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New York Criminal Law Newsletter

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Inside

NYSBA

Message from the Chair

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

The Executive Committee of the Criminal Justice Section (CJS Executive Committee) is anticipating the challenges of the 2008–2009 term as we work to bring about positive change to the criminal justice system. Last year brought a shift in state leadership and an increase in economic instability. This year, with the retirement of Chief Judge Kaye, we will experience a change in the leadership and dynamic of the Court of Appeals. Nevertheless, the CJS is prepared to press its agenda forward and advocate for a criminal justice system that is fair and just and responsive to the needs of the community. This year we will continue to concentrate our efforts on those criminal justice initiatives that are ripe for legislative reform and include the following: 1) state sentencing laws; 2) statewide standardization of indigent defense resources; and 3) creation of a state-funded office dedicated to the investigation and resolution of wrongful convictions. As a Section, we will seek to influence the development of each of these criminal justice initiatives.

CJS Officers' Meetings

While the Executive Committee usually takes a break during the months of July and August, the CJS officers held teleconference meetings during July and August to prepare for the upcoming year. The officers submitted the Section's yearly budget, arranged the Executive Committee meeting schedule for 2008 and 2009 and made plans for the CJS Annual Meeting in January 2009.

CJS Executive Committee Meeting

Since our last *Newsletter*, the CJS Executive Committee had one meeting, which was held on June 4, 2008, in New York City. At the meeting, the CJS Executive Committee voted in favor of a report written by members of the CJS Executive Committee who opposed recommendations by the NYSBA Committee on the Civil Rights Agenda ("Special Committee") for the following: 1) a requirement that trial judges give a verbal warning consistent with the ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986) to trial counsel before jury selection and 2) to have NYSBA and other bar associations undertake a comprehensive study of the necessity for continued use of peremptory challenges.

At the June 4 meeting the Executive Committee also discussed a report by the NYSBA Committee on Civil Rights ("Civil Rights Committee") regarding Executive Detention, Habeas Corpus and the Military Commissions Act of 2006. The report outlined a compelling argument that the detainees in Guantanamo Bay were being detained in violation of the U.S. Constitution and that such detainees were entitled to protection under our laws. The Executive Committee decided to organize a speakers' panel during the year to address this very important constitutional issue. We did not take a position on the report as we needed more time to review the legal implications.

Since the June 4 meeting the U.S. Supreme Court ruled that detainees at Guantanamo Bay have the right to challenge their detention in federal court in the case of *Boumediene v. Bush*, 128 S. Ct. 2229. In many respects the Supreme Court ruling is consistent with the arguments proffered by the Civil Rights Committee. We congratulate the Civil Rights Committee for their excellent report.

In closing, I'd also like to congratulate and thank Spiros Tsimbinos, *Criminal Law Newsletter* Editor, and all of you who have contributed to the *Newsletter* over the years. This year will mark the fifth-year anniversary of our *Newsletter*. Keep up the good work! Best regards.

Jean Walsh

Message from the Editor

This *Newsletter* contains several feature articles that should be of great issue to criminal law practitioners. A full review is presented regarding the major decisions in criminal law which were issued by the United States Supreme Court during its last term. Important trends within the Court are also analyzed with the view to presenting not only where the Court has been, but where the Court may be going in the future. Author Paul Shechtman utilizes the case of *Giles v. California*, which was recently decided by the United States Supreme Court, to discuss yet another aspect of the *Crawford* ruling and its impact on New York law.

The recent major problem involving the failure of many sentencing judges to impose the mandatory term of post-release supervision is also discussed in a separate article and recommendations are presented to avoid similar problems in the future. As in prior issues, we also present brief summaries of important decisions rendered by both the United States Supreme Court and the New York Court of Appeals in the criminal law area. During the month prior to the end of the Supreme Court's term, the Court issued several critical 5-4 decisions involving gun control and the use of the death penalty. These cases are fully discussed in our United States Supreme Court section.

Our "For Your Information" section continues to present a variety of issues which should be of interest and value to criminal law practitioners. The adoption of the new federal wiretapping law is covered in full and some interesting statistics are presented with respect to the level of violent crime in the United States. For the benefit of attorneys in New York City, we also present details regarding the adoption of the 2009 budget for the various prosecution offices and the Legal Aid Society within the City. We also report on the new seven-day-a-week arraignment procedures for juvenile offenders.

In the "About Our Section" portion of this issue, we also highlight coming activities and events and are pleased to announce the names of and welcome many new members who have joined in the last few months.

This issue marks the completion of our fifth year of publication. Our first issue was sent to our members in Fall 2003, and since then we have published 20 issues. The publication of this *Newsletter* requires the effort and support of many people. In particular, I would like to thank the two staff persons of the Bar Association who have performed all of the technical work in producing the *Newsletter* during the last five years. These individuals are Lyn Curtis and Wendy Harbour from the Newsletter Department. I thank them for their valuable assistance. I would also like to thank the former Chair of our Section, Michael Kelly, who had the foresight to institute the publication of the *Newsletter*; Roger Adler, last year's Chair; and this year's Chair, Jean Walsh, for their assistance and support.

I again urge members to present articles for publication in our *Newsletter*. The continued support of our members and feedback regarding the quality and nature of the various issues is important as we continue to strive to present the best legal product possible.

Spiros A. Tsimbinos

Editor's Note: In our last issue (Summer 2008) a typographical error was made on page 8 in the article on sex offender sentencing. In the chart relating to post-release supervision, in the last column, the maximum term for a D Felony where the prior felony is a VFO should be 15 years, not 20 as listed. Please note the correction.

The Post-Release Supervision Fiasco and Lessons to Be Learned Therefrom

By Spiros A. Tsimbinos

In 1966 and 1967, while I was still in law school, I was fortunate enough to have participated in an internship program with the Queens County District Attorney's Office.

While I was there, one of the main areas of interest and concern was the newly enacted New York State Penal Law, which was passed on June 10, 1965, and which was to become effective on September 1, 1967. The new law dramatically changed New York's provisions dealing with the elements of various crimes and the sentences to be imposed thereon.

In order to familiarize the legal community and its own assistants with the new law, the Queens District Attorney's Office, in cooperation with the Queens County Bar Association, organized and conducted several detailed and lengthy seminar programs dealing with the specific provisions of the new statute. The seminars were held on day-long Saturday sessions over the course of several weeks, with detailed written material provided. The sessions were largely taught by professors of criminal law from several of the city's law schools.

Although initiated and organized by the Queens District Attorney's Office, the seminars were open to all members of the Queens legal community, and hundreds of attorneys from the prosecution, Legal Aid, private defense bar, and the court system attended, as well as almost all of the county's judges. As a result of this intensive effort to become familiar with and get ready for the new law, when the new statute went into effect, the legal community efficiently dealt with the changes with few, if any, errors occurring.

On August 6, 1998, Governor Pataki signed legislation which effectuated another important change in New York's sentencing structure. A mandated period of post-release supervision was added to the term of any defendant convicted of a violent felony offense as part of the overall sentence. This new mandatory term was made effective as to all such crimes committed after September 1, 1998. Contrary to the active steps taken in Queens in 1966 to become familiar with significant new changes in the sentencing laws in 1998, when the post-relief supervision statute was enacted, I saw almost no mention of the new legislation. As a result, I began writing articles on my own, detailing the new changes, and Matthew Bender Co. in August 1998, published and distributed a detailed pamphlet which I had authored on the 1998 changes. Included within that pamphlet was an extensive section on the new concept of post-release supervision and a prophetic warning that "criminal law practitioners should be vigilant to fully become familiar with the new provisions."

The cloud of oblivion regarding the addition of the post-supervision term became personally obvious to me when I appeared at a sentence on behalf of a client who had committed a violent felony offense after September 1, 1998 and was clearly eligible for the post-release supervision term. After the judge imposed the mandatory jail time, I waited to hear the amount of post-release supervision to be imposed, but nothing happened. Although I might have been accused of going against my client's interest, I asked to approach the Bench, and diplomatically alerted the Court to the new requirements. I was quickly brushed off as if I didn't know what I was talking about, and the Court insisted on leaving the sentence as set.

About five weeks later, I received a call from the Court advising me that the case was being put back on the calendar because the State Department of Correctional Services had refused to accept the defendant as sentenced. At the ordered re-sentencing, the Court imposed the required supervision term but compensated for it by reducing the original jail sentence by six months, thus making my client quite happy.

In 2004, as part of the reforms of the Rockefeller drug laws, additional legislation was enacted, which added the post-release supervision term for defendants convicted of certain specific drug crimes. In 2007, periods of post-relief supervision were also added to the sentences of certain sex crime offenders. As a result of the continuing effort to add terms of post-release supervision to an increasing number of crimes by the year 2008, the number of defendants who were subject to such a sentence had grown to a significant portion of all of the felony sentences imposed.

It appears, however, that despite the legislation which was enacted from 1998 to 2007, some in the legal community were unaware of the necessity to include the period of post-relief supervision as part of the determinate term. Penal law § 70.45, which first added the concept of post-release supervision, specifically mandates that this was part of the sentence. Despite this fact, hundreds of defendants have apparently been sentenced in recent years without the period of post-relief supervision being pronounced by the sentencing court at the time of sentence. Because this occurred, apparently in large numbers, the clerks in some courts and the Department of Correctional Services eventually proceeded to simply add the appropriate post-release supervision term to the defendant's commitment papers without any feedback to the original sentencing court.

Although these efforts by the court clerks and the Department of Correctional Services were probably well motivated, they should have been alerted to the fact that such

a procedure was not proper, since the New York Court of Appeals in *People v. Catu*, 4 N.Y.3d 242 (2005) had made it clear that this procedure was flawed. Rather than alleviating the situation, they actually made matters worse. It would have been much better if, at an early stage, they had alerted the sentencing court and had remitted the matter for resentencing, as was done in my case in 1998.

The New York Court of Appeals, in 2008, in the cases of *People v. Sparber et al.*, 10 N.Y.3d 457 2008 WL 1860092 (April 29, 2008), and *Garner v. Department of Corrections*, 10 N.Y.3d __ 2008 WL 1860082 (April 29, 2008) specifically made clear that only the court could impose the period of post-release supervision, and it became apparent that the criminal justice system was facing a major crisis with literally hundreds of defendants subject to re-sentencing, and perhaps many others whose sentences had already expired.

Although the post-release supervision problem had become apparent in 2000 and 2001, when certain appellate court cases began receiving cases where no such term had been imposed, the full extent of the problem did not become clear until the fallout from the *Sparber* and *Garner* cases became public. Then it was estimated by a leading official in that office "that several hundred defendants from Manhattan alone were affected" (see *New York Law Journal*, April 30, 2008, pages 1 and 7). The State Department of Correctional Services also issued a statement that several thousand inmates could be impacted because of the failure of sentencing courts to impose the period of post-release supervision at the time of the original sentence.

Anthony J. Annucci, Chief Counsel for the Department of Correctional Services, was quoted in a *New York Law Journal* article of June 18, 2008 as having stated in an affirmation that

> *Garner* and *Sparber* may ultimately affect as many as 30,000 inmates and parolees. The rulings "could have a significant adverse impact on public safety if the (Correctional Services) Department, Parole, sentencing courts, district attorneys and other state, county and municipal entities are not afforded an appropriate opportunity to respond deliberately and carefully in resolving sentencing errors."

In response to the public outcry, the legislature and Governor Paterson announced in late June that they had passed legislation requiring that those defendants still in custody be re-sentenced to terms that would include post-release supervision. In actuality, this was the result that the Court provided for in the *Garner* and *Sparber* cases, and it appears that the legislative reaction was really a redundant effort to placate public opinion. Despite the ability to re-sentence, many inmates had already been ordered released because of the defect involving the post-release supervision, and it appears that nothing can be done with respect to those defendants.

Overall, it appears that the problem which occurred with respect to the post-release supervision amounts to a major fiasco which was caused by a failure of many in the criminal justice system to become aware of a major change which had occurred and to implement the change in question. It appears inconceivable how, in hundreds of cases, a prosecutor, a defense attorney, and a judge could all fail to be aware that a period of post-release supervision had to be imposed and would simply proceed to sentence a defendant to an invalid sentence.

I write this article not merely to criticize a fundamental lapse in the criminal justice system, although such criticism is warranted, but to warn that unless corrective measures are taken, the situation could happen again. A sentencing commission has been working in New York for the last several months to make recommendations regarding fundamental changes in our sentencing structure. The Commission has already made preliminary recommendations, and its final recommendations are expected by the end of the year. If New York State is to again make fundamental changes in its sentencing laws, it must also make sure that these changes are well known to all who practice within the criminal justice system, and that no errors occur.

First of all, any new changes that are to be enacted in the future should have a much longer period of time between the enacted date and the effective date. For example, the passage of the Penal Law in 1965 allowed for a two-year period before it became effective. The initial passage of the post-release supervision term allowed for only a one-month period from passage to effective date. Any new legislation should provide for at least a six-month period to allow ample time for study and discussion of the new provisions. It would make logical sense, since most of the major criminal law legislation is enacted and signed by the Governor in June or July, to make any effective date as of January 1 of the following year. This will also avoid the summer months when the court system slows down and it is difficult to effectively communicate with all aspects of the legal system.

Further, any new legislation should prompt the holding of detailed programs and seminars as was done in Queens in 1966, and should involve local bar associations and others in the local legal community who would come together as one, to become fully familiar with the changes in question. It is hoped that in this way, when any new significant sentencing changes are enacted, we will have learned from past mistakes and will be able to avoid the public embarrassment, expense, and waste of valuable resources which have occurred from the post-release supervision fiasco.

The Right of Confrontation and the Impact of *Giles v. California*

By Paul Shechtman

Among the flurry of end-of-term decisions of the United States Supreme Court was *Giles v. California*, in which the Court continued to define its new Confrontation Clause jurisprudence.[1] In an opinion by Justice Scalia (who authored *Crawford v. Washington* and *Davis v. Washington*), the Court recognized a "forfeiture exception" to the Confrontation Clause but only where the defendant has engaged in conduct *designed* to prevent the hearsay witness from testifying.[2] *Giles* is a defeat for prosecutors who had hoped to employ a broad forfeiture exception (one that did not include a purpose requirement) to admit the testimonial hearsay of victims in homicide cases.

Giles also provides a useful roadmap to explore the post-*Crawford* Confrontation Clause. We now know this:

1. The Confrontation Clause applies only to "testimonial hearsay." After *Crawford*, some courts were of the view that the reliability test of *Ohio v. Roberts* still applied to non-testimonial hearsay. It is now clear that *Ohio v. Roberts* is dead. As Justice Scalia put it in *Davis*, testimonial hearsay "mark[s] out not merely the core [of the Confrontation Clause], but its perimeter."[3]

2. We now also have a better understanding of the meaning of "testimonial." In *Crawford*, Justice Scalia left the term ill-defined, concluding that under any acceptable definition the hearsay statement at issue (the custodial confession of a wife implicating her husband) was testimonial. Many courts, however, read *Crawford* to favor a "declarant-oriented" definition: if the declarant reasonably believed that her hearsay statement would be used prosecutorially, then the statement was testimonial. *Davis* scuttled that belief, at least in cases where the hearsay declaration was made in response to police questioning. After *Davis*, a court looks not to the declarant's state-of-mind but to that of the police officer who is conducting the questioning (or more precisely to that of a reasonable officer). If the officer's principal purpose, objectively viewed, was to respond to an ongoing emergency, then the declarant's answer ("My husband hit me") is non-testimonial. If the purpose was to gather evidence about a completed crime, then the declaration is testimonial.

3. The new Confrontation Clause excludes a co-defendant's custodial statement or plea allocution unless the co-defendant is subject to cross-examination (or the declaration is offered for a non-hearsay purpose).[4] This is a bright line rule. In New York, a co-defendant's custodial confession is inadmissible as a matter of state hearsay law, so *Crawford* has not disadvantaged prosecutors on this score.[5] Redacted plea allocutions ("I conspired [with others] to rob the bank") were regularly admitted in New York as declarations against interest, and *Crawford* has brought an end to that practice.[6]

   For the most part, this aspect of *Crawford* is welcome. Outside New York, it was commonplace for courts to find that custodial confessions implicating another (e.g., Mrs. Crawford's statement about her husband) were against the declarant's interest and reliable, even though the declarant had every reason to curry favor with the police and to shift blame from herself. But bright line rules have their costs. Consider a case in which D_1 is on trial for ordering the murder of V, and V's body has not been found. *Crawford* prevents the prosecution from offering against D_1 the custodial statement (or plea allocution) of D_2 in which D_2 admitted chopping up the body and disposing it at sea. Whatever else is true, the admission of such a purely self-inculpatory statement ("I chopped up the body") is a far cry from the hearsay declaration of Lord Cobham implicating Sir Walter Raleigh in treason.

4. We now know that the constitutional admissibility of 911 calls and crime-scene statements will be judged against the *Davis* purpose-of-the-inquiry test. In New York and elsewhere, courts are applying the test in a manner that favors the prosecution. Hearsay statements are admitted where an ongoing emergency is sometimes difficult to discern. The decision of the New York Court of Appeals in *People v. Nieves-Andino* is a prime example.[7] The working rule appears to be this: if the perpetrator is at large and the victim is at the scene and still under the stress of excitement caused by the event, her hearsay statement is likely to be admissible, which is to say most of what qualifies as an excited utterance will be constitutionally admissible in New York.

5. *Giles* provides further support for courts that want to find 911 calls and crime-scene statements non-testimonial. The hearsay statement there was made to a police officer who was responding to a domestic violence call. Crying as she spoke, the victim told the officer that Giles had choked her and threatened to kill her if he discovered that she was

cheating on him. The California courts concluded that the declaration was testimonial, and the State did not challenge that determination in the Supreme Court. The State's concession, however, did not go unmentioned. Justice Scalia observed that the majority was "accept[ing] without deciding that [the victim's] statements accusing Giles of assault were testimonial." Justice Alito, who wrote separately, expressed serious doubts as to whether the victim's "statement falls within the scope of the Clause." And Justice Breyer, in dissent with Justices Stevens and Kennedy, emphasized that the case was "premised on the assumption, not challenged here, that the witness' statements are testimonial." All of these justices, one suspects, may have found the statements non-testimonial but for the State's concession.

6. *Giles* also makes clear that dying declarations are an exception to the Confrontation Clause. As Justice Scalia put it, "declarations made by a speaker who was both on the brink of death and aware that he was dying" even though unconfronted are a "historic exception" to the Clause.

7. After *Crawford*, one of the most debated issues has been whether the Confrontation Clause applies where there is no state involvement in the making of the statement. In dicta in *Giles*, Justice Scalia added these tantalizing sentences to the debate: "Only testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules." If that dicta becomes the law, then the new Confrontation Clause will be stronger but narrower than the old. A co-defendant's custodial declaration (or plea allocution) will be excluded regardless of its reliability. But a domestic violence victim's diary entries recording her abuse or a child's statement to a physician identifying her assailant will be admissible if they come within a state-law hearsay exception, no matter how novel the exception or unreliable the statement.

8. Finally, it bears emphasis that the Supreme Court has granted *certiorari* in yet another Confrontation Clause case, which will be decided next term. *Melendez-Diaz v. Massachusetts* presents the question whether a chemist's analysis ("this sample contains cocaine") is testimonial.[8] This past term, the New York Court of Appeals decided three forensic analysis cases—*People v. Rawlins*, *People v. Meekins*, and *People v. Freycinet*.[9] In the first, it held that a fingerprint comparison ("the latent prints match the defendant's") was testimonial. In the second, it held that a DNA analysis of sperm recovered from the victim was non-testimonial where the analysis did not link the DNA profile of the sample to that of the defendant. And in the third, it held that a redacted autopsy report (one which listed the observed knife wounds but did not opine on cause of death) was non-testimonial. For the Court of Appeals, the critical inquiry in each case was whether the forensic report accused the defendant of the crime. As Judge Robert Smith wrote in *Freycinet*: "The Clause is in a way an echo of Sir Walter Raleigh's unheeded demand . . . 'Call my accuser before my face,' [and] the writer of the redacted autopsy report was not defendant's 'accuser' in any but the most attenuated sense." Whether the Supreme Court will adopt that same approach in *Melendez-Diaz* remains to be seen.

Endnotes

1. *Giles v. California*, 128 S. Ct. 2678 (2008).
2. *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006).
3. *See also Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (reaffirming that the Confrontation Clause has no application to "unreliable out-of-control nontestimonial statements").
4. *Crawford*, 541 U.S. at 65.
5. *People v. Geoghegan*, 51 N.Y.2d 45 (1980).
6. *See People v. Hardy*, 4 N.Y.3d 192 (2005), overruling *People v. Thomas*, 68 N.Y.2d 194 (1986).
7. *People v. Nieves-Andino*, 9 N.Y.3d 12 (2007).
8. *Melendez-Diaz v. Massachusetts*, 69 Mass. App. Ct. 1114 (2007), *cert. granted*, 128 S. Ct. 1647 (2008).
9. *People v. Rawlins*, 10 N.Y.3d 136 (2008); *People v. Freycinet*, 2008 WL 2519867.

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A Review of the 2007–2008 Term of the United States Supreme Court

By Spiros A. Tsimbinos

Introduction

The United States Supreme Court held its final session of the 2007–2008 term on June 26, 2008. As the Court begins its 2008–2009 term in October, it appears appropriate to review last year's session to determine where the Court has been and where it might be headed in the future. A general review of all of the Court's cases was conducted and a specific analysis was made of the Court's 14 major decisions in the criminal law area. From this review and analysis, certain specific conclusions can be drawn as follows:

Fewer 5-4 Decisions

Although the Court ended its session with three highly controversial and sharply divided 5-4 opinions—to wit: the Washington, D.C., gun control law, the death penalty for child rapists, and the extension of judicial review to the Guantanamo detainees—one of the major trends emerging from the 2007–2008 term was the substantially fewer number of 5-4 decisions and the fact that Chief Judge Roberts has achieved some success in promoting greater consensus among the various justices. During the 2006–2007 term, 23, or almost 30%, of the Court's decisions were by a 5-4 vote. This past term, however, the number of 5-4 decisions amounted to 11, or approximately 16%. With respect to the 14 major criminal law decisions, this past term only 3 were decided by a 5-4 vote, or approximately 20% of the total. During the 2006–2007 term, approximately 33% of the criminal law decisions involved a 5-4 split.

The Continued Presence of Two Voting Blocs

Despite the fewer number of 5-4 decisions, it still remains obvious that the Court was sharply divided on some of the major political and social issues of the day and that, basically, two voting blocs exist, Chief Justice Roberts and Justices Alito, Scalia and Thomas make up one group. The other group is made up of Justices Ginsburg, Breyer, Souter and Stevens. Although not always the case, these Judges continue to vote as a group in many instances, and especially in the highly controversial cases, expressing differing judicial philosophies and different views on the major political and social issues of the day.

Justice Kennedy Continues to Be the Critical Swing Vote

As in the 2006–2007 term, Justice Kennedy continues to remain as the critical swing vote. For example, Justice Kennedy's vote was decisive in three of the most important and controversial cases to be decided by the Court. These cases were *District of Columbia v. Heller*, where the Washington, D.C. Gun Control Law was declared unconstitutional and Justice Kennedy supported the concept of an individual right under the Second Amendment of a citizen to possess a weapon for purposes of self-defense. In *Kennedy v. Louisiana*, Justice Kennedy provided the key vote that declared invalid a death penalty statute for child rapists and held that such a penalty may be imposed only where the death of a victim has occurred. In *Boumediene v. Bush,* Justice Kennedy again supplied the critical vote in declaring that foreign-born prisoners held at Guantanamo still possess certain constitutional rights and can utilize the concept of habeas corpus to obtain federal court review.

It is interesting to note that up to the very last month of the Court's past term, it appeared that Justice Kennedy was losing his position as a critical swing vote, since many of the Court's decisions had involved at least 7-2 determinations. An article which appeared in the *New York Times* on May 23, 2008 in fact rendered the opinion that Justice Kennedy "was no longer the essential Judge, and looked like just one of the pack." Perhaps Justice Kennedy read the article in question, since almost immediately thereafter he resumed his status as the critical vote in the 5-4 decisions discussed above.

With respect to criminal law decisions, Justice Kennedy clearly continues to be a critical vote. During the 2006–2007 term, he was in the majority nearly 90% of the time, and during this past 2007–2008 term, he was in the majority in 12 of the 14 major decisions issued, or approximately 86% of the time.

A More Favorable Term for the Criminal Defense

During the 2007–2008 term, of the 14 major criminal law decisions issued, 8 decisions were in favor of the defense, and 6 decisions were in favor of the prosecution. Thus the defense was successful in approximately 57% of the cases. This is a substantial change from the 2006–2007 term, where approximately 65% of the decisions were in favor of the prosecution, and only 35% were favorable to the defense. In addition to the death penalty case for child rapists, the defense won major victories in cases involving the federal sentencing guidelines and the right of confrontation under the *Crawford* rulings. The number of criminal defense victories was such that a commentator in a July 8, 2008 article in the *New York Law Journal* characterized the defense victories as "remarkable."

The Dilution of the Pro-Prosecution and Pro-Defense Blocs

My prior analysis of the 2006–2007 term revealed the existence of two groups of justices, one which was usually pro-prosecution, and the other which was usually pro-defense. The pro-prosecution group consisted of Chief Justice Roberts and Justices Alito, Scalia and Thomas, with Justice Kennedy often joining this group. The pro-defense group consisted of Justices Ginsburg, Souter, Stevens and Breyer. A review of the 14 major criminal law decisions during the 2007–2008 term indicates that these groupings are still present but to a lesser extent, and that some of the justices in question became either more pro-defense or more pro-prosecution than they had been in the past. During the 2007–2008 term, of the 14 cases reviewed, Justices Alito and Thomas voted in favor of the prosecution in 10 cases, for a pro-prosecution rating of 71%. Justice Roberts voted in favor of the prosecution in 9 cases, for a 64% pro-prosecution rating, and Justices Scalia and Kennedy voted in favor of the prosecution in 8 matters, for a pro-prosecution rating of 57%. The pro-prosecution ratings for all of the Justices in question were down from the 2006–2007 term, with the greatest decrease occurring for Justices Scalia and Kennedy. Justice Scalia, in particular, during the last few years, has been more pro-defense than anticipated, and it is not surprising that he recently remarked on a PBS interview with Charlie Rose that he should be "the darling of the defense bar."

With respect to the normally pro-defense group, the interesting development during the 2007–2008 term was that Justice Stevens and Justice Breyer voted in favor of the prosecution 50% of the time. This was almost double their pro-prosecution rating during the 2006–2007 term. Both of these Justices joined the majority in *Baze v. Rees*, voting to uphold the use of lethal injections as a means of implementing the death penalty. With respect to the just-completed term, Justices Ginsburg and Souter voted in favor of the prosecution in only 4 cases and have the lowest pro-prosecution rating of only 29%. This was basically consistent with their positions during the 2006–2007 term.

Conclusion

The past term of the Court produced several important and controversial issues emphasizing the vital role that the United States Supreme Court plays in our federal system of checks and balances. The importance of the Supreme Court is such that it may even play an important role in the upcoming presidential election, since the Court is still evenly divided between two groups that differ to some extent in judicial philosophies. The possible appointment of one or two new justices may shift the critical balance in one direction or the other. Justice Stevens is presently 88 years of age, and some of the other Justices are in their 70s.

There is an extremely good possibility that the next president will be appointing one or two new justices, which can dramatically influence the course of future decisions. It must be noted that often the justices appointed by a president continue to exert a substantial influence through their decisions on the Court long after the president who made the appointment has passed from the scene. In this regard, one need only point to the position of former Justice Sandra Day O'Connor, and now Justice Kennedy, who were appointed by President Reagan and who have exercised "the critical swing vote" long after the Reagan era has passed. It is thus extremely important that criminal law practitioners be aware of past and current trends in the Court as we seek to determine its possible future direction. I hope that this analysis has been helpful, valuable and interesting to our readers.

Spiros A. Tsimbinos is the Editor of this *Newsletter*. He is also a former President of the Queens County Bar Association and previously served as legal counsel and Chief of Appeals in the Queens County District Attorney's office. He has lectured widely and has authored numerous articles in the field of criminal law.

My Return to the United States Supreme Court

By Spiros A. Tsimbinos

In June of 2006, I had the pleasure of attending a series of events which were held at the United States Supreme Court in Washington, D.C., and I reported on these activities in the Fall 2006 issue of this *Newsletter*. On June 2, 2008, I was again fortunate enough to have received an invitation to attend this year's activities at the United States Supreme Court, which were sponsored by the Supreme Court Historical Society.

Justice Samuel Alito delivering 2:00 p.m. lecture

The first important event of the day was a lecture presented at 2:00 p.m. by the Court's newest Justice, Justice Samuel Alito, Jr. The lecture was presented in the Supreme Court Courtroom and Justice Alito provided an amusing and informative lecture on the history of the antitrust lawsuits commenced against the major league baseball teams, culminating in the Court's 1922 decision finding that baseball was not subject to the provisions of the Sherman Antitrust Act. The lecture was attended by a large group of some 200 attorneys and judges, and Justice Alito received many accolades for both the detailed and scholarly lecture presented, as well as several humorous remarks, which made the lecture a delight. Justice Alito was also quite gracious in thanking the members of his staff who assisted in the preparation of the program.

String quartet from U.S. army band performing during cocktail reception

The 2:00 p.m. lecture was preceded and followed by various tours of the Court which were conducted by members of the curator's staff. The participants in the tours were treated to the wonderful opportunity to view the beautifully furnished rooms within the Court building, as well as the famous "spiral staircase." A view of the east and west conference rooms with the hanging portraits of the various Chief Justices was also an impressive sight.

At 7:00 p.m., a wonderful and lavish cocktail reception was held in the east and west conference rooms and in the adjoining garden areas. Beautiful chamber music was provided by members of a string quartet from the United States Army Band. Several of the Justices of the Supreme Court mingled with approximately 230 attorneys and judges who attended the cocktail reception. During the cocktail hour I was fortunate to have spoken for a few minutes to Chief Justice Roberts and Justices Alito and Scalia. My conversation with Justice Scalia was most interesting, since I mentioned to him that as a defense attorney and as someone who has written on the activities of the Court, I found that he had voted in favor of the defense in many more instances than was anticipated by my defense colleagues. Justice Scalia smiled and stated to me that he really should be considered "the darling of the defense bar." I was then pleasantly surprised when, a few weeks later, I saw an interview of Justice Scalia on PBS's "Charlie Rose Show," and during the interview, Justice Scalia, in response to a question by Charlie Rose, paraphrased some of the remarks he had made to me. In this respect, it appears that my possible exclusive from Justice Scalia was pre-empted by Charlie Rose.

Following the cocktail reception, a wonderful dinner was held in the great hall of the Supreme Court. In addition to the fine food and wine and the wonderful service, we were treated to a special event in the form of an entertainment program presented by the members of the

U.S. army chorus performing at dinner

United States Army Chorus. These wonderful members of our Armed Forces delighted the audience with a series of patriotic classics and a stirring rendition of the theme songs of the various branches of the Armed Forces. They received several standing ovations. I was advised that at each year's dinner, the appearance by the members of the Armed Forces is obtained by a special request to the President of the United States. Further, at each year's dinner, the Chief Justice opens the event by a special toast to the President of the United States, as a thank you for the entertainment to be provided, and in keeping with the respect that one branch of the government has for the other. Seven members of the Court were in attendance at the dinner, to wit: Chief Justice Roberts and Justices Scalia, Kennedy, Alito, Thomas, Ginsburg and Breyer.

Guests at dinner in Great Hall of U.S. Supreme Court

My return to the United States Supreme Court this year was another highlight, and the Supreme Court Historical Society should be given great credit for organizing this event and for insuring that the work and value of the United States Supreme Court is supported, and that the workings of this great institution are made known to the legal profession and the community at large. I was advised by Mr. David T. Pride, Executive Director of the Supreme Court Historical Society, that this year the Society had a direct New York connection by providing assistance to many of the New York City high schools through its program of lectures on the workings of the Court and its role in American society.

I was most fortunate in 2006 to have attended that year's event, and was pleased to have been able to write about my adventure. I was really lucky to be able to make a return trip to the Supreme Court in 2008, and I hope that my reporting on this year's events and the accompanying photographs will prove informative and interesting to our readers.

Spiros A. Tsimbinos is the Editor of this *Newsletter*. He is also a former President of the Queens County Bar Association and previously served as legal counsel and Chief of Appeals in the Queens County District Attorney's office. He has lectured widely and has authored numerous articles in the field of criminal law.

Book Review

The Execution of Willie Francis by Gilbert King

Reviewed by Paul Shechtman

Gilbert King's *The Execution of Willie Francis* is the story of a stuttering, uneducated, 17-year-old black boy in St. Martinville, Louisiana, who on May 3, 1946, was strapped to the electric chair, having been convicted of the murder of a local white pharmacist, only to miraculously survive the jolt of electricity. "What was it like to taste death?" a reporter asked Willie after the failed execution. Willie responded: "Like you got a mouth full of cold peanut butter, like blue and pink and green speckles, like shines in a rooster's tail." And he added, "I reckon dying is black. Some folks say it's gold. Some say it's white as hominy grits. I reckon it's black. I ought to know. I been mighty close."

"King's beautifully written book tells the story of Francis *and of the search for justice in the post–World War II American South."*

Could the State of Louisiana strap "Lucky" Willie again to "Gruesome Gertie," as the 300-pound portable electric chair was nicknamed? Was a second try cruel and unusual punishment? That question reached the United States Supreme Court in *Louisiana ex rel. Francis v. Resweber*.[1] King's beautifully written book tells the story of *Francis* and of the search for justice in the post–World War II American South.

As King tells it, the story goes like this: On November 8, 1944, the body of Andrew Thomas, the 53-year-old owner of Thomas Drug Store and brother of the St. Martinville police chief, was found shot to death outside his home. Neighbors heard gun shots and saw a mysterious car parked in front of the Thomas house with its lights on, but knew nothing more. Thomas was a notorious "ladies man," and rumors circulated that the murderer was a jealous husband of one of the women Thomas was seeing. Those rumors were dispelled, however, when Willie Francis was stopped by the police in Fort Arthur, Texas, where he was visiting his sister. Found in possession of Thomas' wallet, Willie "voluntarily" confessed to the crime: "when he came out the garage i shot him five times, that all i remember a short story." As for the motive, Willie wrote: "it was a secret about me and him."

Willie Francis' trial was all too typical of southern justice for blacks in the first half of the 20th century. It commenced six days after two local lawyers were appointed to represent Willie. The two lawyers conducted no investigation; made no motions; waived opening statement; did little, if any, cross-examination; and called no witnesses in Willie's defense. After 15 minutes' deliberation, 12 white male jurors found Willie guilty of the crime. The next morning, he was sentenced to death. Six months later, when no appeal was filed, Governor Jimmie Davis, "the Singing Governor," most famous for his hit song "You Are My Sunshine," set May 3, 1946, for Willie's execution.

Only after Gruesome Gertie failed to deliver a lethal blow (a loose wire may have limited the electricity that reached Willie's body) and the State decided to reset the execution date did Willie begin to receive effective representation. Bertrand DeBlanc, a young St. Martinville lawyer, took Willie's case to the Supreme Court, where he was assisted by J. Skelly Wright, later to become a distinguished federal judge. By a vote of 5 to 4, the Court rejected Willie's petition and allowed the second execution to proceed. "Accidents," Justice Reed wrote, "happen for which no man is to blame." Willie, it seems, received the news with equanimity: "Death and me is old neighbors," he told reporters.

"Willie Francis' trial was all too typical of southern justice for blacks in the first half of the 20th century. . . . The two lawyers conducted no investigation; made no motions; waived opening statement; did little, if any, cross-examination; and called no witnesses in Willie's defense."

Among the justices in the majority was Felix Frankfurter, the consistent advocate of judicial restraint. In private, however, Justice Frankfurter brooded about the case, calling Louisiana's decision to return Willie to the chair "a barbaric thing to do." Stung by the intense criticism his concurring opinion received, Justice Frankfurter went so far as to enlist a leading member of the Louisiana bar, a former student of his at Harvard, to wage a campaign for clemency for Willie.

Justice Frankfurter's secret attempt to gain clemency failed, as did two more petitions for Supreme Court review. (The last one included affidavits from witnesses reporting that the two executioners had been "so drunk it would have been impossible for them to have known what they were doing.") On May 9, 1947, one year after

the first attempt, Willie Francis was again strapped to Gruesome Gertie as 500 people looked on. At 12:08 p.m., 2,500 volts of current were sent through his body, and this time he was not so lucky.

Did an innocent boy die in the electric chair on May 9, 1947? Unlike others who have written about *Francis*, King is not so sure.[2] Indeed, he suggests that Willie may well have been guilty of Thomas' murder, and he offers an intriguing explanation of the "secret about me and him" that Willie alluded to in his confession. One must read King's compelling book to learn the explanation.

* * *

From 1947 to 2007, *Francis* was mentioned only occasionally in Supreme Court opinions. This year, however, it resurfaced when the Court considered the constitutionality of Kentucky's three-drug method of execution by lethal injection in *Baze v. Rees*.[3] In his plurality opinion upholding Kentucky's procedure against a cruel and unusual punishment challenge, Chief Justice John Roberts referred approvingly to *Francis* and called Louisiana's first attempt to execute Willie an "isolated mishap."

In 1992, shortly before his death, Bertrand DeBlanc visited Willie Francis' grave with a group of journalists. As King recounts, DeBlanc brushed away a tear and said, "[I]f Willie's appeal was today, we'd win." In 2008, after *Baze*, that assessment seems unduly optimistic.[4]

Endnotes

1. 329 U.S. 459 (1947).
2. *See* Miller and Bowman, *Death by Installment: The Ordeal of Willie Francis* (Greenwood 1988).
3. 128 S. Ct. 1520 (2008).
4. Notably, Willie Francis, who was 15 years old when Thomas was murdered, could not now be put to death. *See Roper v. Simmons*, 543 U.S. 551 (2005).

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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 May 6, 2008 to September 3, 2008.

Deprivation of Counsel

***People v. Umali*, decided May 5, 2008 (N.Y.L.J., May 7, 2008, pp. 14 and 26)**

In a unanimous decision, the New York Court of Appeals rejected a defendant's claim that he was entitled to a new trial when the trial judge had initially ordered him not to discuss his testimony with his attorney during a four-day recess at his trial. The attorney challenged the judge's order and after a day and a half into the recess, the trial court changed his ruling. The New York Court of Appeals concluded that since the defendant had two and a half days to talk to his lawyer about the case, this was sufficient to correct any disadvantage that may have occurred from the day and a half in which he was improperly prohibited from discussing his testimony with counsel.

The Court also, in its ruling, rejected the defendant's other claims that he was denied a fair trial because of an error in the court's charge regarding the defense of justification and the burden of proof which was applicable thereto. The Court found that in reviewing the entire charge, the jury was given the correct legal standard with respect to the prosecution's burden to disprove that the defendant did not reasonably believe that deadly force was required. The Court's decision was written by Judge Graffeo.

Forfeiture of Peremptory Challenges

***People v. Luciano*, decided June 3, 2008 (N.Y.L.J., June 4, 2008, pp. 1, 14 and 26)**

In a unanimous decision, the New York Court of Appeals held that a judge may remedy a litigant's discriminatory use of peremptory challenges by requiring the litigant to forfeit the improperly exercised challenges. The Court emphasized, however, that the trial Court's decision was discretionary and in the case at bar the trial judge had acted upon the mistaken belief that the law actually required him to order the forfeiture of the challenges in question. Under these circumstances the Court of Appeals ruled that the defendant was entitled to a new trial. The decision, which was joined in by a unanimous Court, was written by Chief Judge Kaye.

Double Jeopardy

***Santos Suarez v. Hon. John Byrne*, decided June 3, 2008 (N.Y.L.J., June 4, 2008, p. 28)**

In a unanimous decision, the Court of Appeals held that a defendant could be retried for first-degree manslaughter following his acquittal by a jury of intentional murder and a reversal of his conviction for depraved indifference murder on legal insufficiency grounds. The Court found that although the first-degree manslaughter count had been submitted to the jury at the defendant's first trial, it was not considered by the jury in light of its initial determination. Under these circumstances the Court found that the defendant could be retried for intentional manslaughter and that the double jeopardy prohibition did not apply. The defendant had commenced an Article 78 proceeding to prohibit his retrial, but the Appellate Division had denied the defendant's claim and the Court of Appeals affirmed the Appellate Division judgment.

Weight of the Evidence Review

***People v. Johnson*, decided June 3, 2008 (N.Y.L.J., June 4, 2008, pp. 14 and 29)**

In a unanimous decision, the New York Court of Appeals, based upon some recent rulings, remitted the matter back to the Appellate Division to review the elements of the crime for which the defendant had been convicted as part of its weight of the evidence review. The Court of Appeals based its decision on its recent ruling in *People v. Danielson,* 9 N.Y.3d 342 (2007*)*. In rendering its decision, the Court of Appeals stated:

> By having chosen to manifest its weight of the evidence review power in a writing, the Appellate Division does not say that it assessed the evidence in light of the elements of the crime as charged to the jury, and the opinion does not otherwise offer confirmation that, in fact, it did. Accordingly . . . we remit to the Appellate Division so that it may make such an assessment.

Imposition of Consecutive Sentences

***People v. Azaz*, decided June 3, 2008 (N.Y.L.J., June 4, 2008, p. 30)**

In a unanimous decision, the New York Court of Appeals affirmed the imposition of consecutive 25-years-to-life sentences involving the killing by the defendant of his wife and child. The Appellate Court found that the defendant had inflicted additional blows against the child after he had attacked the wife and that the trial court retained consecutive sentence discretion when separate offenses are committed through separate acts even though they are part of a single transaction.

Dangerous Contraband

People v. Finley

***People v. Salters*, decided June 10, 2008 (N.Y.L.J., June 11, 2008, pp. 1, 14 and 27)**

In two separate rulings, the New York Court of Appeals reduced felony convictions to misdemeanors by finding that small amounts of marijuana did not constitute dangerous contraband when held by New York State prison inmates. In *Finley,* the defendant was found by a guard trying to discard three marijuana cigarettes. In *Salters*, the defendant was overheard on a telephone call with his girlfriend, apparently conspiring to smuggle marijuana into the correctional facility. In *Finley*, the Court unanimously determined that the small amount of marijuana did not constitute dangerous contraband so as to elevate a normally misdemeanor charge to a felony. In *Salters*, five of the Court's judges also concluded that a misdemeanor charge rather than a felony was warranted. Judges Pigott and Graffeo dissented, however, finding that the jury had sufficient evidence before it to conclude that the defendant's attempt to bring marijuana into the prison facility could, under the circumstances in question, constitute dangerous contraband. The dissenters in *Salters,* rather than reducing the conviction, would have ordered a new trial finding that the trial court had erred in refusing to charge the jury that they could consider the lesser included offense of attempted promoting prison contraband in the second degree.

Suppression of Confessions

***People v. Malaussena*, decided June 12, 2008 (N.Y.L.J., June 13, 2008, p. 29)**

In a unanimous decision, the Court of Appeals affirmed a defendant's conviction and upheld the introduction of his confession during the trial. The Court determined that the trial judge did not commit error in declining to suppress the defendant's confessions. Even assuming that the defendant was in custody once a detective observed blood on his shoes, any violation of the *Miranda* ruling did not affect the defendant's post-*Miranda* admissions. The Court of Appeals emphasized that the defendant had voluntarily appeared at the police station and did not incriminate himself prior to receiving the *Miranda* warnings. The Court further concluded that the defendant's ultimate decision to disclose incriminating information was not the function of a single continuous chain of events since questioning had ceased for approximately four hours before he received *Miranda* warnings and confessed for the first time.

Brady Violation

***People v. Hunter*, decided June 12, 2008 (N.Y.L.J., June 13, 2008, pp. 1, 5 and 26)**

In a unanimous decision, the New York Court of Appeals reversed a defendant's conviction and ordered a new trial because the prosecutors had failed to inform a defendant in a rape and sodomy case that his alleged victim had accused another man of rape in circumstances similar to his. The Court found that there was a reasonable probability that the undisclosed information may have led to the defendant's acquittal and that therefore a reversal was warranted. The Court's decision was written by Judge Robert Smith.

Guilty Plea

***People v. Montilla*, decided June 25, 2008 (N.Y.L.J., June 26, 2008, p. 27)**

In a unanimous decision, the New York Court of Appeals held that a defendant's guilty plea to a previous crime constitutes a conviction for the purposes of enhanced punishment and it was not necessary that a sentence actually have been imposed in order for the prior conviction to count. In the case at bar the defendant's conviction for possession of a weapon had been elevated on the grounds that he had previously been convicted of another crime. The Court of Appeals referring to Criminal Procedure Law § 1.20(13) stated that conviction means the entry of a plea of guilty. Under these circumstances, the defendant's guilty plea was sufficient for the purpose of elevating what would have been a misdemeanor possession of a weapon to a felony.

Vacating a Guilty Plea

***People v. Barrett*, decided June 25, 2008 (N.Y.L.J., June 26, 2008, p. 28)**

In a 6–1 decision the New York Court of Appeals rejected a defendant's claim that his guilty plea was based upon threats from a co-defendant. The Court found that the Trial Court did not abuse its discretion in rejecting the defendant's claim without a hearing. The majority opinion stated that only in rare instances will a defendant be entitled to an evidentiary hearing when he seeks to withdraw a validly entered guilty plea. The Court found that the defendant's affidavit that was submitted in support of his claim was not sufficient to warrant a hearing, and that the trial judge was in his discretion to deny a hearing and to uphold the guilty plea based upon the record which was established in the matter.

Judge Jones dissented, finding that a hearing was warranted and that the defendant's claim that he was pressured by threats from the co-defendant should be explored and not summarily rejected.

Attorney General's Criminal Law Jurisdiction

***People v. Grasso*, decided June 24, 2008 (N.Y.L.J., June 26, 2008, pp. 1 and 26)**

In a unanimous decision, the New York Court of Appeals dismissed four causes of action which were brought by the Attorney General's Office against Richard Grasso regarding the compensation paid to him when he was Chairman of the New York Stock Exchange. The Court found that the four causes of action in question were not based upon authority given to the Attorney General under the Not-For-Profit Corporation Law, and that the causes of action in question had a lower burden of proof than was specified by the statute. Under these circumstances, the Attorney General had acted beyond his authority in bringing the actions in question, and those causes of action were required to be dismissed.

Shortly after the Court of Appeals' decision, the Appellate Division, First Department, dismissed the remaining state claims which had been filed under the Not-for-Profit Law since the New York Stock Exchange had converted to a for-profit entity, and the Attorney General's jurisdiction was no longer applicable. The decision of the Appellate Division, First Department, was reported in the *New York Law Journal* of July 2, 2008, pp. 1 and 7.

Following the Appellate Division's decision, the Attorney General's Office announced that it would not be taking further appeals with regard to the Grasso matter, and that for all intents and purposes, the *Grasso* case is over.

Right of Confrontation

***People v. Freycinet*, decided June 26, 2008 (N.Y.L.J., June 27, 2008, pp. 22 and 29)**

In a unanimous decision of June 26, 2008, the New York Court of Appeals found that an autopsy report prepared by a doctor who did not appear on the stand in a murder trial was not testimonial, and therefore the evidence was properly admitted, and the defendant had not been denied his right of confrontation under the *Crawford* line of cases. The Court of Appeals considered the issue in question along the same lines that it decided *People v. Rawlins,* 10 N.Y.3d 136 (2008). The Court determined that the autopsy report had been prepared by a medical examiner, and that the medical examiner's office was independent and not subject to the control of the prosecutor or any other law enforcement agency. Further, the report did not directly link the defendant to the crime, but was concerned only with what happened to the victim and who killed her. Using this criterion, the autopsy report was found not to be testimonial in nature and its introduction did not violate the *Crawford* principals.

Search and Seizure

***People v. Estrella*, decided July 1, 2008 (N.Y.L.J., July 2, 2008, p. 29)**

In a unanimous decision, the New York Court of Appeals affirmed a lower court ruling declining to suppress cocaine which was recovered from the defendant's vehicle. The officer had stopped the vehicle because the windows were overtinted, in violation of New York law. The vehicle in question was registered in Georgia, and the tinting was legal in Georgia. The Court, however, concluded that the New York officer was not chargeable with this knowledge when he stopped the vehicle, and since he had a good-faith basis for doing so, based upon New York law, his initial stop of the vehicle was valid.

Ineffective Assistance of Counsel

***People v. Simmons*, decided July 1, 2008 (N.Y.L.J., July 2, 2008, p. 28)**

In the case at bar, defendant's attorney had served oral notice that the defendant wanted to testify before the Grand Jury. Subsequently the defendant was indicted without ever having appeared before the Grand Jury in question. The prosecutor in question had provided notice of the date and time of the Grand Jury presentation. Defendant claimed, on appeal, that his attorney had effectively abandoned him and had not proceeded to protect his rights regarding his appearance before the Grand Jury. The Court of Appeals held that in the case at bar, the defendant had failed to establish that he was prejudiced by the failure of his attorney to effectuate his appearance before the Grand Jury. There was no claim that had he testified before the Grand Jury, the outcome would have been different.

Recent United States Supreme Court Decisions Dealing with Criminal Law

During the last two months before taking its summer recess, the United States Supreme Court issued several important rulings in the area of criminal law as follows:

United States v. Williams, 128 S. Ct. 1830 (May 19, 2008)

In a 7-2 ruling, the United States Supreme Court upheld the constitutionality of the Federal Internet Pornography law, which was enacted in 2002. The federal statute makes it a crime to exchange on-line messages about any material or purported material that would cause another to believe that it depicts a minor engaged in sex, whether actual or simulated. The federal statute has been attacked as being overbroad and violating First Amendment guarantees. The Supreme Court, however, in its ruling stated that child pornography harms and debases the most defenseless of our citizens and that there was no real danger that the statute would be applied to otherwise innocent or protected conduct.

Justice Scalia wrote the opinion for the majority. Justice Souter and Justice Ginsburg dissented, arguing that the majority decision would now infringe on First Amendment rights and was contrary to prior holdings of the Court which shielded some types of computer mass-generated types of pornography.

Boumediene v. Bush

Alodah v. United States, 128 S. Ct. 2229 (June 12, 2008)

In a 5-4 decision, the United State Supreme Court held that the detainees held at Guantanamo Bay in Cuba can challenge their extended imprisonment in the federal courts through the use of the habeas corpus mechanism. The Court, in its decision, also ruled that the alternative review system that Congress had established last year through the Military Commissions Act was inadequate and could not foreclose federal court review. The Court was sharply divided in rendering its decision with Justice Kennedy, who wrote the majority opinion, once again emerging as the critical swing vote. Justice Kennedy was joined in his majority opinion by Justices Ginsburg, Souter, Breyer and Stevens. Chief Judge Roberts issued a vigorous dissent, arguing that the majority's opinion placed unwarranted limitation on presidential and congressional authority to deal with national security issues. Justice Roberts was joined in his dissent by Justices Alito, Thomas and Scalia. Justice Scalia in his own separate opinion also warned, "The nation will live to regret what the Court has done today."

The impact of this long-awaited and controversial decision is not yet known and we await the developments as to whether several pending military tribunal proceedings will continue and what exact role the federal courts will play in this matter in the future. The Supreme Court ruling has also prompted comments by the presidential candidates of both parties and it appears that it will become an issue in the pending general election.

Indiana v. Edwards, 128 S. Ct. 2379 (June 19, 2008)

In a 7-2 decision, the United States Supreme Court determined that a mentally ill defendant who is nonetheless competent to stand trial is not necessarily competent to dispense with a lawyer and represent himself. The seven-judge majority found that the trial judge was within his prerogative to assign counsel and no constitutional violation occurred in denying the defendant his right to defend himself. Justice Breyer wrote the majority opinion in which Justices Roberts, Alito, Ginsburg, Stevens and Souter joined. Justices Scalia and Thomas dissented, arguing that the right to self-representation was fundamental and should not be abridged. This case generated substantial interest in the criminal law area with 19 states filing *amicus curiae* briefs in support of the position taken by the State of Indiana. Although we were able to report on the holding in this case in our last issue, the decision was reached just as we were going to press and we were not able to provide the full details regarding the case. We are therefore providing the information herein.

Kennedy v. Louisiana, 128 S. Ct. 2641 (June 25, 2008)

In a 5-4 decision, the United States Supreme Court declared that the imposition of the death penalty for the crime of child rape violates the Eighth Amendment's ban on cruel and unusual punishment. The five-judge majority in effect declared that the death penalty can be instituted only in situations involving the killing of an individual. Justice Kennedy, who issued the majority opinion, stated that there was a distinction between intentional first degree murder and non-homicide crimes against individual persons.

In the case at bar, Louisiana had adopted the death penalty for individuals who committed rape of children under the age of 12. Several other states had similar statutes. The decision was another example of a closely divided court, and generated substantial public comment. Joining Judge Kennedy in the majority were Justices Ginsburg, Souter, Breyer and Stevens.

Justice Alito wrote a vigorous dissent, stating that the majority opinion contained no coherent explanation for the result reached. Joining Justice Alito in dissent were Justices Thomas, Scalia and Roberts. Although this term the Supreme Court has issued fewer 5-4 decisions than in the past, it appears that the Court continues to be sharply divided on major issues, and that Justice Kennedy continues to occupy the critical swing vote in many of these close decisions.

District of Columbia v. Heller, 128 S. Ct. 2783 (June 26, 2008)

In another 5-4 decision with historical consequences, the United States Supreme Court held for the first time that the Second Amendment protects an individual right, and not merely a collective or militia right, to keep and bear firearms for the purposes of self-defense. The result of the Court's decision was to strike down the tough 32-year-old ban on handguns which had operated in Washington, D.C. The majority ruling specifically noted that the states and federal government were still free to impose limited and reasonable restrictions on the carrying of firearms in certain instances, but that a complete ban on an individual's right to possess a firearm was unconstitutional. The majority opinion was written by Justice Scalia, who was joined by Chief Justice Roberts and Justices Thomas, Alito and Kennedy. Once again Justice Kennedy became the critical swing vote on this important issue.

A vigorous dissenting opinion was issued by Justice Stevens, who argued that the Second Amendment related only to militia gun use and did not involve an individual right to the possession of a weapon. Justice Stevens was joined in dissent by Justices Breyer, Souter and Ginsburg. Both the majority and dissenting opinions predicted that additional judicial rulings will be necessary to define the precise guidelines for gun possession and gun control within the nation.

Giles v. California, 128 S. Ct. 2678 (June 25, 2008)

In a 6-3 decision, the United States Supreme Court reaffirmed the right of a criminal defendant to confront witnesses against him, even when the defendant is responsible for the witness's absence. In the case at bar, the trial court had allowed prosecutors to introduce statements that the murder victim had made to a police officer responding to a domestic violence call. Based upon the United States Supreme Court decision in *Crawford v. Washington,* 541 U.S. 36 (204), the defendant argued that he was denied his fundamental right of confrontation. The State of California had argued that the defendant had forfeited his right to raise the issue, since he was in effect responsible for the absence of the witness. The Supreme Court's majority opinion held, however, that the defendant's actions were not designed to prevent the witness from testifying, and therefore a blanket forfeiture rule could not be applied. Justice Scalia issued the majority opinion and was joined by Justices Roberts, Alito, Thomas, Souter and Ginsburg. Justice Breyer issued a dissenting opinion in which Justices Stevens and Kennedy joined.

Justices to Hear Significant Evidence Suppression Case in October

The case of *Herring v. United States*, which involves the question of whether the United States Supreme Court will further limit the use of the exclusionary rule in search and seizure cases, is scheduled for oral argument on October 7, 2008. The case involves an individual who was searched by police officers based upon a mistake, that he was subject to an outstanding arrest warrant as a result of careless record-keeping by another police department.

Law enforcement officials had claimed that they believed they had a good-faith basis for the stop and subsequent search, and that the suppression of the discovered evidence should not be subject to the exclusionary rule. A decision in this matter is expected by the end of the year, and another close vote is anticipated. We will keep our readers advised of developments.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from May 9, 2008 to September 3, 2008.

People v. Moye (N.Y.L.J., May 9, 2008, pp. 1 and 6)

In a 3-2 decision, the Appellate Division, First Department, reversed a defendant's marijuana conviction because the prosecutor committed an egregious violation of the unsworn witness rule by vouching for a police officer's testimony. Justice Catterson, writing for the majority, found that reversible error had occurred when the prosecutor, in an attempt to reconcile the police officer's statements with conflicting testimony from another witness, interjected his personal integrity and the veracity of the District Attorney's office into his summation in order to bolster the credibility of the officer. Justices Freedman and Buckley joined the majority opinion.

Justice McGuire issued a vigorous dissent, claiming that the prosecutor's remarks were in response to statements by defense counsel which attacked the personal integrity of the prosecutor. Defense counsel had not only attacked the credibility of the officer but had suggested that the prosecutor was complicit in the officer's false statements. Justice Nardelli joined Justice McGuire in dissent and based upon the sharp split in the court, it appears this case is headed for review by the New York Court of Appeals.

People v. Williams (N.Y.L.J., May 23, 2008, pp. 1 and 2, and May 28, 2008, p. 26)

In a 3-2 decision, the Appellate Division, First Department, reversed a defendant's conviction for filing a false statement because she was not present at sidebar conferences during which three potential jurors were questioned in the presence of the judge. The Appellate Division majority held that Court of Appeals precedents established that a defendant has a fundamental right to be present, including during sidebar discussions with prospective jurors concerning their background, bias and ability to be impartial. The majority opinion was written by Justice Acosta and was joined in by Justices Mazzarelli and Andrias. A dissenting opinion was issued by Justice Buckley, which was joined in by Justice Williams. The dissenting Justices argued that rather than ordering an immediate reversal, the matter should be remitted for a reconstruction hearing to determine whether the defendant was able to see and hear what transpired during the sidebar conferences.

People v. Goldstein (N.Y.L.J., May 23, 2008, pp. 1 and 2, and May 29, 2008, p. 26)

In a 3-2 decision, the Appellate Division, Third Department, upheld a depraved indifference conviction of reckless endangerment for speeding through a work zone during a police chase in the year 2000. The defendant, after entering a plea, had attempted to withdraw his plea arguing that during the plea colloquy the defendant indicated that he had a memory lapse about nearly hitting the road crew and that this was inconsistent with acting with depraved indifference. The three-judge majority, in an opinion written by Justice Rose, pointed out that the defendant had specifically admitted that he was operating a large sports utility vehicle at a high rate of speed through a highway construction zone and he knew that there were workers and flag people directing traffic at the time. The majority opinion thus concluded that the defendant's plea adequately established the elements of depraved indifference. The majority opinion was joined in by Justices Peters and Kavanaugh. A dissent was issued by Justices Lahtinen and Mercure, who argued that some of the defendant's responses during the plea colloquy cast significant doubt on whether the defendant acted with the requisite culpable mental state to commit reckless endangerment in the first degree. Based upon the split within the Court and the recent case law regarding depraved indifference, it appears likely that this case will ultimately be decided by the New York Court of Appeals.

People v. Rashan (N.Y.L.J., May 30, 2008, p. 26)

In a unanimous decision, the Appellate Division, First Department, rejected a people's appeal and held that cocaine which was seized from the defendant had been properly suppressed by the trial court. The Appellate Division found that police officers had initially detained the defendant on a routine traffic stop and had continued to detain him when no further identifiable grounds for the stop remained. Under these circumstances and pursuant to established legal principles, the defendant's motion to suppress had been properly granted.

People v. Dolan (N.Y.L.J., June 5, 2008, pp. 1, 8 and 28)

In a 4-1 decision, the Appellate Division, Third Department, held that a trial judge did not err in declining to charge a jury with a renunciation defense at the trial of a defendant who broke off an assault against a former girlfriend and was soon thereafter stabbed in the chest. The majority held that a defendant claiming renunciation must prove the existence of that defense by a preponderance of the credible evidence. In the case at bar the evidence did not support the conclusion that the defendant when he ended his attack on the victim and left the scene did so because he had a change of heart. The Court's majority opinion was written by Justice Kavanaugh and was joined in by Justices Spain, Cardona and Carpinello. Justice Stein dissented, stating that he found credible evidence that the defendant had manifested a voluntary and complete renunciation of his original plan to abduct the victim and that therefore a renunciation charge should have been given to the jury.

People v. Weaver (N.Y.L.J., June 9, 2008, pp. 1 and 6, and June 10, 2008, p. 26)

In a 4-1 decision, the Appellate Division, Third Department, held that the warrantless use by police of a global positioning device on a defendant's vehicle did not violate the driver's right to privacy or any Fourth Amendment rights under either the U.S. Constitution or the New York State Constitution. The majority opinion was written by Justice Rose and was joined in by Justices Cardona, Carpinello and Malone. Justice Stein dissented, stating that he found that the use of the GPS device on the defendant's vehicle was an unreasonable search and seizure under Article 1, Section 12 of the New York State Constitution. The decision in this case appears to have been one of first impression and the matter may be taken up by the New York Court of Appeals.

People v. Waite (N.Y.L.J., June 9, 2008, pp. 1 and 27)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's conviction and ordered a new trial for a defendant whose waiver of the right to a public trial was erroneously treated by the trial court as a simultaneous waiver of the defendant's constitutional right to confront witnesses. The Appellate Division noted that under the Court of Appeals ruling in *People v. Hinton*, 31 N.Y.2d 71 (1972), a showing that the courtroom should be closed to safeguard the identity of officers could also demonstrate grounds for anonymous testimony. In the *Waite* case, however, no evidentiary showing was made, and a new trial was therefore warranted.

People v. Buchanan (N.Y.L.J., June 10, 2008, pp. 1 and 2, and June 12, 2008, p. 26)

In a 3-2 decision, the Appellate Division, Fourth Department, held that a defendant's due process rights were not violated when the trial judge required that he wear a stun belt throughout the trial. The defendant had been charged with murdering a teenage girl and the trial judge in question had a policy of using stun belts as a restraint with respect to all serious cases. Based upon the U.S. Supreme Court decision in *Deck v. Missouri*, 544 U.S. 622 (2005), the majority concluded that the use of the stun gun belt was justified. The majority pointed out that the stun belt was not visible and that the defendant's right to be presumed innocent was not implicated. The majority opinion was written by Justice Scudder and was joined in by Justices Hurlbutt and Smith. The dissenting opinion joined in by Justices Fahey and Gorski argued that the Court's blanket policy of using a stun belt was directly contrary to the requirement that there must be a case-by-case determination of the necessity to use such a device with respect to the particular defendant.

People v. Irvine (N.Y.L.J., June 12, 2008, p. 31)

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's conviction on an attempted sodomy charge and remitted the matter for a new trial, finding that the trial court had committed reversible error in requiring that the defense turn over privileged notes. The notes in question were defense counsel's notes taken during interviews with the defendant. The People used the notes to cross-examine the defendant and to elicit a testimony harmful to the defense. The Appellate Division found that there was no evidence that the defendant waived his attorney-client privilege and that the notes in question should have been deemed confidential and privileged. Thus, even in the absence of defense objection a reversal was warranted in the interest of justice.

People v. Hoffler (N.Y.L.J., June 16, 2008, pp. 1 and 2, and June 18, 2008, p. 26)

In a unanimous decision, the Appellate Division, Third Department, reversed a defendant's conviction for murder in the first degree and ordered a new trial. The trial court had failed to administer an oath under which prospective jurors pledged to answer questions truthfully. This error led to a failure to provide a vital constitutional safeguard for juror impartiality and made a new trial necessary. The Court's opinion was written by Justice Peters.

People v. Robinson (N.Y.L.J., June 16, 2008, p. 1 and June 19, 2008, p. 27)

In a unanimous decision, the Appellate Division, Second Department, upheld a defendant's drunken driving conviction and ruled that an individual breathalyzer's "source code" is subject to discovery, but that the State's inability or failure to provide the code to the defendant did not deprive him of a fair trial. The Appellate panel found that the defendant in question failed to present any specific evidence to support his speculative contention that the source code contained software bugs and that he needed the source code to challenge the accuracy of the test.

People v. Valdez (N.Y.L.J., June 18, 2008, pp. 1 and 3, and June 23, 2008, p. 18)

In a unanimous decision, the Appellate Division, First Department, upheld a defendant's conviction even though the prosecutor had improperly bolstered the credibility of the sole identifying fact witness. In a decision written by Justice Lippman, the Court characterized the prosecutor's efforts as attempting to elicit background character evidence regarding the witness in question. The Court found that, although this was improper, the testimony was largely irrelevant, and since the defendant had failed to object and had not preserved the issue for review as a matter of law, the Court would decline to exercise its interest-of-justice discretion. In declining to exercise its interest-of-justice discretion, the Court concluded it could not find that the defendant had been prejudiced by the error which had occurred.

People v. Wilson (N.Y.L.J., June 19, 2008, p. 29)

In a unanimous decision, the Appellate Division, Third Department, upheld a defendant's conviction and found that the trial court had properly exercised its discretion in denying a for cause challenge of prospective juror. The juror in question had expressed inconvenience and the inability to run his business efficiently while on jury duty. The Appellate Court found that this was not a sufficient reason to sustain a for cause challenge and that the juror in question had stated that he would serve if chosen.

People v. Florestal (N.Y.L.J., June 25, 2008, pp. 1 and 7, and June 30, p. 26)

In a unanimous decision, the Appellate Division, First Department, reversed a defendant's murder conviction because the trial judge had instructed the jury to determine whether the mother had acted with depraved indifference by assessing the objective circumstances surrounding her acts. The Court held that under recent rulings from the New York Court of Appeals the judge's instructions were erroneous, and the jury should have been instructed to examine the mental state of the woman.

People v. Wells (N.Y.L.J., July 1, 2008, pp. 1 and 10, and July 2, 2008, p. 29)

In a unanimous decision, the Appellate Division, First Department, upheld a defendant's conviction for depraved indifference murder. In the case at bar, the defendant, while he was severely intoxicated, recklessly drove his vehicle through a densely populated area at a high rate of speed. The Court concluded that this type of conduct was the very epitome of depraved indifference to human life. The Court also found that the trial judge had properly refused to entertain the defense of intoxication to negate the culpable mental state of depraved indifference.

People v. Passino (N.Y.L.J., July 10, 2008, pp. 2 and 28)

In a 4-1 decision, the Appellate Division, Third Department, held that an inmate's admission during an in-prison interview with an investigator that he had sent Governor Pataki a letter containing white powder was properly admitted into evidence at the defendant's trial. Although the defendant had not been given his *Miranda* warnings, he was told before any statements were made that he was free to leave the room. The Appellate panel thus found that his subsequent statements were voluntary and not custodial. Under these circumstances, no suppression was warranted and the defendant's conviction was upheld. Justice Spain dissented, finding that the defendant made the statements in question under the compulsion of being a confined inmate, and that a finding of voluntariness was not justified.

People v. Loyd (N.Y.L.J., July 10, 2008, p. 2)

In a unanimous decision, the Appellate Division, Third Department, ordered a resentencing for a defendant who had received more prison time when he sought resentencing under the Drug Law Reform Act, which had been passed in 2005. The defendant had been serving a sentence of 7 to life, and after seeking resentencing, his sentence was adjusted to two consecutive terms of 5 years, so that in effect his minimum term was increased. The Appellate Panel determined that under the 2005 resentencing statute the law allows a defendant to withdraw his sentencing request if he is dissatisfied with the new sentence, and that this had not occurred with respect to the defendant in question. Under these circumstances it was necessary to remit the defendant for possible resentencing.

People ex rel David NN v. Hogan **(N.Y.L.J., July 15, 2008, pp. 1 and 2, and July 17, p. 26)**

In a unanimous decision, the Appellate Division, Third Department, held that the Office of Mental Health retains the authority to seek the civil confinement of sex offenders it once held in its facilities, even if the offenders are in the custody of other agencies or back in the community. The Court ruled that the Civil Confinement Law passed in New York State in 2007 gave the Office of Mental Health the authority in question and that agency continues to have jurisdiction over the defendant.

People v. Gordon **(N.Y.L.J., July 15, 2008, p. 2)**

In a unanimous decision, the Appellate Division, Third Department, held that a term of imprisonment could not be substituted for the one year of interim probation the defendant had agreed upon when pleading guilty to a charge of driving while intoxicated. In the case at bar, after the defendant had entered the plea in question, he was subsequently arrested for another drunk driving offense at the time of sentence. The Court, noting the subsequent arrest, refused to abide by the original plea agreement and imposed a sentence of two to six years in prison. The Appellate Panel held that at the time of the original plea, the defendant was never informed that the plea agreement would be altered if any subsequent charges were involved. The Third Department thus concluded that the sentencing court could not subject the defendant to the enhanced sentence unless it had offered him the opportunity to withdraw his plea. The matter was thus remitted to the sentencing court for either the imposition of the originally promised term or the withdrawal of the original guilty plea.

People v. Glenn **(N.Y.L.J., July 28, 2008, pp. 1, 7 and 29)**

In a 3-1 decision the Appellate Division, Second Department, upheld the denial of a suppression motion involving a plastic bag containing marijuana that a police detective had testified he had spotted across four lanes of traffic and one lane of parking. The majority opinion determined that the Hearing Court was in the best position to assess the demeanor, testimony and credibility of the witnesses and that credibility determinations by a Hearing Court are accorded great deference and may not be disturbed unless clearly unsupported by the record. The three-judge majority consisted of Judges Rivera, Miller and Dillon. Justice Belen issued a strong dissent, stating that common sense dictated the complete improbability, if not outright impossibility, of the detective's testimony.

For Your Information

New Criminal Law Signed by Governor Paterson

On May 15, 2008, Governor Paterson signed into law a bill which makes it a felony to display a noose to threaten or harass a person. The new law adds displaying a noose to threaten or harass someone based on racial or other types of bias to the aggravated harassment statute, which already covers the displaying of swastikas or burning crosses. The new legislation is one of the first bills signed by the new Governor. A conviction for the new crime carries up to 4 years in prison.

New York City Commences 7-Day-a-Week Processing for Juvenile Arrestees

New York City Mayor Michael R. Bloomberg announced that beginning in June 2008, the City will also process juvenile arrests on weekends. As a result, the City will become the first in the State to offer 7-day-per-week processing for minors, a standard already in place for adult defendants. Prior to the new procedures announced by the Mayor, juveniles arrested on weekends were often detained as long as 48 hours. The Mayor noted that the City's juvenile delinquency system processes close to 12,000 kids each year. The new procedures will enable many of the young arrestees to be sent home in a more expeditious fashion and to receive appropriate support services. The Legal Aid Society, which represents approximately 90% of the children who appear before the City's Family Court, hailed the implementation of the new system as a landmark, which will ensure that children will be treated fairly in the juvenile justice system and promptly brought before a judge when they are accused of misconduct.

New York State Reports Results of Civil Confinement System During Its First Year of Operation

The New York State Division of Criminal Justice Services in late May issued a report with respect to the operation of the civil commitment system which has been in place since March 2007, when the Governor signed new legislation involving a new Article 10 of the Mental Hygiene Law. The report stated that during the first 12 months the statute was in effect, there were 1,726 individuals who were screened for eligibility in the civil commitment system. Of this group, the Attorney General's Office filed petitions for civil commitment against 196 of these individuals. Of these 196, 33 agreed to secure facility confinement, 20 agreed to strict and intense supervision and treatment. Only 12 management trials were required to be held. From these trials, seven offenders were found to be in need of management by the Court, four were found not in need. One case ended with a hung jury and is to be re-tried. Only three offenders were confined in secure facilities by judges.

The small number of required trials appears to have been an unexpected result and appears to be based upon the State exercising a more selective process before attempting to impose civil commitment. Some portions of the civil commitment law have also been placed in legal jeopardy by recent court decisions. It has also been estimated that it would cost approximately $200,000 a year to civilly confine an offender. Based upon the continuing legal cloud over the enacted legislation and the expense involved, it appears that the State has determined to move slowly and carefully during the first year the system has been operating. We will keep our readers advised of further developments with respect to the civil commitment system for convicted sex offenders.

New York State Bar Association Issues New Handbook for Appeals to the New York Court of Appeals

In May, the New York State Bar Association announced the availability of the third edition of the *Practitioner's Handbook for Appeals to the Court of Appeals*. This informative and valuable guide is authored by the Hon. Alan D. Scheinkman, currently a Justice of the New York Supreme Court in Westchester County, and Professor David D. Siegel, Distinguished Professor of Law at Albany Law School. The *Handbook* covers such important topics as the jurisdiction of the Court, the perfecting of a civil appeal, brief writing and oral argument. The various procedures for the making of different types of motions to the court are also covered. This *Handbook* provides practical procedural guidance, updated case and statutory references and includes revised appendices, which all assist the practitioner in handling an appellate matter in the New York Court of Appeals. The *Handbook* is listed at a price of $57, with a special price of $48 for members of the New York State Bar Association. The *Handbook* can be ordered by writing to the Registrar's Office at the New York State Bar, or by placing a telephone order by calling 1-800-582-2452 or 1-518-463-3724.

Congress Finally Adopts Compromise Wiretap Law

In late June Congress finally adopted a compromise bill relating to the government's wiretapping powers. The new bill grants legal immunity to phone companies that took part in President Bush's program of eavesdropping without judicial warrants, which took place after the 9/11 attacks. The government was also granted additional powers to spy on terrorism suspects. The law which was finally adopted came after many months of disputes with the Democratic majority in the House and Senate. The deadlock had left a void of more than five months in the appropriate legal procedures to be followed, and the compromise bill was generally hailed as an acceptable means of balancing civil liberties concerns with national security interests. The new wiretapping bill which was signed by President Bush on July 10, 2008 will expire at the end of 2012, and it can be either renewed or modified by Congress. The compromise bill contains some additional judicial review of the wiretapping procedures and internal review within the agencies themselves by various inspector generals.

FBI Reports Slight Decrease in Violent Crime in 2007

At the end of June the FBI issued its final report relating to crime statistics for the year 2007. It was reported that the overall number of violent crimes declined by 1.4% from 2006. Property crimes were also down 2.1% from last year. The 2007 decline constituted a reversal from the two prior years where an increase in violent crime had occurred. With respect to specific crimes, the FBI report indicated that theft of vehicles had dropped by 8.9% from the prior year, rapes were down 4.3% and murders had dropped by 2.7%. The latest FBI figures are good news since law enforcement officials had been increasingly concerned regarding expected increases in the crime rate in the coming years.

Any Death Penalty in New York State Appears Dead

Despite the fact that the State Senate has repeatedly supported a restoration of a death penalty statute in New York State, the State Assembly has refused to consider any such bill. During this year's legislative session the Assembly, for all practical purposes, allowed any consideration of the death penalty to simply die in committee by refusing to have the members of the Assembly Codes Committee vote and report on a bill. Rather the Committee simply voted to hold the bills, thereby blocking any legislative action. Since the restoration of the death penalty statute, which was subsequently found unconstitutional by the New York Court of Appeals, the number of homicides in New York State has substantially dropped and the public's attitude has softened. As a result, there is presently no great public pressure for the death penalty to once again be restored.

State Commission on Judicial Conduct Issues Its 2007 Statistics

The State Commission on Judicial Conduct recently issued its report detailing its activities for the year 2007. The Commission reported that in 2007 it had received 1,711 complaints. Four hundred thirteen preliminary inquiries were conducted regarding the complaints in question, and 192 investigations were initiated. Of the 27 public decisions issued, five resulted in removals from office and three judges stipulated to leave the bench. Ten public censures were also issued as well as nine public admonitions. There were also 25 confidential cautionary letters issued. The Commission also reported that because of its increasing volume of work, the Commission's budget for the fiscal year 2008-2009 was increased to $5.1 million.

Judicial Pay Increases

As of the end of June, the issue regarding judicial pay increases has still not been fully resolved. Although a judicial decision had been issued in favor of the judiciary with respect to their quest for judicial pay increases, the state legislature had not acted on any pay increase when it ended its legislative session prior to taking its summer recess. The initial Supreme Court decision finding a constitutional violation by the legislature is heading for appellate review, and whether litigation or legislative action will eventually resolve the dispute appears uncertain. Some have raised questions regarding whether judges should be ruling on their own request for judicial increases and the current economic crisis in New York State has imposed an additional barrier to any increased public expenditures.

U.S. Prison Population Continues to Rise

A recent study by the PEW Center found that in 2006 a little more than 2 million were incarcerated in the nation's prisons. This represented approximately 1 in 100 adults in the country. The number of people in prison has dramatically increased in the last 25 years, rising from 420,000 in 1980 to 2.1 million in 2006. New York State currently has approximately 65,000 inmates in its prison facilities. New York over the last several years has been successful through certain changes in sentencing procedures and a decrease in the crime rate to somewhat reduce its prison population. Some of the other large states in the country, however, have not been as fortunate. The prison population in Texas, for example, is presently listed at 171,000. Florida's inmate population is also listed at 97,000. The booming prison population is increasingly raising concerns, since its effects have wide-ranging economic and social results for our nation.

Chief Judge Kaye to Retire at End of Year, Governor in Process of Selecting Replacement

Chief Judge Judith Kaye reached age 70 in August and as a result must retire from the Court at the end of the year. Judge Kaye has served on the New York Court of Appeals for 25 years. She was initially appointed by Governor Cuomo in 1983 and was designated as Chief Judge in 1993. The Commission on Judicial Nominations has already been reviewing candidates for the Chief Judgeship and will be submitting recommendations for the Governor's consideration in the near future. We will keep our readers advised regarding the selection of a new Chief Judge.

New York City Adopts Final 2009 Budget for Prosecutors and Legal Aid

In our last issue, we reported that in early July, after compromises agreed upon by the Mayor's Office and the City Council, the budgets for prosecutors and defense agencies were set at roughly the same level as for 2008. Last-minute developments resulted in the 2009 budgets actually being slightly less than the level set for 2008. The grim economic forecasts influenced the City Council at the last minute to slightly modify the figures that had initially been considered. As a result, the budget for the Legal Aid Society for the year 2009 has been set at $83.3 million, down from $85.4 million in 2008, or a decline of 2.5%.

The overall budget for the City's six prosecutors was set at a total of $249.9 million for the year 2009, representing a decrease of 2.7% from the $256.8 million received in 2008. The budget breakdown for each of the six prosecutors' offices is set forth below:

Prosecutors	2009 Budget	2008 Budget	% Change
Manhattan	$72.1	$74.7	–3.5%
Brooklyn	$72.3	$74.4	–2.8%
Bronx	$42.6	$43.7	–2.5%
Queens	$40.2	$40.4	–0.5%
Staten Island	$7.2	$7.5	–4.0%
Special Narcotics	$15.5	$16.1	–3.7%
Total	**$249.9**	**$256.8**	**–2.7%**

New York City Population Continues to Increase

Despite the fact that many of our nation's older cities have seen declines in population, New York City continues to experience a significant population growth. It was recently reported by the U.S. Census Bureau that from July 2006 to July 2007, New York experienced a population increase of 23,960. New York was number six with respect to population increases among the nation's largest cities. The Census Bureau also reported that New York continues to rank as the nation's largest city, with a current population of 8,274,527. New York thus surpasses Los Angeles, which is the second largest City, by nearly 4.5 million people. The census report also indicated that some of the southern and western states that have seen large population increases in recent years may be nearing a leveling off period, particularly with respect to Florida, whose population growth has slowed considerably from 2006 to 2008.

New Appellate Division Appointments

On July 23, 2008, Governor Paterson announced that he had appointed Justice Helen E. Freedman to the Appellate Division, First Department. Justice Freedman has served on the bench for 25 years and most recently has sat in the Commercial Division in the Supreme Court in Manhattan. Justice Freedman is 65 years of age and is a graduate of New York University School of Law. Her appointment to the Appellate Division, First Department, brings that Court to its full complement of 18 Justices. During the last year and a half former Governor Eliot Spitzer and now Governor Paterson have made five appointments to the various Appellate Divisions. Thus, at the present time, there is only a single vacancy in the Appellate Divisions, to wit, in the Third Department. It is expected that vacancy will be filled shortly.

Sentencing Commission Delays Issuance of Its Final Report

The Sentencing Commission initially established by former Governor Eliot Spitzer had issued its preliminary report in October 2007 and was to have issued its final recommendations by March 1, 2008. However, due to the responses that have been received to its preliminary draft and the numerous recommendations made by various groups especially with respect to modifications to the drug statutes, the Commission requested an extension of time to file its final recommendations. In addition, the abrupt resignation of former Governor Spitzer and the designation of Governor Paterson created some confusion as to the continued operation of the Commission and its makeup. This situation was apparently resolved in late July, when Governor Paterson signed an executive order extending the life of the Commission and directing that the Commission continue its work with its present composition of commissioners. The Commission is now expected to issue its final recommendations by the end of the year. The Criminal Justice Section has been closely following the work of the Sentencing Commission and at the annual January 2008 meeting devoted a significant portion of its CLE program to the Commission's preliminary recommendations. We will continue to follow this matter and will report any new developments to our members.

U.S. Supreme Court Decision on Washington, D.C. Gun Law Leads to Attacks on New York Statutes

On June 26, 2008, the United States Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783, the United States Supreme Court in a 5-4 decision held that under the Second Amendment an individual right to possess a weapon for the purposes of self-defense existed and that a statute which placed a total restriction on such possession was unconstitutional. Utilizing this decision, many criminal defense lawyers in New York State have now begun to attack charges of criminal possession of a weapon involving various defendants. The majority opinion of the United States Supreme Court did specifically state that reasonable restrictions on the possession of a weapon could be enforced by the States, so that it appears unclear what, if any, New York statutes are subject to attack. As was predicted in the various opinions issued in the Supreme Court case, it may take future decisions to clarify the exact parameters under which the individual right to possession of a weapon can be restricted. Based upon the *Heller* decision, however, it may be a good idea for defense attorneys to consider raising the issue if warranted. It appears that many defense lawyers are already doing so.

District Attorney Donovan Becomes New President of the District Attorneys Association

On Saturday, July 26, 2008, the District Attorneys Association of New York installed Staten Island District Attorney Daniel M. Donovan, Jr. as its new President. Mr. Donovan has served as the District Attorney in Staten Island since 2003, having been reelected in 2007. He will serve as President of the District Attorney's Association for a one-year period. We congratulate District Attorney Donovan on his new post and wish him well in his new position.

Attorneys Warned to Register with Office of Court Administration

In what appears to be a continuing failure on the part of many attorneys, hundreds of attorneys have again failed to register in the various Appellate Divisions within the required time sequence. Several of the Appellate Divisions have taken the extreme remedy of suspending attorneys from practice for failing to comply with the registration requirements. In late July, the Appellate Division, Fourth Department, publicly announced that 200 attorneys in that Department had been suspended for failing to register. The names of these attorneys were listed in a Court Note published in the *New York Law Journal*. All attorneys are warned to be aware of the possible penalties for failure to register and should fully and promptly comply with the registration requirements.

Integrity Commission Issues Charges Against Former Spitzer Officials

The State Commission on Public Integrity in late July 2008 charged four former officials in the Spitzer administration with violations of the Public Officers Law with respect to allegations that the State Police were improperly utilized to gather harmful information on former Senate Majority Leader Joseph Bruno. The Commission charged that the four officials misused their official positions to cause the State Police to engage in conduct that was wholly unrelated to the statutory mandate of the State police to detect and prevent crimes. The penalties for the charges issued are civil in nature and involve fines of $10,000 to $40,000.

The four officials charged were Darren Dopp, Spitzer's press secretary, Preston Felton, the former Acting Superintendent of the State Police, Richard Baum, Spitzer's secretary, and William Howard, who served as the Governor's liaison with the State Police. Some of the four officials have publicly denied any wrongdoing and have issued statements that they will contest the charges in question. They have basically asserted the position that they acted under the direction of Governor Spitzer, who has himself denied any knowledge of the actions taken. Darren Dopp, in particular, has recently asserted that Herbert Teitelbaum, the Executive Director of the Commission on Public Integrity, was fully made aware of Governor Spitzer's involvement and refused to consider this information. Mr. Dopp is quoted in a *New York Law Journal* article of July 21, 2008 as stating, "At some point we just lost confidence that Mr. Teitelbaum was being objective." Mr. Teitelbaum responded to these claims in an article in the *New York Law Journal* of July 28, 2008. It is expected that the fallout from the Spitzer administration will continue and that further developments with respect to the alleged ethics violations will be forthcoming. We will keep our readers advised.

About Our Section and Members

Criminal Justice Section Plans Fall and Winter Activities

Plans are currently in the works for special CLE programs to be held in the fall and during our Annual Meeting in January. Details regarding these programs will be provided to our members through separate mailings.

Criminal Justice Section Budget

Section Chair Jean Walsh recently reported to the Executive Committee that the Section is financially sound and, in fact, this year we expect a small surplus, which will provide needed support for some of our larger criminal justice projects. We also expect to dedicate a portion of the surplus to membership recruitment activities.

Tentative Executive Committee Meeting Schedule for 2008–2009

The Executive Committee has established a tentative schedule as listed below for the holding of its Executive Committee meetings for the 2008–2009 year. Members wishing to have any issue addressed at any of the upcoming Executive Committee meetings should directly contact one of the Section officers or their District representative. The schedule of tentative meetings is as follows:

Wednesday, November 19, 2008 at 6:00 p.m. (NYC)

Friday, January 9, 2009 at 2:00 p.m. (TBA)

Thursday, January 29, 2009 at 8:00 a.m. (Annual Meeting, NYC)

Wednesday, April 1, 2009 at 6:00 p.m. (TBA)

Wednesday, May 27, 2009 at 6:00 p.m. (NYC)

The Criminal Justice Section Welcomes New Members

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

Jason Reid Adams
David Allen
Daniel R. Alonso
J. Patten Brown
Frank V. Carone
Doris M. Carrasquillo
Chloe Frances Cockburn
John Lawrence Cook
Brian Michael Derr
Richard DeSimone
Frank J. Ducoat
Anthony P. Ellis
Adam Joshua Fee
Andrew Scott Gable
Kenneth M. Gazzaway
Timothy Patrick Gumkowski
William Hauptman
Joy Honigsberg
Debra A. James
Debra Eichorn Jaroslawicz
Dianne Jauregui
Sabino Jauregui
Peter W. Johnston
Janette L. Jurado
Svetlana Khvalina
John G. Martin
Peter Henry Mayer
Maureen McBride
Robert S. Meyers
Joanna R. Munson
Meghan Nayak
Shanise Jasmine O'Neill
Angela Olszewski
JoAnne Page
Brian Yardley Parker
Adam Rodriguez
Yvette Rodriguez
Yana A. Roy
Andrew J. Schatkin
Aaliyah Christine Shorte
Frank W. Smithson
Tina K. Sodhi
Arun Srinivas Subramanian
Amy Deborah Weiner
Myongjae Matthew Yi

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Capital Crimes
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