report identified the recent explosion of technology such as email, cell phones and Blackberrys as making it possible to always be on call, thereby severely limiting any "quiet time."

The report also identified significant dissatisfaction among attorneys, particularly younger attorneys, with their heavy workloads and recommended that, where possible, more flexible work schedules be adopted. The top twelve stress factors identified by the Committee's report are as follows:

1. Pursuit of billable hours
2. Effects of economic conditions / increased competition
3. Inadequate flex-time / reduced-hour arrangements
4. Breakdown in professional values at firms
5. Depersonalization of employer
6. Negative personal effects of advancements in law-office technology
7. Need for better stress management / time management skills
8. Incivility and discourtesy from fellow attorneys / some judges
9. Attorney-bashing in the media / by the public
10. Rising business costs of a law practice
11. Burden of paying off law school loans
12. Lack of passion and excitement for profession

After listing the top 12 stress factors the Committee's report concluded being an attorney is an ever-more demanding profession in which practitioners are finding less time for families or for the citizenship activities that have been the traditional obligation of lawyers. The Committee's report was adopted at the House of Delegates meeting on April 12, 2008.

New Members

During the last several months, we have continued to add new members for our Criminal Justice Section. Listed on page 34 of this issue are the names of the members who have recently joined.

Section Committees and Chairs

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

Mark R. Dwyer
New York County District Attorney's Office
One Hogan Place
New York, NY 10013
dwyerm@dany.nyc.gov

Awards
Norman P. Effman
Attica Legal Aid Society
14 Main Street
Attica, NY 14011
attlegal@yahoo.com

Capital Crimes
Barry I. Slotnick
Buchanan Ingersoll & Rooney PC
New York Times Building
620 Eighth Avenue
New York, NY 10018
barry.slotnick@bipc.com

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

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

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

Norman P. Effman
Attica Legal Aid Society
14 Main Street
Attica, NY 14011
attlegal@yahoo.com

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

Drug Law and Policy
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007
malvinanathanson@nysbar.com

Barry A. Weinstein
Goldstein & Weinstein
888 Grand Concourse
Bronx, NY 10451
bweinstein22@optonline.net

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

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

James H. Mellion
McCormack Damiani Lowe Mellion
499 Route 304
P.O. Box 1135
New City, NY 10956
jmellion@mdlmlaw.com

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

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

Judiciary
Cheryl E. Chambers
New York State Supreme Court of Kings County
Second Judicial District
320 Jay Street 25.49
Brooklyn, NY 11201
cchamber@courts.state.ny.us

Juvenile and Family Justice
Eric Warner
MTA Inspector General
111 West 40th St., 5th Floor
New York, NY 10018
ewarner@mtaig.org

Legal Representation of Indigents in the Criminal Process
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007
malvinanathanson@nysbar.com

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

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

Membership
Marvin E. Schechter
Marvin E. Schechter Attorney At Law
152 West 57th Street, 24th Floor
New York, NY 10019
marvin@schelaw.com

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

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

Nominating
Roger B. Adler
225 Broadway, Suite 1804
New York, NY 10007
rbalaw1@verizon.net

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

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

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

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

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

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

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

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

NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

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

Name:_____

Daytime phone: _____Fax: _____

E-mail: _____

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

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

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

The Criminal Justice Section Welcomes New Members

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

Bonnie Ackerman
David J. Baker
Amy Elizabeth Benedetto
Brad J. Berfas
Jonathan M. Binstock
Sandra E. Cavazos
May R. Che
Dori Cohen
Tehra A. Coles
Salvador Collazo
Daniel Mcgrayne Conaway
Brian David Crow
Brian Patrick Dassero
James John Daw
Michelle Josephine Demeri
Alfred Wayne Digrazia
Michael F. Donnelly
Wayne J. Donovan
Alexander Martin Dudelson
Lauren Popper Ellis
Russell E. Farbiarz
Joseph Gregory Farrell
Shannon Elizabeth Filbert
Peter M. Finocchiaro
Lauryn Kay Fraas
William Donald Gibney
Steven Gildin
James P. Gilpatric
Douglas Adam Goerss
Jason P. W. Halperin
Elizabeth Surrick Healy
David M. Hoovler
Samuel A. Howell
Soraya Evelyn Hurtado
Joan N. James
Walter M. Jeram
LaTanya Jones
Daniel Scott Kahn
Olivia Tarr Karis-Nix
Kendra Lea Kelly
Rebekah Ruth Nellis Kennedy
Laura Robin Kiersh
Edward W. Klein
William F. Kocher
Andrew I. Kossover
Mariana Louise Kovel
Michael Leigh Lambert
Nadjia Limani
James C. Locantro
Joseph L. Lucchesi
Thomas J. Maroney
Mary Mihalakos Martuscello
Dennis K. McDermott
Alicia Ann Mcfarlane
Alfredo F. Mendez
Lisabeth A. Mendola-D'andrea
Thomas H. Miller
Mark T. Montanye
Christina F. Myers
Patrick M. O'Connell
Joshua McIntire Paulson
Mary Beth Peppito
Jesse Quackenbush
Joanne D. Quinones
Kenneth J. Schreiber
Mark Simoni
Gary R. Somerville
Raymond D. Sprowls
Ying Stafford
David Szuchman
Andrew E. Tomback
Joshua J. Tonra
Christopher John Torelli
Claudel Trajan
Audrey A. Watson
James Clay Williamson
Gary J. Wojtan
Margaret R. Woods
John D. Wright
Angela Zagreda

Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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

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

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

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

NEW YORK CRIMINAL LAW NEWSLETTER

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

Section Officers

Chair
Jean T. Walsh
New York Stock Exchange, Inc.
Market Surveillance Division
20 Broad Street
New York, NY 10005
JWalsh@nyx.com

Vice-Chair
James P. Subjack
2 West Main Street
Fredonia, NY 14063
jsubjack@netsync.net

Secretary
Marvin E. Schechter
152 West 57th Street, 24th Floor
New York, NY 10019
marvin@schelaw.com

Treasurer
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007-2914
malvinanathanson@nysbar.com

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

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