NYSBA WINTER 2008 | VOL. 6 | NO. 1

New York Criminal Law Newsletter

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

Inside

NYSBA

Message from the Chair

I would like to report to you regarding our Section's recent activities on criminal justice issues. The Executive Committee of the Criminal Justice Section met on September 20, 2007, and spent much of the evening discussing two important issues: 1) the Report by the New York State Bar Association's Task Force on Town and Village Justice Courts and 2) NYSBA's support of the DeFrancisco-Weprin Bill regarding cameras in the courtroom, which is a bill that is supported by Governor Spitzer.

The Report on the Justice Courts points out that a significant number of justices presiding over our state's town and village justice courts are non-lawyers. The Report strongly recommends that all justices presiding over town and village justice courts be attorneys. A constitutional amendment would be necessary to bring about this change in the justice court system. The CJS Executive Committee was informed that the Association of the Bar of the City of New York ("City Bar") was prepared to publish their report on town and village justice courts with additional recommendations for improvement of the justice court system. The CJS Executive Committee decided to postpone its vote on the NYSBA Report until it had an opportunity to review the City Bar Report. The CJS Executive Committee believes that the town and village justice court system is seriously in need of reform and should be upgraded to operate in a fair and impartial manner consistent with the law and the constitution. The CJS Executive Committee's position on the Report will be discussed in the next *Newsletter*.

With respect to the issue of NYSBA's support of the DeFrancisco-Weprin Bill on cameras in the courtroom, it was noted that in 2001, NYSBA took the position that cameras should be allowed in the courtroom, but conditioned its approval of such media coverage on a series of preconditions and protections outlined in its reports to the House of Delegates (March 31, 2001). Recently, NYSBA leadership gave its Report to the House of Delegates (March 31, 2001). NYSBA leadership then gave its support to the DeFrancisco-Weprin bill (S.2067 / A.3950). Thereafter, in June 2007, the CJS Executive Committee unanimously voted in favor of a resolution requesting the NYSBA leadership to reconsider its support of the bill, as it appeared substantially inconsistent with NYSBA's formal position taken in 2001. Upon receipt of the resolution, NYSBA leadership and the NYSBA Executive Committee requested the CJS Executive Committee to compare NYSBA's original position on cameras in the courtroom with the bill and report its findings to the NYSBA Executive Committee.

Also at the September meeting, the Hon. Leon Polsky presented a report ("the Polsky Report") to the CJS Executive Committee comparing NYSBA's formal position on cameras in the courtroom with the DeFrancisco-Weprin Bill. In his report, Polsky identified three main areas where the formal NYSBA position and the bill significantly differed. Polsky argued that these three major differences alone would have caused the House of Delegates to disapprove of the bill. As a result, the CJS Executive Committee voted to transmit the Polsky Report along with the June 2007 CJS resolution and a letter written by former NYS Senator John Dunne, which mirrored the CJS resolution, to the NYSBA leadership and the NYSBA Executive Committee urging the leadership to withdraw their support of the bill and to refrain from taking a position on any legislation that is inconsistent with the formal positions of the House of Delegates and NYSBA.

I would also like to inform you that the last meeting of our Executive Committee took place on Friday, November 30, 2007. Items on the agenda included several criminal justice initiatives and plans for our Section's Annual Meeting on January 31, 2008, at the New York Marriott Marquis. As in the past, the Annual Meeting will include an awards luncheon and a CLE program. We are endeavoring to obtain either Attorney General Andrew Cuomo or James Comey as our keynote speaker at the awards luncheon. We are also hoping to have Denise O'Donnell, Commissioner of the Division of Criminal Justice Services, as a participant in our CLE program. The CLE program will focus on various aspects of sentencing, including a discussion of the recently advanced recommendations and proposals from the Sentencing Commission.

Warmest wishes for a healthy and happy holiday season.

Jean Walsh

Message from the Editor

In this issue, we provide detailed information regarding recent legislation which affects the area of criminal law. Peter Dunne, who has written for our publication in the past on the issue of depraved indifference murder, focuses this time on the recently enacted Civil Commitment Procedures for sex offenders. In addition, Barry Kamins, who, over the course of several years, has provided updates on newly enacted legislation, continues this practice with respect to the 2007 legislative session. These two special feature articles should be of great value to our readers, providing informative and practical information for the everyday practitioner.

The New York State Court of Appeals, which resumed hearing cases in early September, has also issued several important decisions, including the last death penalty case, *People v. Taylor*. The United States Supreme Court, which commenced its 2007–2008 term in early October, also began issuing several decisions relating to criminal law. Summaries of these cases are discussed in our United States Supreme Court section.

As in the past, several items of interest are included in our "For Your Information" section, including a recent important change instituted by the Office of Court Administration involving criminal histories made available to the public. We also announce the reappointment of Judge Carmen Beauchamp Ciparick, who was reappointed to the Court of Appeals by Governor Spitzer in late November. We congratulate Judge Ciparick and look forward to her continued distinguished service.

As we approach our Annual Meeting in January, we also provide detailed information regarding the Section's activities and programs. We look forward to a large turnout of Section members at our meetings, CLE programs, and luncheon and thank our Section officers and Committee chairs for their work in setting up these activities.

We have received several favorable comments regarding our last issue. We appreciate comments from our readers and hope that you continue to enjoy future issues.

Spiros A. Tsimbinos

Request for Articles

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

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

www.nysba.org/CriminalLawNewsletter

New 2007 Legislation Affecting the Practice of Criminal Law

By Barry Kamins

Introduction

This article reviews changes in the Penal Law, Criminal Procedure Law, and several related statutes that were enacted in the last legislative session and signed into law by the Governor. What follows is an overview of the changes; the reader is encouraged to read the new statutes to appreciate their nuances and complexities.[1]

Procedural Changes

In the past session, the Legislature enacted a number of procedural changes. Clearly, the most dramatic change was the Sex Offender Management and Treatment Act (SOMTA) that addresses the dangers posed by recidivist sex offenders.[2] This legislation was a response to a recent New York Court of Appeals decision[3] that rejected the state's attempt to use the involuntary civil commitment procedures in Article 9 of the Mental Hygiene Law to detain sex offenders following their periods of incarceration. The new law affords sex offenders the procedural safeguards that the Court found lacking in the prior commitment process.

The legislation creates a new Article 10 of the Mental Hygiene Law, which is premised on a legislative finding that certain sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses.[4] To address this problem the legislation provides, under certain circumstances, either continued custodial detention or strict post-release supervision. Both the detention and the supervision can last for the remainder of the sex offender's life.

Nineteen other states have enacted similar legislation, and approximately 2,700 men are being held involuntarily in civil commitment programs around the country. In upholding the constitutionality of civil confinement statutes, the United States Supreme Court has held that such confinement is lawful if a sex offender is "mentally abnormal" and dangerous.[5] The Court later held that the state must be able to prove that such offenders have serious difficulty in controlling their behavior.[6]

New York's legislation applies to all persons convicted of felony sex offenses under Article 130 of the Penal Law. In addition, it applies to the newly created crime of a "sexually motivated felony." An individual is guilty of a sexually motivated felony when he or she commits one of 24 designated non-sex crimes for the purpose, in whole or part, of the offender's sexual gratification.[7] Thus, if a defendant commits the crime of Arson in the First Degree and the arson is sexually motivated, the defendant has committed a sexually motivated felony and is subject to the civil commitment law. Only defendants serving state prison sentences are subject to the law; thus, defendants sentenced to local jail terms or probation are not vulnerable.[8] The law also applies to all defendants serving state prison sentences who were sentenced *prior* to April 13, 2007, for any felony sex offense under Article 130 of the Penal Law or any designated non-sex crime that, by clear and convincing evidence, was sexually motivated.

The new law provides numerous procedural steps that must precede any finding that a sex offender should be civilly committed. First, at least four months prior to the anticipated prison release of a sex offender, the Department of Corrections must notify the Office of Mental Health and the Attorney General.[9] A committee of professional personnel will preliminarily review the file to determine if the offender should be referred to a "case review team" for further evaluation. The statute is silent on what factors the committee should use in determining that a further evaluation is necessary. Although an inmate may have a scheduled release date from prison, once his case is subject to review for possible civil management, his release can be postponed if the Attorney General files a securing petition with the court.

If the committee refers the case for further review, the offender (now known as the respondent) is notified and the matter is sent to a case review committee that is comprised of 15 members who are appointed by the Commissioner of the Office of Mental Hygiene.[10] Any three of these members may sit as a team to review a particular case. If the case review team determines that the respondent is a sex offender requiring civil management, it must notify the respondent and the Attorney General. The notification must be made within 45 days of the notice of the anticipated release of the offender.[11] It must be accompanied by a written report from a psychiatric examiner that includes a finding as to whether the respondent has a "mental abnormality" as defined in the statute.[12] If the case review team recommends that the Attorney General file a civil management petition, it is at the Attorney General's discretion whether to do so; if a petition is filed, it must be filed within thirty days.[13] A petition is filed in the Supreme Court or County Court in the county where the respondent is incarcerated.[14] If the case review team determines that the respondent does *not require* civil management, no petition will be filed.

Should a petition be filed by the Attorney General, the respondent is entitled to court-appointed counsel. No bail is permitted during civil management petition proceedings. Within 30 days of the filing of a petition, the court must conduct a probable cause hearing; if probable cause is found that the respondent requires civil manage-

ment, a trial is ordered.[15] If probable cause is not established, the petition is dismissed and the respondent is released. The trial must be conducted within 60 days of a probable cause determination.[16]

The offender may choose a trial by a jury of twelve jurors or a bench trial and may ask to remove the trial to a county in which he was sentenced, although the court, upon application of the Attorney General, can deny the application. At trial, the burden is on the Attorney General, by clear and convincing evidence, to establish that the respondent suffers from a mental abnormality.[17] That abnormality must be a condition or disorder that affects the volitional capacity of the individual in a manner that predisposes him to the commission of a sex offense and that results in a serious difficulty in controlling such conduct. The verdict of the jury must be unanimous.[18] If the jury is unable to reach a unanimous verdict, the court must schedule a second trial within 60 days.[19] If a second jury is unable to reach a unanimous verdict, the court must dismiss the petition. If a unanimous jury, or a judge, finds that the respondent suffers from such an abnormality, then it is the *court*'s ultimate responsibility to determine the respondent's fate: confinement or intensive supervision.[20]

Following submission of additional evidence, the court must determine, by clear and convincing evidence, whether the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses and an inability to control behavior that the respondent must be confined to a secure treatment facility. If the court does not so find, it must order the respondent to submit to strict and intensive supervision by the Division of Parole. Such supervision may include electronic monitoring, polygraph testing and residence restrictions. A respondent may appeal from either decision by the court.

It should be noted that the period of confinement and the period of supervision are both indefinite and can theoretically last for the remainder of the sex offender's life. Civilly committed sex offenders have an ongoing right to court-appointed counsel and can challenge their continued confinement once a year.[21] Offenders under strict supervision may move for termination of supervision or modification of conditions once every two years. If an offender violates a condition of strict supervision, the Attorney General may file a petition for confinement or modification of the terms of supervision.

The Legislature enacted a number of other procedural changes. A new law liberalizes the ability of a judge to determine that a child under the age of 14 is a "vulnerable witness," thus allowing the child to testify by two-way closed-circuit television.[22] This provision was originally enacted to provide child witnesses an alternative to in-court testimony when that experience would be mentally or emotionally harmful to the child. The amendment no longer requires a prosecutor to demonstrate "extraordinary circumstances" in order to utilize this procedure and only requires a prosecutor to establish that the child would suffer "serious" rather than severe mental or emotional harm.

Two new procedural changes will affect defendants who are on probation. First, rules involving the transfer of probation from one jurisdiction to another have been tightened.[23] When a probationer resides in another jurisdiction within the state, the sentencing court will now be required to transfer the supervision of the probationer to the Probation Department in the other jurisdiction. In addition, a sentencing court can no longer retain jurisdiction over the probationer for purposes of re-sentencing in the event of a violation of probation. Second, a pilot program has been authorized for four counties outside New York City in which probation authorities would have the legal authority to issue temporary detainer warrants for high-risk probationers who have been convicted of sex offenses or family offenses.[24] This would allow probation officers to bring a probationer to jail for temporary detention even when a court is not in session. The pilot program is scheduled to sunset on March 31, 2010.

Creation of New Crimes

In the past session, the Legislature created several new crimes that will effectively address serious and continuing societal problems. In an effort to toughen the drunk driving laws, the Legislature created two new crimes: Aggravated Vehicular Homicide and Aggravated Vehicular Assault.[25] These crimes were a response to a particularly grisly death of a seven-year-old girl who was killed while returning from her aunt's wedding in Long Island. It is interesting to note that there is currently no crime of "Vehicular Homicide" (although there is a crime of Vehicular Manslaughter), and thus it might be a misnomer to create a crime that appears to increase the penalties of a crime that does not exist. It would seem that the Legislature used the word "homicide" in the title of the crime to stress the seriousness with which it treats this important subject.

In any event, the new crime of Aggravated Vehicular Homicide is a class B felony, punishable by up to 25 years in prison. A person is guilty of Aggravated Vehicular Homicide when he or she engages in reckless driving under the Vehicle and Traffic Law, commits the crime of Vehicular Manslaughter in the Second Degree, and one of five aggravating factors is present. These factors include the following: a blood level content of .18% or more at the time the car is operated; the defendant causes the death of more than one person; the defendant causes the death of one person and the serious physical injury of another person; the defendant's license is suspended pursuant to various drunk driving laws; or the defendant has previously been convicted of intoxicated or impaired driving within the prior ten years. The new crime of Aggravated Vehicular Assault (a class C felony) increases the penalties

for Vehicular Assault by the presence of similar aggravating factors.

Another new crime addresses sex and labor trafficking. New York now joins 29 other states and the federal government in attempting to combat human trafficking. The United States Department of State has estimated that 14,500 to 17,500 people a year are brought into the United States and then used for forced labor, involuntary domestic servitude, or sexual exploitation. Trafficking also originates domestically, and the Office of Children and Family Services recently estimated that over 2,500 children in New York State are exploited for purposes of commercial sexual activity each year. Although there are federal laws against human trafficking, they are usually invoked only against the largest trafficking rings rather than smaller operations such as sweatshops and brothels.

New York's new law is one of the strongest anti-trafficking measures in the country. It addresses the problem in three significant ways. First, it creates new crimes that specifically target the methods used by traffickers to exploit their victims. Second, it provides the delivery of social services to trafficking victims who are currently ineligible to receive such services. Third, it creates a task force to improve training to help prosecutors and police recognize trafficking situations.

The legislation creates two new crimes: Sex Trafficking, a class B felony, and Labor Trafficking, a class D felony.[26] A person is guilty of Sex Trafficking when he or she intentionally advances or profits from prostitution by using any of five methods to compel or induce a victim to engage in prostitution. These means include providing the victim with certain drugs; using materially false or misleading statements; withholding or destroying documents, including passports or immigration papers; or requiring that prostitution be performed to repay a real or purported debt. In addition, the crime is committed if the trafficker coerces the victim by threatening physical injury or death, deportation, unlawful imprisonment, exposing secrets, or a variety of other possible harmful acts. The new crime of Labor Trafficking tracks the language of sex trafficking and prevents an individual from forcing a victim into labor servitude.

Modification of Sex and Labor Trafficking Laws

Other changes in the Penal Law and Criminal Procedure Law have been made to address sex and labor trafficking. The crime of Promoting Prostitution in the Third Degree has been amended to preclude "prostitution tourism," in which a person in New York knowingly sells travel-related services for the purposes of prostitution services in another jurisdiction.[27] International sex trafficking is an enormous problem, and each year thousands of young women are trafficked across international borders for the purpose of commercial sexual exploitation. In addition, the new legislation provides that a trafficking victim shall not be deemed to be an accomplice of the trafficker.[28] This provision relieves prosecutors of the evidentiary burden of corroborating the victim's testimony in a criminal prosecution. The new law also authorizes wiretapping of a trafficker's telephone[29] and adds Sex Trafficking and Labor Trafficking to the list of felonies that are designated as criminal acts for purposes of prosecuting Enterprise Corruption.[30] Finally, Patronizing a Prostitute has been elevated from a B misdemeanor to an A misdemeanor.[31]

A second component of the anti-trafficking legislation provides social services for trafficking victims.[32] These services may include emergency temporary housing, health care, mental health counseling, drug addiction screening and treatment, language and translation services, job training, and placement assistance. The Office of Temporary and Disability Assistance (OTDA) may also coordinate with the federal government to help victims obtain special visas to remain in this country to testify against traffickers.

Under the third component of the legislation, the Interagency Task Force on Human Trafficking is created and will be co-chaired by the Commissioners of the Department of Criminal Services and OTDA.[33] The Task Force is responsible for collecting data on the extent of trafficking in New York, establishing training programs for law enforcement personnel, and evaluating the state's progress in preventing and prosecuting trafficking. The Task Force must report to the Governor and Legislature by November 1, 2008, and the term of the Task Force expires on September 1, 2011.

Crimes Relating to Service Animals

The Legislature also enacted new offenses relating to service animals. A recent survey indicates that 89% of disabled individuals who use service animals had experienced some type of harassment, interference, or attack by individuals or uncontrolled animals. A new crime, Interference, Harassment or Intimidation of a Service Animal, constitutes a B misdemeanor, and an individual is guilty of this offense when he or she makes it impractical or dangerous for a service animal to perform its responsibilities.[34] One is guilty of Harming a Service Animal in the Second Degree, a class A misdemeanor, when a person causes physical injury to or the death of a service animal.[35]

Enforcement of Penalties

In the past session, the Legislature enacted numerous measures that will expand both the definition of and the penalties for existing crimes. For example, the crime of Disseminating Indecent Material to Minors[36] has been expanded to include the communication of indecent material by *words*, as well as by graphic or visual images. The amendment was unnecessary, however, because the Court of Appeals recently interpreted the prior statute to include the use of words.[37] The crime of Unlawful

Surveillance has been expanded to include the use of a cellular phone that is used to take photographs.[38] The Legislature addressed the problem of cemetery desecration in a variety of ways. It expanded the crime of Cemetery Desecration by making it a crime to *steal* property from a burial place in addition to damaging property.[39] In addition, a new crime of Aggravated Cemetery Desecration was created.[40] A person is guilty of this crime, an E felony, if he or she removes a body part or any object from a casket or crypt. This crime will address a rash of thefts in upstate cemeteries in which individuals have removed cemetery markers, statues, uniforms, and Civil War relics from the graves of war veterans.

The recent legislative session focused its attention on a growing problem of unlawful sexual interaction between employees at correctional facilities and inmates. Accordingly, the Penal Law was amended to expand the definition of "employee" to increase the number of individuals who can be prosecuted for such activities. Previously, only those who worked at the institution could be prosecuted. Under the amendment, any person who enters the facility as an employee of a government agency, or as a volunteer, is prohibited from engaging in any sexual activity with an inmate.[41] This will include employees of the Department of Education, employees of the Department of Health and Mental Hygiene, contractors, maintenance crews, medical staff, and food service workers.

Finally, the Legislature has expanded the enterprise corruption statute and money laundering statutes to add Trademark Counterfeiting to the list of crimes that may form the basis for prosecution.[42] While it has been recognized for some time that the production and sale of counterfeit goods is a growing problem, what has been overlooked is the fact that those involved in street-level distribution of these goods are also known to engage in violent criminal activity. By amending the Penal Law, the Legislature has given law enforcement the tools needed to target the larger criminal networks engaged in fraud and violence.

Changes Relating to Crime Victims

Each year the Legislature enacts measures addressing concerns of crime victims, and this year was no exception. With respect to domestic violence cases, an amendment expands a judge's ability to revoke an individual's firearm license when the individual has previously violated an Order of Protection by causing physical injury to another.[43] In addition, a new law allows victims of domestic violence to move out of their residence in order to ensure their safety without breaking a lease agreement.[44] The victim must establish that if he or she remains on the premises, there is a substantial risk of physical or emotional harm to the victim or such person's child and that the landlord has refused to permit a termination of the lease.

Victims of certain sex crimes have received increased benefits under a new law that authorizes a court to issue a pre-trial order compelling a defendant to undergo HIV testing.[45] Previously, a court could issue that type of order only *after* a defendant had been convicted. Under the new law, a victim can request a pre-trial order if the sex offense includes sexual intercourse, or oral or anal sexual conduct. The victim must submit a written application within six months of the date of the crime and file it prior to or within 48 hours of the filing of an Indictment or Superior Court Information. The results of the testing cannot be disclosed to the court and can be given only to the victim and, if requested, to the defendant. Any information obtained during a hearing on the application for an order cannot be used in a civil or criminal proceeding. It is interesting to note that had the Legislature not enacted this bill, New York State would have lost federal funds for failing to comply with a provision known as Federal Grants to Encourage Arrest Policies.

Victims will also benefit from a new law that authorizes a court to issue a Temporary Order of Protection when a defendant is remanded.[46] This addresses situations in which defendants violate Temporary Orders of Protection while in custody by making telephone calls or sending mail that harasses or threatens a victim. In addition, under an amendment to the Penal Law, municipalities and other providers of emergency response services can now seek restitution for their costs in responding to a false report of a bomb or hazardous substance.[47]

Finally, victims of identity theft will benefit from a new law that requires the law enforcement agency that has jurisdiction over the identity theft offense to take a police report of the matter, provide the victim with a copy of the report at no charge, and begin an investigation.[48] Police reports are the first step in helping identify theft victims clear their names and recover from identity theft. Victims need these reports to document the crime and to notify credit bureaus that, upon request, must block the reporting of inaccurate information about the victim. When a copy of a police report is provided to the three largest nationwide credit-reporting companies (Experian, Equifax and TransUnion) must place an extended fraud alert in the victim's credit file for seven years. The alert entitles the victim to free credit reports.

Collateral Consequences of Criminal Convictions

For the second year in a row, the Legislature addressed an area that it had not focused on previously: the collateral consequences of criminal convictions. Two new laws give added protection to applicants for jobs and current employees who have a criminal record. Under one law, employers can no longer ask prospective employees about prior non-criminal convictions (violations) or youthful offender adjudications.[49] Under a second new law, employers cannot discriminate against current employees with convictions that predate their employment

and convictions that are unrelated to the job and do not constitute a threat to safety.[50] Previously, such protection had been afforded only to applicants for employment but not to current employees.

Another bill will greatly assist the reentry of individuals who leave prison. Previously, individuals who entered local or state prisons had their Medicaid benefits terminated and were required to reapply for those benefits after being released. Frequently, there were significant time periods before the reinstatement of benefits, and individuals were without medical care, drug treatment, and mental health services. A new law mandates that Medicaid benefits be *suspended*, but not terminated, upon incarceration, and that the benefits be reinstated immediately upon release.[51] Finally, one new law actually *reduces* privileges to ex-offenders. Persons convicted of violent felony offenses or class A-1 felonies can no longer obtain a firearm license even if they receive a Certificate of Relief from Disabilities or a Certificate of Good Conduct.[52]

Registration of Sex Offenders

In the area of sex offender registration, the Legislature responded to reports from numerous police agencies that sex offenders throughout the state are failing to register or update their registrations. As a result, the penalty for failing to register has been increased to an E felony for the first offense, and a D felony upon the second offense.[53]

Vehicle and Traffic Law Changes

A number of new laws were enacted that will affect motorists who violate the Vehicle and Traffic Laws. For the past 20 years there has been a pilot program in seven counties[54] in which an ignition interlock device has been utilized to combat drunk driving. This device, once installed, permits a car to be started only after an alcohol analysis of the operator's breath. If the analysis indicates a blood alcohol level that is above the legal limit, the car will not start. A new law extends the program statewide and courts will now be able to require the use of an ignition interlock device as a condition of probation.[55] The law also permits the device to be installed on any car the probationer owns or operates. Individuals who are issued conditional driver's licenses and who are on probation will be issued licenses that indicate that the car must contain an ignition device. Finally, a new law increases the penalties for snowmobiling while intoxicated when the offender is on the private property of others.[56]

New Laws Affecting Prisoners

Several new laws will affect prisoners. Inmates serving determinate sentences for drug offenses are now eligible for early parole release for the purpose of deportation.[57] This change will affect hundreds of individuals who were sentenced to determinate sentences pursuant to the 2004 and 2005 Drug Reform Acts.

A second bill, not yet signed by the Governor, will affect approximately 8,000 mentally ill inmates currently within the New York State prison system.[58] Frequently, mentally ill inmates are disciplined by placing them in solitary confinement. Studies have shown that such treatment causes inmates to engage in acts of self-mutilation and to commit suicide at a rate three times higher than inmates in the general prison population. The new law requires mental health clinicians to evaluate individuals who exhibit signs of mental illness. If the inmate meets one of numerous criteria, the inmate must be assigned to a residential mental health treatment program jointly operated by the Office of Mental Health and the Department of Correctional Services.

New Law Regarding Reporting of Crimes

The Legislature enacted a new law that will protect individuals who *report* crimes or suspicious behavior. In November 2006, six Muslim imans were removed from a U.S. Airways flight awaiting takeoff after a number of passengers and crew onboard reported to authorities what they believed to be suspicious behavior. After receiving these reports, airport security and federal air marshals agreed that the actions were suspicious enough to warrant the removal of the imans from the plane. The men were detained and ultimately released, but they later sued U.S. Airways and are seeking the names of the passengers who reported their activities.

In response to that incident, the Legislature enacted the Freedom to Report Terrorism Act.[59] Pursuant to this statute, a person who acts in good faith and reports allegedly suspicious behavior of another person shall be immune from civil and criminal liability. The person making the report must have a reasonable belief that such suspicious behavior constituted or is indicative of an act of terrorism. It is interesting to note that the statute also protects an individual who reports allegedly suspicious behavior that is indicative of a *crime* as long as the report is based upon a reasonable belief. It remains to be seen how this statute will interact with civil actions for false arrest or malicious prosecutions.

Technical Modifications

A number of minor or technical new laws were enacted in the past session. Suffolk County became the twenty-third county in which defendants can appear for non-substantive proceeding by video conferencing in lieu of a personal appearance.[60] The crime of Failure to Disclose the Origin of a Recording in the First Degree is now a "designated offense" for which an eavesdropping or video surveillance warrant may be issued.[61] Criminal Mischief is now a crime for which criminal courts and Family Court may exercise concurrent jurisdiction when committed between members of the same family or household.[62] The current ticket scalping law has been repealed, and there are no longer restrictions on the maximum resale price of tickets.[63] However, it is an A

misdemeanor for "ticket speculators" to sell tickets, and the statute still precludes the resale of tickets within 1,500 feet of sites that seat at least 5,000 individuals. Finally, a technical amendment of the crime of Non-Support of a Child provides that a prior conviction for either the second or first degree offense within the preceding five years elevates the crime to a class E felony.[64]

Endnotes

1. A discussion of several new laws can also be found in the "Criminal Law Column," *New York Law Journal*, October 11, 2007.
2. Art. 10, Mental Hygiene Law (MHL), ch. 7, eff. April 12, 2007.
3. *State of New York ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607, 825 N.Y.S.2d 702, 859 N.E.2d 508 ("*Harkavy I*") (2006). In a later case, *State of New York ex rel. Harkavy v. Consilvio*, 8 N.Y.3d 645 (2007) ("*Harkavy II*"), the Court held that a second group of sex offenders were also improperly committed under Article 9 of the Mental Hygiene Law. While the Court noted that the new legislation addressed the procedural flaws identified in *Harkavy I*, it did not rule on the propriety of the standards enunciated in SOMTA.
4. MHL § 10.01, ch. 7, eff. April 13, 2007.
5. *Kansas v. Hendricks*, 521 U.S. 346 (1997).
6. *Kansas v. Crane*, 534 U.S. 407 (2002). The new legislation tracks that language. See MHL § 10.03(i).
7. See MHL § 10.03(f) for a list of specified offenses. A "sexually motivated" felony does not subject the defendant to increased incarceration; however, as noted, it subjects the defendant to the civil commitment law.
8. MHL § 10.03(a)(g). ch. 7, eff. April 13, 2007.
9. MHL § 10.05(b). ch. 7, eff. April 13, 2007.
10. MHL § 10.05(e), ch. 7, eff. April 13, 2007.
11. MHL § 10.05(g). ch. 7, eff. April 13, 2007.
12. MHL § 10.03(i). ch. 7, eff. April 13, 2007. A court has recently ruled that a sex offender has no right to counsel at the initial psychiatric interview that is conducted to aid the review team in determining whether the offender is in need of civil management. *State of New York v. Davis*, N.Y.L.J., 9/25/07 (Sup. Ct., Bronx Co.) The issue of when the right to counsel attaches is one of the issues in *Mental Hygiene v. Spitzer*, a challenge to the constitutionality of the statute, pending in the Southern District.
13. MHL § 10.06(a), ch. 7, eff. April 13, 2007.
14. MHL § 10.06(a)(b), ch. 7, eff. April 13, 2007.
15. MHL § 10.06(g), ch. 7, eff. April 13, 2007.
16. MHL § 10.07(a), ch. 7, eff. April 13, 2007.
17. MHL § 10.07(a), ch. 7, eff. April 13, 2007.
18. In August, a jury in Washington County heard the first civil confinement trial under the new law and found that the offender did not suffer from a mental abnormality requiring civil confinement. He was released from custody. Later that month, an offender finishing a 16-year prison sentence in Greene County became the first offender to be civilly confined after waiving a probable cause hearing and trial and consenting to indefinite civil confinement.
19. MHL § 10.07(e), ch. 7, eff. April 13, 2007.
20. MHL § 10.07(f), ch. 7, eff. April 13, 2007.
21. MHL § 10.09(a), ch. 7, eff. April 13, 2007.
22. Criminal Procedure Law (CPL) § 65.10, ch. 548, eff. 8/15/07.
23. CPL § 410.80, ch. 191, eff. 9/1/07.
24. CPL § 410.92, ch. 377, eff. 7/18/07.
25. Penal Law (PL) §§ 125.14 and 120.04-a, ch. 345, eff. 11/1/07.
26. PL §§ 230.34 and 230.36, ch. 74, eff. 11/1/07.
27. PL § 230.25(1), ch. 74, eff. 11/1/07.
28. PL § 230.36, ch. 74, eff. 11/1/07.
29. CPL § 700.05(8)(b), ch. 74, eff. 11/1/07.
30. PL § 460.10(1)(a); ch. 74, eff. 11/1/07.
31. PL § 230.04, ch. 74, eff. 11/1/07.
32. Social Services Law (SSL), art. 10-D, ch. 74, eff. 11/1/07.
33. SSL § 483-ee, ch. 74, eff. 11/1/07.
34. PL § 242.05 ch. 582, eff. 11/1/07.
35. PL § 242.10, ch. 582, eff. 11/1/07.
36. PL § 235.25, ch. 8, eff. 3/19/07.
37. *People v. Kozlow*, 8 N.Y.3d 554 (2007).
38. PL § 250.40, ch. 291, eff. 11/1/07.
39. PL §§ 145.22 and 145.23, ch. 353, eff. 7/18/07.
40. PL §§ 145.26 and 145.27, ch. 376, eff. 11/11/07.
41. PL §§ 130.05(3)(e) and (3)(f), ch. 335, eff. 11/1/07.
42. PL §§ 460(1)(a) and 700.05(8)(b), ch. 568, eff. 11/1/07.
43. CPL § 530.14, ch. 198, eff. 8/3/07.
44. CPL § 530.12(g); Real Property Law § 227-c, ch. 571, eff. 11/1/07.
45. CPL § 210.16, ch. 571, eff. 11/1/07.
46. CPL §§ 530.12 and 530.13, ch. 137, eff. 7/3/07.
47. PL § 60.27(11), ch. 519, eff. 8/15/07.
48. Executive Law (EL) § 646, ch. 346, eff. 7/18/07.
49. EL § 296(16), ch. 639, eff. 11/1/07.
50. Correction Law (CL) § 751, ch. 284, eff. 7/19/07.
51. Social Services Law § 366(1-a) ch. 355, eff. 41/08.
52. CL § 701(2), ch. 235, eff. 10/16/07.
53. CL § 168-t, ch. 373, eff. 8/17/07.
54. Albany, Erie, Nassau, Onondaga, Monroe, Westchester and Suffolk counties.
55. PL § 65.10(k-1), ch. 669, eff. 10/27/07.
56. Parks, Recreation and Historic Preservation Law § 25.24, ch. 311, eff. 11/1/07.
57. Executive Law § 259-i (2)(d), ch. 239, eff. 7/18/07.
58. CL § 137(6), S. 333-B approved by both houses and sent to the Governor for signature, eff. eighteen months after it is signed into law.
59. PL § 490.01, ch. 651, eff. 8/28/07.
60. CPL § 182.20, ch. 29, eff. May 14, 2007.
61. CPL § 700.05(8)(b), ch. 570, eff. 11/1/07.
62. CPL § 530.11(1); Family Court Act § 812 (1), ch. 541, eff. 11/13/07.
63. Arts and Cultural Affairs Law, art. 25, ch. 61, eff. 5/31/07.
64. PL § 260.06, ch. 310, eff. 11/1/07.

Mr. Kamins is a Member of Flamhaft Levy Kamins Hirsch & Rendeiro LLP. He is an Adjunct Professor at Fordham and Brooklyn Law Schools, Co-Chair of the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure and author of *New York Search and Seizure*. Mr. Kamins is also currently serving as President of the Association of the Bar of the City of New York and is a regular contributor to our *Newsletter*.

New York's New Sex Offender Management and Treatment Act

By Peter Dunne

On March 14, 2007, Governor Eliot Spitzer signed into law the Sex Offender Management and Treatment Act,[1] which went into effect April 13, 2007. This law will have enormous consequences for the prosecution and defense of sex offenders.

This article will examine the major points of the law, review the legal basis and constitutional issues of the Act, and, finally, describe difficulties for practitioners in representing sex offenders.

First, and most importantly, the law establishes a new sex offender civil commitment procedure under the Mental Hygiene Law.

In addition, it creates a new felony sex offense entitled "sexually motivated felony," introduces new sentencing requirements, enhances some post-release supervision periods, and designates certain Class D and E felonies and "violent" felonies.

According to the legislative history, the primary purpose of the legislation is "to enhance public safety by allowing the State to continue managing sex offenders upon expiration of their criminal sentences, either by civilly confining the most dangerous recidivistic sex offenders, or by permitting strict and intensive parole supervision of offenders who pose a lesser risk of harm."

The civil commitment procedure outlined by the Act is the most revolutionary aspect of the Act.

The Act applies to all persons who have been convicted and sentenced to state prison for all felonies contained in Penal Law section 130 as well as some specifically delineated felonies, such as Incest or Patronizing a Prostitute, as well as any attempt to commit these crimes, which is a felony, along with the newly created class of crimes called Sexually Motivated Crimes.[2]

It applies retroactively to all persons convicted of one of these felonies who are still serving a sentence as of April 13, 2007, and includes state prison inmates, persons serving parole, persons under conditional release, and those under post-release supervision.[3] It applies to juvenile offenders but not to anyone adjudicated a youthful offender.

It also applies to defendants found not guilty by reason of mental disease or defect and to those found incompetent to stand trial pursuant to CPL § 730.[4]

However, the Act applies to only a detained sex offender who suffers from a mental abnormality.

The Act defines mental abnormality as "a congenital or acquired condition, disease, or disorder that affects the emotional, cognitive or volitional capacity in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."[5]

The Act establishes three decision-making stages before a petition to civilly commit a defendant is filed by the Attorney General.

"This article will examine the major points of the law, review the legal basis and constitutional issues of the Act, and, finally, describe difficulties for practitioners in representing sex offenders."

First, the Act authorizes the Commissioner of Mental Health to establish a "multi-disciplinary staff" to initially screen all sex offenders to determine whether the defendant is subject to further evaluation.[6] Although this group is authorized to "review and assess relevant medical, clinical, criminal, or institutional records, actuarial risk assessment instruments, or other records and reports, including records and reports provided by the District Attorney of the County where the person was convicted," there are no guidelines within the Act which guide this decision, other than the broad definition of "mental abnormality."

Second, the Act authorizes the Commissioner of Mental Health to establish a case review panel consisting of 15 members who will sit in groups of three to review each case submitted by the multi-disciplinary team.[7] The panel will determine whether the defendant is a "sex offender requiring civil management."[8] The panel is charged with examining the same records as the multi-disciplinary staff of the first stage. In addition, the panel may "arrange" a psychiatric examination of the defendant.[9]

The defendant is to be notified when his case is referred to this panel, and the panel will notify the defendant of its decision.[10]

If the panel decides that the defendant is a "sex offender requiring civil management," it will notify the Attorney General in writing within 45 days of the anticipated release of the defendant.[11]

One of the unusual aspects of the law involves the numerous time frames of the commitment procedure. Unlike CPL § 30.30, for example, which mandates a speedy trial, under penalty of dismissal, many of the time frames of the law are not mandatory. The law specifically states, for example, "failure to notify the Attorney General in writing within 45 days shall not affect the validity of such notice. . . ."[12]

The last stage of review is by the Attorney General. Upon receiving a case from the case review panel in the second stage, the Attorney General must decide whether to file a petition to initiate civil commitment. Presumably, in addition to a review of all the records and reports previously reviewed, the Act also directs the Attorney General to consider "information about the continuing supervision to which the [defendant] will be subject as a result of the criminal conviction, and shall take such supervision into account. . . ."[13]

This provision presumably refers to any post-release supervision or parole of the defendant. This presents an unusual situation. This language seems to indicate that persons convicted of less serious crimes and who have received shorter periods of post-release supervision would be more likely to be subject to a petition and civil confinement than persons who have been convicted of more serious crimes and received longer periods of post-release supervision.

"The burden of proof is on the Attorney General to prove by clear and convincing evidence that the respondent suffers from a mental abnormality."

Within 30 days of receipt of the case review panel's recommendation, the Attorney General may file a civil management petition in Supreme Court of County Court where the defendant is located. The petition must allege "facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management."[14] The petition must be served on the respondent, and it triggers the respondent's right to counsel.[15]

The Attorney General is directed to file the petition in the county of the respondent's incarceration. Within ten days, the respondent has the option to move to change the venue to the county where the conviction took place.[16] The Court is directed by the Act to grant removal unless the Attorney General shows "good cause" for retaining the case in the county of incarceration.[17]

Within 30 days of filing, the court must conduct a probable cause hearing. Certified psychiatric reports are admissible without testimony from the examiner, and the respondent may not relitigate the underlying offense.[18]

Within 60 days after the probable cause determination, the respondent must be tried before a jury of 12. The respondent may waive a jury trial and choose a bench trial. During the trial, commission of the underlying sex crime shall be deemed established and cannot be relitigated. Plea minutes and prior trial testimony are all admissible.[19]

The burden of proof is on the Attorney General to prove by clear and convincing evidence that the respondent suffers from a mental abnormality.[20] The verdict must be unanimous in the case of a jury trial. The Court must charge the jury that commission of the sex offense cannot be the sole basis of the finding that the respondent suffers from a mental abnormality.

If there is a unanimous verdict that the respondent does not suffer from a mental abnormality, the court must issue a discharge order and dismiss the petition. If there is not a unanimous verdict, the respondent must be retried within 60 days.[21]

If there is a unanimous verdict that the respondent does suffer from a mental abnormality, the jury will be discharged and the trial will move on to a second stage to determine the appropriate "post-sentence treatment."[22]

This phase is for the Court alone. The question is whether the respondent is a "dangerous sex offender requiring confinement" or a sex offender requiring strict and intensive supervision.

If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong disposition to commit sex offenses and such an inability to control behavior that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court will find the respondent to be a dangerous sex offender requiring confinement.[23]

The only other choice is to find that the respondent is a sex offender requiring strict and intensive supervision. No other choice is given to the court once the jury has unanimously determined that the respondent suffers from a mental abnormality.[24]

Commitments to a secure facility are indefinite. Annual reviews are authorized by the Act.[25]

For years, New York has had a mechanism in place which authorizes the civil commitment of individuals who represent a danger to themselves or others.[26] Briefly, under this section of the Mental Health law, a court is authorized to civilly commit a person when the court is "informed . . . that a person is apparently mentally ill and is conducting himself or herself in a manner . . . which is likely to result in serious harm to himself or herself or others."[27]

Such a finding triggers a series of psychiatric evaluations and judicial reviews revolving around a finding that the person is "in need of involuntary care and treatment," in that he or she is a person who "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare," and around a finding that the person at liberty would "likely result in serious harm" which is "a substantial risk of physical harm to the person . . . or a substantial risk of physical harm to other persons. . . ."[28]

The Sex Offender Management and Treatment Act is an outgrowth of this procedure.

One difference between the two sections is in the definition of the mental condition which is the predicate for indefinite detention.

There are two obvious constitutional issues presented by the Act. First, does the Act deprive the respondent of due process by its definition of "mental abnormality"?

Second, does the Act present an issue of double jeopardy? After all, the respondent is being detained following the expiration of the individual's sentence for, among other reasons, the very act for which he or she was serving the sentence.

Both of these issues were rejected by the United States Supreme Court is *Kansas v. Hendricks*,[29] in a sharply divided 5-4 opinion. The state of Kansas enacted a civil commitment procedure for sex offenders that was basically similar to the New York Act. The Kansas Supreme Court struck down the law because of the Act's definition of "mental abnormality." It held that the Act's definition of "mental abnormality" did not satisfy what it perceived to be the U.S. Supreme Court's mental illness requirement in the civil commitment context.[30] The U.S. Supreme Court had previously generally approved involuntary civil commitment procedures for mentally ill persons.[31] However, it was always with the following caveat: "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify involuntary commitment."[32] The finding of dangerousness was usually coupled with a finding of mental illness.

In *Hendricks*, the Court dismissed the difference and essentially held that for the purposes of civil commitment, the terms were synonymous.[33]

With regard to the double jeopardy claim, the Court held that there was no issue, because this was a civil proceeding and not a criminal one. The primary purpose of the Act, according to the Court, was not punitive or retributive, but rather, its primary aim was to provide treatment for individuals suffering from a mental abnormality.[34]

The Court of Appeals will certainly review this Act in the future. There is one striking difference, which the Court may notice, between the New York law and the Kansas law, which passed constitutional muster. The difference is in the burden of proof. In the Kansas law, the state had to prove beyond a reasonable doubt that the respondent suffered from a "mental abnormality."[35] Under the New York law, the burden of proof is by "clear and convincing evidence."[36] Whether this difference is significant is an interesting question.

As of this date, there has only been one reported case of the Act being used. *In re Douglas Junco*,[37] in Washington County, a probable cause hearing was held, and the Court found that there was probable cause to hold a trial. There has been no report that such a trial was held or what the determination was.

As of now, the Act has put an incredibly difficult burden on the practitioner in the defense of an individual charged with a sex crime. Specifically, defense counsel has absolutely no idea of what the likelihood is of a petition being filed against a client. How often the Attorney General will invoke the Act is not known. Therefore, the possibility is real that every eligible sex offender who is sentenced to state prison may be civilly committed prior to the expiration of his or her sentence. There is no rational basis at this time to give advice.

A promise not to file a petition as part of a plea bargain would be unenforceable. The Attorney General would not be part of the plea agreement and would not be bound by it. Similarly, the Act does not anticipate that a recommendation by a Criminal Term Justice would have any effect.

On November 16, 2007, the United States District Court in the Southern District of New York granted a preliminary injunction with respect to two portions of the Act. *Mental Hygiene Legal Service v. Spitzer*, 07 Civ. 2935. The Court held that Section 10.06(k), which mandates involuntary civil detention pending the commitment trial based on a finding at the probable cause hearing that the individual may have a mental abnormality, without a finding of current dangerousness, raises serious due process concerns and will likely be held to be unconstiutional.

The Court also held that Section 10.07(d) authorizes civil commitment based on a showing by clear and convincing evidence that the person committed the sexual offense with which he or she was charged, but found incompetent to stand trial and never convicted of any offense. The Court found that the clear and convincing burden of proof does not afford the protections that due process requires in determining whether these incompetent persons are in fact offenders within the meaning of the Act.

At this point, all a practitioner can do is to make the client aware of the Act and inform him or her of the consequences of a plea.

Endnotes

1. Mental Hygiene Law (MHL)Article 10.
2. MHL § 10.03(p).
3. MHL § 10.03(g).
4. MHL § 10.03(g)(2),(3).
5. MHL § 10.03(I).
6. MHL § 10.05(d).
7. MHL § 10.05(a).
8. MHL § 10.05(g).
9. MHL § 10.05(e).
10. MHL § 10.05(f), (g).
11. MHL § 10.05(g).
12. Similar language also accompanies the time frame for the Attorney General to file a petition, MHL § 10.06(a), and for the probable cause hearing, MHL § 10.06(h).
13. MHL § 10.06(a).
14. MHL § 10.06(a).
15. MHL § 10.06(c).
16. Interestingly, this is the only time frame with an explicit penalty provision. "If the respondent does not timely file a notice of removal . . . then the proceeding shall continue where the petition was filed." MHL § 10.06(b).
17. MHL § 10.06(b).
18. MHL § 10.06(j).
19. MHL § 10.07.
20. MHL § 10.07(d).
21. MHL § 10.07(e).
22. MHL § 10.07(f).
23. *Id.*
24. *Id.*
25. MHL § 10.09(b).
26. *See, generally*, MHL § 9.
27. MHL § 9.43.
28. MHL § 9.01.
29. 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501.
30. *In re Hendricks*, 259 Kan. 246, 261, 912 P.2d 129, 138.
31. *Foucha v. Louisiana*, 504 U.S. 71, 1186 S. Ct. 1780, 118 L. Ed. 2d 437; *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323.
32. *Hendricks*, at 358, S. Ct. at 2080, L. Ed. 2d at 513.
33. *Id.*, at 360, S. Ct. at 2081, L. Ed.2d at 514.
34. *Id.*, at 362, S. Ct. at 2087, L. Ed.2d at 515.
35. *Id.*, at 353, S. Ct. at 2077, L. Ed. 2d at 509.
36. MHL § 10.07(d).
37. 16 Misc. 3d 327, 836 N.Y.S.2d 856.

Peter Dunne has served for several years as Law Secretary to Queens Supreme Court Justice Robert C. McGann. He is a graduate of Boston University School of Law and has previously written articles for our *Newsletter* dealing with the issue of Depraved Indifference Murder.

The Restitution Conflict—Does the MVRA Trump ERISA?

By Roger Bennet Adler

It is not surprising that criminal defense attorneys representing clients charged with financial crimes have generally focused their attention upon their client's penological exposure. Increasingly, however, the impact and application of the federal restitution statute ("Mandatory Victims Restitution Act" [18 U.S.C. § 3613]) suggests that formerly perceived safe havens of client financial assets—retirement accounts—may well be reached to insure that restitution is made to crime victims.

Any assessment of such client exposure commences with the recognition that restitution is limited to the offense of conviction—and not to uncharged or acquitted conduct (*Hughey v. United States*, 495 U.S. 411, 10 S. Ct. 1979, 109 L. Ed. 2d 408 [1990]; *see also United States v. Berardino*, 112 F.3d 606, 609–612 [2d Cir. 1997]). However, such payments may be the subject of and included in a plea agreement. Moreover, a client's current financial difficulties, and existing cash flow problems, do not insulate him from the imposition of a significant restitution award (*e.g.*, *United States v. Atkinson*, 788 F.2d 900, 904 [2d Cir. 1986]; *United States v. Salameh*, 261 F.3d 271, 277 [2d Cir. 2001] *but cf. United States v. Potasnik*, 89 F.3d 63, 75 [2d Cir. 1996]; *United States v. Thompson*, 113 F.3d 13, 15, 16 [2d Cir. 1997]; *United States v. Carboni*, 204 F.3d 39, 47 [2d Cir. 2000]).

Against this backdrop, it was not surprising that the government would seek to levy upon defendants' retirement accounts—notwithstanding perceived protections afforded by the ERISA statute and its anti-alienation provisions (29 U.S.C. § 1056(d)(1)).

Here, in the Second Circuit, the conflict between the two statutes, MVRA and ERISA, first reared its head in *United States v. Irving* (452 F. 3d 110, 126 [2d Cir. 2006]).

In *Irving*, the panel, in a decision authored by Judge Cardamone, dealt with a *fine* and the applicability of the ERISA anti-alienation provisions. Judge Cardamone recognized the conflict between the MVRA and ERISA and, noting that the MVRA was enacted subsequent to the ERISA statute, and primarily relying upon out of circuit, lower court authority (*United States v. James*, 312 F. Supp. 2d 802, 806 [E.D. Va 2004]) held for the government.

James involved a guilty plea to theft of government funds (18 U.S.C. § 666). Judge Ellis sentenced Mr. James to one year in prison based upon a loss of $202,000 and a court-ordered restitution of $93,000 to be paid in monthly installments of $150, following his release from prison. Thus, the first anti-alienation case involved restitution to a government entity—the National Science Foundation.

More recently, and with even greater jurisprudential significance, the Ninth Circuit confronted the statutory conflict in *United States v. Novak* (476 F.3d 1041 [9th Cir. 2007]).

In *Novak*, the majority opinion by Circuit Judge Marsha Berzon was confronted with an appeal by a defendant who had pleaded to conspiracy to transport stolen goods (18 U.S.C. § 371), stolen from the Nestle Food Company, and filing false tax returns (26 U.S.C. § 7206[1]). He was sentenced by the Court to serve a 24-month term of imprisonment and pay in excess of $3 million in restitution.

When it was ascertained that Novak had been employed by the May Department Store and was covered by their retirement plan, both the initial panel decision (441 F.3d 819) and the recently published *en banc* majority held that the retirement plans were the appropriate subject of garnishment to pay the restitution award imposed by the sentencing court.

Judge Berzon and her majority recognized the existing "apparent tension" between the two statutes. Nonetheless, the Court found that the recent MVRA amendment trumped ERISA It placed heavy reliance upon the opening language in MVRA—"[n]otwithstanding any other federal law . . . may be enforced against all property or rights of property" (*United States v. Novak*, *supra*).

An additional question, which Judge Berzon recognized, relates to when a retirement plan participant's interest constitutes "property" under 18 U.S.C. § 3613(a). This issue related to the government's efforts to seek to have May Department Stores *immediately* cash out a portion of the retirement benefits held on Novak's behalf, rather than await Novak's retirement.

The Court recognized that this was a more aggressive approach than simply diverting the retirement checks written from Novak's retirement account to the Probation Department (generally 60 days after the plan, retiree turns age 65). Thus, the government must await the retiree's initial retirement, unless the defendant's retirement benefits entitle the defendant to a lump sum annuity payment of the full value of the annuity.

Put another way, the government essentially steps into the defendant's "retirement shoes" but is not empowered to compel a premature "cash out." Accordingly, the Court remanded the case back to the sentencing judge to resolve payment. It significantly placed the burden on the

defendant to establish that, under the retirement plans, there are no current rights to immediate payment.

Senior Circuit Judge Betty B. Fletcher filed a strong dissenting opinion for herself and Judges Reinhardt, Pregerson, Rawlinson and Thomas. She observed at the outset, as a function of statutory construction, that any evaluation in the perceived tension between the two statutes begins with the recognition that Congress cannot repeal a prior law unless it expresses a "clear and manifest" intent to do so (*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S. Ct. 1989, 48 L. Ed. 2d 540 [1976]).

The dissent then proceeded to examine the legislative history attendant to the MVRA, noting that Arizona Senator John McCain had proposed an amendment to the MVRA to achieve and authorize such garnishment. However, the MVRA was subsequently enacted and signed into law *sans* the McCain amendment.

The perceived significance of the McCain amendment and a 1997 ERISA amendment to authorize the garnishment of funds was that the crime victim was the retirement entity itself! Simply put, the dissent viewed this as reflecting Congress's ability to repeal anti-alienation status if, when and to the extent legislatively desired.

Since *Novak* was decided, the issue has not generated significant legal writing in reported cases (*see, e.g., United States v. Hyde*, __ F.3d __, 2007 U.S. App. Lexis 18694 [1st Cir. 8/7/07]—government attempt to garnish the proceeds of a house sale claimed exempt under a Chapter 7 federal bankruptcy proceeding), and Judge James B. Zagel's opinion in *United States v. Prebis*, __ F. Supp. 2d __, 2007 U.S. Dist. Lexis 46105 [N.D. Ill. 6/26/07].

In the current state of litigative uncertainty, counsel needs to tread cautiously, and proceed prudently, unless and until the Supreme Court rules. This underscores the importance of sharp negotiation skills, since it is unlikely now, during the rapidly waning days of the Bush administration, with a Democratic majority in Congress, that a legislative solution to resolve this conflict will be forthcoming any time soon.

Roger Bennet Adler is Manhattan based and has appeared extensively in the United States District Courts for the Eastern and Southern Districts of New York. He is the Immediate Past-Chair of the Criminal Justice Section.

Official Citations to Criminal Law Decisions from the Court of Appeals for the 2006–2007 Term

Covering Decisions from September 6, 2006 to September 2, 2007
(Listed in Chronological Order)

Case	Citation	Issue Involved
People v. Diaz	7 N.Y.3d 831 (2006)	Right to Appeal
People v. Utsey *People v. Nelson* *People v. Corey Smith*	7 N.Y.3d 398 (2006)	Retroactive Sentencing
People v. Bautista	7 N.Y.3d 838 (2006)	Drug Re-sentencing Appeals
People v. Pizarro *People v. Grant*	7 N.Y.3d 840 (2006) 7 N.Y.3d 421 (2006)	Factual Findings Supported by Record Harmless Error
Gorgham v. DeAngelis *People v. Cuttita*	7 N.Y.3d 470 (2006) 7 N.Y.3d 500 (2006)	Prosecutorial Misconduct Authority of Attorney General
Policano v. Herbert	7 N.Y.3d 588 (2006)	Depraved Indifference Murder
Oglesby v. McKinney	7 N.Y.3d 561 (2006)	Selection of Jurors
People v. Bolling	7 N.Y.3d 874 (2006)	Justification Charge
People v. Carter	7 N.Y.3d 875 (2006)	Failure to Preserve
People v. Cagle	7 N.Y.3d 647 (2006)	Second Felony Offender Status
People v. Nelson	7 N.Y.3d 883 (2006)	Substitution of Counsel
People v. Harper	7 N.Y.3d 882 (2006)	Failure to Preserve
People v. Brown	7 N.Y.3d 880 (2006)	Preservation Rule
State of New York ex rel. Harkavy v Consilvio	7 N.Y.3d 607 (2006) & 8 N.Y.3d 645 (2007)	Civil Commitment of Sex Offenders
People v. Romero	7 N.Y.3d 633 (2006)	Weight of Evidence Claim
People v. Vega	7 N.Y.3d 890 (2006)	Weight of Evidence Standard
People v. Moyett	7 N.Y.3d 892 (2006)	Waiver of Appeal
People v. Lane	7 N.Y.3d 888 (2006)	Failure to Preserve
People v. Ross	7 N.Y.3d 905 (2006)	Sentencing as Predicate Felony Offender
People v. Parker	7 N.Y.3d 907 (2006)	Failure to Preserve
People v. Romero	7 N.Y.3d 911 (2006)	Fair Trial
People v. Ozuna	7 N.Y.3d 913 (2006)	Ineffective Assistance of Counsel
People v. Bradley	8 N.Y.3d 124 (2006)	Right of Confrontation
People v. Gillian	8 N.Y.3d 85 (2006)	Right to Proceed Pro Se
People v. Kisoon *People v. Martin*	8 N.Y.3d 129 (2007)	Mode of Proceedings Error
People v. Tzitzikalakis	8 N.Y.3d 217 (2007)	Restitution

People v. Williams	8 N.Y.3d 854 (2007)	Failure to Preserve
People v. Grajales	8 N.Y.3d 861 (2007)	Pretrial Photographic Identification
People v. Jackson	8 N.Y.3d 869 (2007)	Harmless Error
People v. Melendez	8 N.Y.3d 886 (2007)	Lack of Preservation
People v. Dallas	8 N.Y.3d 890 (2007	Search and Seizure
People v Rowland	8 N.Y.3d 342 (2007)	Withdrawal of Guilty Plea
People v. Ramchair	8 N.Y.3d 313 (2007)	Ineffective Assistance of Counsel
People v. Dean	8 N.Y.3d 929 (2007)	Consecutive Sentences
People v. Havrish	8 N.Y.3d 389 (2007)	Fifth Amendment Violation
People v. Kozlow	8 N.Y.3d 554 (2007)	Indecent Text Messages
People v. LeGrand	8 N.Y.3d 449 (2007)	Expert Identification Evidence
People v. Gomcin	8 N.Y.3d 899 (2007)	Search and Seizure
People v. Dukes	8 N.Y.3d 952 (2007)	Dismissal of Juror
People v. Chiddick	8 N.Y.3d 445 (2007)	What Constitutes Substantial Pain
People v. Newton, Jr.	8 N.Y.3d 460 (2007)	Intoxication Charge
People v. Bryant	8 N.Y.3d 530 (2007)	MAP / Dunaway Hearing
People v. Castillo	8 N.Y.3d 959 (2007)	Vacation of Guilty Plea
People v. Rosas	8 N.Y.3d 493 (2007)	Consecutive Sentences
People v. Person	8 N.Y.3d 973 (2007)	Lack of Preservation
People v. Sedlock	8 N.Y.3d 535 (2007)	Specification of Time Frame
People v. Louree	8 N.Y.3d 541 (2007)	Post Release Supervision
People v. Washington	8 N.Y.3d 565 (2007)	Conspiracy
People v. Bratton	8 N.Y.3d 637 (2007)	Arrest by Parole Officer
People v. Parilla	8 N.Y.3d 654 (2007)	Statute of Limitations
People v. Long	8 N.Y.3d 1014 (2007)	MAP / Dunaway Hearing
People v. Litto	8 N.Y.3d 692 (2007)	DWI Law and Chemical Inhalants
People v. Charache	9 N.Y.3d 829 (2007)	Lack of Preservation
People v. Nieves-Andino	9 N.Y.3d 12 (2007)	Crawford Issue
People v. Antwine	8 N.Y.3d 671 (2007)	Escape Conviction
Polito and Fortunato v. Walsh	8 N.Y.3d 683 (2007)	Double Jeopardy
North v. Board of Examiners of Sex Offenders	8 N.Y.3d 745 (2007)	Sex Offender Registration Act
People v. Lapetina	9 N.Y.3d 854 (2007)	Burglary Conviction
People v. Liner	9 N.Y.3d 856 (2007)	Lack of Preservation

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 September 10, 2007 to November 1, 2008. In order to provide Court of Appeals decisions to our readers as quickly as possible, we previously cited the *New York Law Journal* for all of the decisions of the 2006–2007 term, which were published in our last three issues. We are also now providing, as listed on pages 17 and 18 of this issue, the official New York Report Citations to cover the Court of Appeals decisions from September 6, 2006 to September 2, 2007.

Harmless Error

***People v. Rivera*, decided September 11, 2007 (N.Y.L.J., September 12, 2007, p. 26)**

In a unanimous decision the New York Court of Appeals affirmed a defendant's conviction on the grounds that since the evidence supporting his guilt was overwhelming, any error in the People's failure to provide him with notice pursuant to CPL § 710.30 regarding an intent to introduce identification testimony was harmless. The Court, in issuing its ruling, relied upon *People v. Grant*, 7 N.Y.3d 421 (2006).

Failure to Specify Post-Release Supervision Period

People v. Collier
***People v. Salaam*, both decided September 18, 2007 (N.Y.L.J., September 19, 2007, p. 26)**

In both of the above cases the New York Court of Appeals unanimously vacated guilty pleas which had been entered and remitted the matters back to the trial courts for further proceedings. In both instances, the plea and sentencing court had failed to advise the defendants that the imposition of a period of post-release supervision was mandated by statute. Based upon the Court's most recent ruling in *People v. Louree*, 8 N.Y.3d, 541 (2007), the failure to advise a defendant regarding the imposition of a period of post-release supervision requires the vacation of a plea, since the entry of a plea of guilty requires a knowing and voluntary consent with respect to all of the conditions involved.

Imposition of Death Penalty

***People v. Taylor*, decided October 23, 2007 (N.Y.L.J., October 24, 2007, p. 26)**

In a 4-3 decision, the New York Court of Appeals nullified the death penalty imposed upon a defendant involved in the infamous Queens Wendy's restaurant massacre. The Court in 2004 in *People v. LaValle*, 3 N.Y.3d 88, had declared New York's death penalty unconstitutional because it mandated judges to tell jurors that if they deadlocked over death or life without parole as the punishment, judges were bound to sentence defendants to a parole-eligible term of between 20 and 25 years to life. The court in *LaValle* found these instructions to be unconstitutionally coercive. In the *Taylor* case, however, the trial judge, perhaps anticipating the constitutional problem, told the jury that if they deadlocked, he would almost certainly sentence the defendant to consecutive sentences totaling 175 years to life.

Despite Judge Fisher's instructions, the Court of Appeals majority found that the death penalty still could not be imposed since the statute had been found unconstitutional. Chief Judge Kaye and Judges Ciparick and Jones voted to vacate the death sentence imposed, joining in an opinion written by Judge Ciparick. Judge Robert S. Smith, who had voted in support of the death penalty in *People v. LaValle*, nonetheless sided with the majority in the instant matter, issuing a concurring opinion and stating that he was bound under the rules of stare decisis. Judge Smith concluded that at this point only the legislature had the power to resurrect the death penalty law. A dissenting opinion was written by Judge Reed and was joined in by Judges Graffeo and Pigott.

The Court of Appeals has struck down the death penalty in all six death penalty cases which have reached the Court. Since the *LaValle* ruling, although the State Senate has repeatedly attempted to restore the death penalty, the State Assembly has refused to take any action. For all practical purposes it now looks that the death penalty in New York is dead.

Recent United States Supreme Court Decisions Dealing with Criminal Law

During the last several months, the United States Supreme Court has begun issuing a series of important decisions in the area of criminal law as follows. The Court also announced that it has accepted several important cases which are of particular interest to criminal law practitioners, including the use of lethal injections as a means of imposing the death penalty.

Kimbrough v. United States, 128 S. Ct (Dec. 10, 2007)

On October 2, 2007, the Supreme Court heard oral arguments on the issue involving the serious sentence disparities between defendants convicted of selling crack cocaine and those convicted of selling powder cocaine. In the case at bar, the defendant faced a guideline range of 19 to 22½ years, but the trial court sentenced him to 15 years, viewing the sentencing guidelines as merely advisory and exercising its sentencing discretion in accordance with the *Booker* line of cases. In early December, the Supreme Court issued its long-awaited decision on this controversial matter and held that sentencing judges had reasonable discretion to deviate from the guidelines. Full details on this case will appear in our next issue.

Justices to Decide Constitutionality of Lethal Injection as a Means of Inflicting Death Penalty

In late September, the United States Supreme Court announced that it has agreed to hear a challenge by two death row inmates with respect to the use of lethal injections as a means of carrying out a death penalty sentence. The two cases, involving Ralph Baze and Thomas Bowling, Jr., concern the lethal injection procedure used in the State of Kentucky. The Court stated it will hear oral arguments on the two cases on January 7, 2008. It is expected that a decision will be issued sometime in February of 2008. The challenges to the use of a lethal injection have been based upon claims that it amounts to cruel and unusual punishment in violation of the Eighth Amendment. Many states utilize lethal injection as a means of executing a death penalty sentence. In recent years, several states have suspended its use and increasing outcries have been made that its use inflicts cruel and unusual punishment. Evidently due to the Court's decision to hear the lethal injection cases, the Court, in late September, also issued a stay of execution with respect to a Texas defendant who was facing execution by the injection method. Following the Court's action on the Texas matter, it appears that all lethal injection executions may be on hold until the final Supreme Court pronouncement. It appears that the United States Supreme Court is ready to address this important issue, and we will keep our readers informed of all developments regarding this matter.

Cases of Interest in the Appellate Division

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from August 2, 2007 to November 1, 2007.

People v. Jenkins (N.Y.L.J., August 1, 2007, pp. 26 and 30)

In a 4-1 decision, the Appellate Division, First Department, upheld a defendant's plea of guilty to criminal sale of a controlled substance in the fifth degree and the sentence imposed of 3½ to 7 years. The defendant had entered into a plea agreement which allowed him to enter a residential drug treatment program as an alternative to incarceration. The defendant successfully completed the program, but the probation department reported that the defendant had improperly been living with his girlfriend who had failed to comply with some of the provisions of the plea agreement. Subsequently, the defendant also failed to communicate with staff members of the treatment program and to respond to telephone calls. As a result, the sentencing court determined that he had not fulfilled the terms and conditions of the treatment program and he was then sentenced to a specified prison term of 3½ to 7 years as a second felony offense. The defendant argued that he had, in effect, completed all of the terms of the actual treatment program and that the other terms were new conditions which were imposed upon him and which did not justify the imposition of the lengthy jail term in question. The 4-judge majority, in an opinion written by Justice Buckley, held that the issue of whether the defendant violated the terms and conditions of the original plea agreement was within the sole discretion of the Office of the Special Narcotics Prosecutor and the sentencing court. In the instant situation, the sentencing court had acted within its discretion.

Justice Peter Tom dissented. Judge Tom found that the defendant, for all practical purposes, had successfully completed the drug alternative-to-prison program. All drug-screening tests had been returned negative. Under these circumstances, the sentencing court should not have departed from the agreed-upon negotiated plea and should have conducted a further inquiry as to the reasons why the defendant had failed to communicate with members of the probation department and the drug rehabilitation program.

People v. Luciano (N.Y.L.J., August 3, 2007, pp. 1 and 2 and August 8, 2007, p. 26)

In a unanimous decision from the Appellate Division, First Department, a defendant's conviction for criminal possession of a weapon in the second degree and assault in the second degree was reversed and a new trial ordered. In the case at bar, the Trial Court found that defense counsel had used some of his peremptory challenges in a racially discriminatory manner in violation of the *Batson* ruling. The Trial Judge thereafter, as a penalty, imposed a forfeiture on defense counsel with respect to the remaining peremptory challenges.

The Appellate Division, First Department, in a decision which it labeled as one of first impression, determined that the forfeiture penalty was an inappropriate remedy and that the defendant was entitled to a new trial. The Court determined that if the Trial Judge had limited his actions with respect to the seating of only certain challenged jurors, such actions might have been sustained. However, a general forfeiture of all of the remaining peremptory challenges was improper and not a remedy the Appellate Court could approve. In rendering its decision, the Appellate Division noted that

> CPL 270.25 provides that a party must be allowed the requisite number of peremptory challenges and that, upon a peremptory challenge, the court must exclude the person challenged. Thus, once the court seated jurors number one and six, the court should have merely disallowed the defendant's peremptory challenges, but not count them as used. By not returning two of the peremptory challenges to defendant upon the court's seating of jurors number one and six, CPL 270.25 was violated and defendant was effectively denied the total number of peremptory challenges he was entitled to there under.

People v. George (N.Y.L.J., August 17, 2007, p. 26)

In a unanimous decision, the Appellate Division, Third Department, reduced a defendant's conviction of depraved indifference murder to manslaughter in the second degree. Basing its decision upon the numerous cases which have come down from the New York Court of Appeals in the last few years regarding the necessity of establishing the elements of depraved indifference, to wit, *People v. Payne*, 3 N.Y.3d 266 (2004) and *People v. Suarez*, 6 N.Y.3d 202 (2005), the Appellate Court determined that although the People's evidence established reckless conduct, the elements to establish depraved indifference were not shown.

People v. Krotoszynski (N.Y.L.J., August 21, 2007, p. 6)

In a unanimous decision, the Appellate Division, Second Department, dismissed a conviction of criminally negligent homicide on the grounds that the evidence was insufficient to establish that the defendant's acts contributed to the victim's death. In the case at bar, the defendant and his girlfriend shared an apartment. The defendant's friend became involved in an altercation with another individual and during the incident the defendant struck the other individual and subsequently pushed him out of the apartment and left him in the hallway. Many hours later, the individual was found in the hallway and was pronounced dead when medical personnel arrived. The defendant was charged with both assault and criminally negligent homicide.

The Appellate Division concluded that the evidence presented by the People, although sufficient to support the assault conviction, was insufficient to establish that any of the defendant's actions, such as striking the decedent with his hands, were an actual contributory cause of the decedent's death. Moreover, the evidence failed to establish that it was reasonably foreseeable that the defendant's conduct in dragging the decedent by the foot into the hall would result in the decedent's death, so as to qualify as a sufficiently direct cause of death.

People v. Rice (N.Y.L.J., August 24, 2007, pp. 1 and 4 and August 29, 2007, p. 26)

In a unanimous decision the Appellate Division, First Department ruled that the police had properly searched an automobile and its occupant after they had stopped the driver because he had repeatedly changed lanes without using a turn signal. The trial court had initially suppressed the introduction of drugs which were found in the defendant's underwear after he was frisked and searched. The Appellate Division reversed the suppression finding, holding that the police officers' actions were reasonable and that the initial stop based upon the failure to use a turn signal was appropriate.

People v. Acevedo (N.Y.L.J., August 24, 2007, p. 26)

In a unanimous decision the Appellate Division, First Department upheld a conviction for depraved indifference murder even though he had been acquitted on the charge of intentional murder. After analyzing all of the new, recent Court of Appeals developments on the subject, the Appellate Division concluded that there was sufficient evidence for the jury to conclude that the defendant had acted in a reckless and wanton manner so as to sustain the finding of depraved indifference. The defendant was accused of killing the victim after an argument and fight in her apartment, where they had been consuming heroin. The defendant had given statements to the police that he had swung a hammer at the victim, but at times did not realize what he was doing and had not intended to take her life. Thus, although the prosecutor had argued to the jury that the defendant had intended to kill the victim, there was sufficient evidence for the jury to find that the defendant had acted in a wanton and reckless manner with a depraved indifference for human life.

People v. Paniagua (N.Y.L.J., September 11, 2007, pp. 1 and 2 and September 13, 2007 p. 26)

In a unanimous decision the Appellate Division, First Department refused to overturn a re-sentencing denial on an A-II drug felony. In reviewing the changes which were made by the drug law reform acts of 2004 and 2005 the Court held that the defendant had not satisfied all of the requirements in order to qualify for re-sentencing with respect to an A-I felony conviction and an A-II drug felony conviction. The First Department specifically focused on meeting merit-time eligibility requirements

In 2006 the Court of Appeals ruled in *People v. Bautista* that it cannot review drug law re-sentencing appeals. This has caused the various Appellate Divisions to become the final arbiters in this area, and recent decisions from the four Appellate Departments have indicated some differences in approach when reviewing re-sentencing proceedings pursuant to the 2004 and 2005 drug law reform acts.

People v. Thorpe (N.Y.L.J., September 17, 2007, pp. 1, 2 and 26)

In a unanimous decision, the Appellate Division, First Department reversed a defendant's felony drug conviction on the grounds that the trial judge had repeatedly interfered with the cross-examination of various witnesses. The trial judge in question, to wit, Arlene Silverman, had previously been criticized for the same type of action in several other cases. However, in the instant matter, the Appellate Division considered the error so egregious as to warrant a reversal. The Court also pointed out that the trial judge had also incorrectly refused to let a defense witness testify regarding money which was found in the defendant's pocket and which had become an issue in the case.

People v. Olivera (N.Y.L.J., September 20, 2007, p. 26)

In a 3-2 decision, the Appellate Division, First Department reversed a defendant's conviction for criminal possession of a controlled substance in the third degree and ordered the holding of a new trial. The three-judge majority found that the Trial Court had commit-

ted reversible error in denying the defense's request to charge the jury on the lesser included offense of criminal possession of a controlled substance in the seventh degree. The Appellate Division found that the difference between the third-degree and the seventh-degree offense was whether the People had established an intent to sell. In the case at bar, buy money was not recovered and the undercover's testimony regarding the drug transaction was uncorroborated. Under the circumstances, criminal possession of a controlled substance in the seventh degree represented a reasonable view of the credible evidence and this lesser included charge should have been presented to the jury for their consideration. Justices Williams and Buckley dissented. Because of the sharp split in the Court, it appears likely that this case will eventually be decided by the New York Court of Appeals.

People v. Aleman (N.Y.L.J., September 28, 2007, pp. 1, 2 and 34)

In a unanimous decision the Appellate Division, First Department vacated a defendant's guilty plea because the plea colloquy clearly indicated that the defendant continually expressed reluctance to admit his guilt in plotting to kill a woman who had spurned his advances and manifested an extreme effort by the trial judge to extract a guilty plea in return for a minimum sentence. The Appellate Division concluded that the defendant's statements throughout the plea proceedings called his guilt into question and suggested that he was not pleading voluntarily, but out of necessity.

People v. Argueta (N.Y.L.J., October 16, 2007, pp. 1 and 2 and October 18, p. 26)

In a unanimous decision the Appellate Division, Second Department held that an immigrant was not entitled to vacatur of a guilty plea on the grounds that his attorney had advised that deportation was merely a possible consequence of a drug conviction, when, in fact, it was virtually certain. The Appellate Court concluded that based upon its review of the entire record the defendant received meaningful representation and defense counsel did not mislead or incorrectly advise the defendant about the immigration consequences of his plea. The Appellate Division relied upon the 1995 Court of Appeals decision in *People v. Ford,* 86 N.Y.2d 397, which held that a defendant's guilty plea cannot be overturned because the defendant was not advised that his conviction could result in his deportation.

The New York Court of Appeals in *People v. McDonald,* 1 N.Y.3d 109 (2003), did state however that a defendant may be entitled to post-judgment relief if he pleaded guilty in actual reliance on an affirmative misstatement by counsel. The Appellate Division found no affirmative misrepresentation in the case at bar. The ruling by the Second Department appears to fall somewhere between the situation in *People v. Ford* and *People v. McDonald*. It is a case of first impression which may eventually have to be reviewed by the New York Court of Appeals.

People v. DeJesus (N.Y.L.J., October 18, 2007, pp. 1, 2 and 36)

In a unanimous decision the Appellate Division, First Department reversed a defendant's drug conviction because the trial court would not allow the defendant to present a witness that could have cast doubt on the defendant's control over one kilogram of powder cocaine which was in the rear of a bread truck. After the defendant had rested his case during the trial, defense counsel asked to reopen the matter stating that he had been contacted by a witness who was willing to testify that someone other than Mr. DeJesus was present on the day the crime was committed and had access to keys to the bread truck. The trial court refused to allow the purported witness to testify. The appellate panel concluded after reviewing the record that given the thinness of the prosecution's case, it was error to refuse to allow the purported defense witness to testify.

People v. Maraj (N.Y.L.J., October 22, 2007, pp. 1 and 8 and October 24, 2007, p 18)

In a unanimous decision the Appellate Division, Third Department vacated a defendant's felony marijuana drug conviction because the defendant had been allowed to plead guilty and then sentenced to a one-year term without ever being represented by counsel. The defendant had advised the Court that he had tried to obtain a lawyer, but could not afford one. The Court, thereafter, proceeded to take the defendant's guilty plea without ever conducting a detailed inquiry as to whether the defendant understood that he was entitled to an attorney if he could not afford one and whether he knowingly and voluntarily waived his right to counsel. The Appellate panel specifically ruled that before allowing a defendant to proceed pro se, the Courts must make a searching inquiry to determine if the defendant understands the dangers of self-representation and the implications of waiving the right to counsel. In the case at bar the record did not contain any such searching inquiry and the conviction was ordered vacated and the matter remitted to the trial court for further proceedings.

For Your Information

New Federal Wiretap Legislation

In early August 2007, President Bush signed a new law which expanded the powers of various federal agencies to carry out wiretap activities in the United States without the necessity of a court warrant. The legislation had previously been approved by both the House and Senate by significant margins. The new legislation updates the Foreign Intelligence Surveillance Act (FISA), which was enacted in its original form in 1978. The new legislation gives the federal government the authority to intercept without warrants any communications between foreigners that are routed through equipment in the United States, provided that foreign intelligence information is at stake. The government will still need to obtain a court warrant to eavesdrop on phone calls or other private communications which occur inside the United States.

In the event a United States resident becomes the chief target of the surveillance, the government would then have to obtain a warrant from the special FISA court. The granting of expanded wiretapping authority to the federal government has become a controversial issue, with civil liberties groups expressing fears that the government could abuse its new authority. On the other hand, the terrorist threat and the need for greater security have led many to believe that granting additional wiretapping authority is a necessary step to safeguard the nation. Since the new law will expire in February 2008 unless Congress votes to renew it, the controversy over the wiretapping issue continues with new developments expected in the future. Senate and House leaders have already indicated they want some modifications in any renewed legislation, and President Bush has stated that he wants the legislation made permanent and retroactive immunity given to telecommunications firms who rendered assistance to the government in the past.

Sentencing Commission Holds Public Hearings and Issues Preliminary Recommendations on Sentencing Procedures

The eleven-member Sentencing Commission established in April 2007 by an executive order from Governor Spitzer has held several public hearings during the last few months and has begun issuing its recommendations for changes in New York's sentencing structure. The commission is headed by Denise O'Donnell, the Commissioner of the Division of Criminal Justice Services. Several members of the defense community who have so far testified before the Commission have called for greater judicial discretion in the imposition of sentences. Some members of law enforcement organizations have raised concerns that the recent changes in the Rockefeller drug laws have made sentences too lenient and have again led to an increase in crime. The Commission issued its first draft report with recommendations in late October with a final report to be completed by March 1, 2008. The Commission has stated that it hopes to have legislative proposals available for consideration by the State Legislature before it concludes its session in June 2008. The sentencing structure in New York has grown increasingly complex over the last several years and any proposed changes should be of interest and concern to all of the members of our Section. We will keep on top of this issue and will report developments as they occur. The chief recommendations of the Sentencing Commission as issued in its preliminary report are summarized as follows:

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

Minorities Are Now Majorities

A recent report from the United States Census Bureau reveals the interesting fact that many groups which have

been classified and are viewed as minorities in fact constitute the majority population in many large areas of the United States. The report covering the period from July 1, 2005 to July 1, 2006 reveals that non-whites now make up a majority in almost one-third of the most populous counties in the country. The report attributes this development to the growing dispersal of immigrants and the suburbanization of blacks and Hispanics. From July 1, 2005 to July 1, 2006, metropolitan Chicago edged out Honolulu in its Asian population and the black population in Houston recently overtook that in Los Angeles. The Miami–Dade County area continues to have the largest percentage of minorities, with 82% in 2006.

The report also found that in 36 counties which had a population of more than 500,000 each, the non-Hispanic white population had now become the new minority. In addition to an increasing Hispanic population, the study also revealed a higher growth rate among the Asian population. Significant increases in the Asian population occurred in Napa, California, and Ocala and Naples in Florida. There was also an increase of more than 300,000 in the Asian population in New York City. At the same time, the population of whites in New York City dropped by 250,000. The Census Bureau report clearly indicates new and dynamic population trends and changes in our nation. As important members of the community at large, attorneys should be aware of these new developments.

Violent Crime Continues to Increase

Recent statistics from the FBI indicate that there was a slight increase in 2006 with respect to the overall number of homicides and other violent crimes. From the years 1993 to 2001, a huge and historic decline in violent crime had occurred. From 2001 to 2005, there was basically a leveling off and the figures on violent crime held steady. In 2005 and 2006 an uptick occurred and an additional increase is expected when the figures for 2007 are issued.

The study, which was issued by the Bureau of Justice Statistics, also revealed that nearly one-half of the people murdered in the United States in 2006 were black, part of a persistent pattern in which blacks are disproportionately victimized by violent crime, often committed by other blacks. The report found that from 2001 to 2005, more than 9 out of 10 black murder victims were killed by other blacks and 3 out of 4 were slain with a gun. The report concluded that the black population of the United States is disproportionately victimized by violent crime. In 2005, for example, the study found that blacks were victims of an estimated 8,000 homicides. Another barometer forecasting increases in crime was a recent New York City Police Department report indicating large increases in the number of teenagers arrested in New York City. In 2006, 52,571 teens between the ages of 13 and 18 were arrested, a 20% increase over 2002.

The Bureau of Justice statistics and the FBI routinely issue periodic reports on the crime situation in the United States and we will continue to report on new developments. Hopefully, in the future, we can report on decreases of crime rather than increases.

New DNA Course

A new and extensive course on DNA technology will be offered at Hofstra University School of Law in the spring. The course will be taught by Robert P. Biancavilla, who is presently serving in the Corruption Unit of the Suffolk County District Attorney's Office. Mr. Biancavilla has also served as a longtime adjunct professor at Hofstra Law School and has lectured nationally on DNA topics. The purpose of the course is to provide concentrated instruction regarding DNA technology. The course will run for 4 weeks and will provide two credits. Mr. Biancavilla has stated that he hopes his new course will inspire a new generation of attorneys to fully embrace what he calls "the most powerful crime fighting tool since fingerprints." Those interested in obtaining more information about the course can contact Hofstra Law School.

OCA Limits Criminal History Information Available to Public

In early August, the Office of Court Administration announced that it is no longer providing information to the public with respect to criminal matters where the disposition involves a maximum sentence of 15 or fewer days in jail. In effect, OCA has determined that with respect to violation dispositions, it will no longer provide this information in criminal history reports which it sells to the public. This new policy appears to be in response to both a lawsuit which was instituted and to the recommendations issued by a special committee of our State Bar Association with respect to the collateral consequences of criminal proceedings. The OCA change has been largely praised by leaders of several Bar associations but some members of law enforcement associations have criticized the fact that the change has occurred without much input from affected agencies and without any advance public announcements. In this regard, Joseph W. Biondo, President of Associated Licensed Detectives of New York State, was quoted in the *New York Law Journal*, Aug. 10, 2007, as saying that the Office of Court Administration should not have made such an important policy decision without consulting the industry affected. In addition, he commented that violation dispositions are often the result of plea bargains involving more serious charges and information regarding them should be available to employers and others so they can make informed decisions. We will keep our readers advised of any further developments in this area.

U.S. Losing Ranking with Respect to Life Expectancy Statistics—Obesity a Factor

In a recently issued report, the United States Census Bureau reported that although Americans are living longer than ever before, they are not living as long as people in 41 other countries. Over the last several years, the United States has been steadily slipping in international rankings of life expectancy as other countries improve in health care, nutrition and lifestyles. Among the countries that now surpass the United States are Japan, most of Europe, Jordan, Guam and the Cayman Islands. For example, the life expectancy in Japan was 82 years for babies born in 2004. For the United States on the other hand, it was 77.9. The statistics, which were compiled by the National Center for Health, also reveal that there is still a significant difference in the life expectancy between white Americans and black Americans. The life expectancy for black Americans was listed as 73.3 years, almost 5 years shorter than that of white Americans.

The National Center attributed the lower life expectancy rate in the United States to several factors. Among the main causes was the high obesity rate. Nearly a third of adults in the United States that are 20 years and older are considered obese and two-thirds are overweight. In fact, with respect to the obesity factor, a recent report indicated that obesity is continuing to increase in all of the states throughout the United States. The report, which was compiled by The Trust For America's Health, rated the state of Mississippi as having the highest obesity rate, with Colorado having the lowest. In Mississippi, in fact, more than 30% of the residents are classified as being obese. Forty-seven other states are also above the 20% mark. This is a vast difference from just 15 years ago when no state had more than a 15% obesity rate. The Report concluded that the nation "is in the middle of a public health crisis and is deteriorating rapidly. Today's children could be the first generation to live sicker and die younger than their parents."

Further, a relatively high percentage of babies born in the United States die before their first birthday, while 40 countries, including Cuba, were listed as having a lower infant mortality rate in 2004 than the United States. It looks like it is definitely time to eat less and exercise more.

Drunken Driving Deaths

While the nation's attention is focused on the number of deaths resulting from the Iraq conflict and the number of deaths resulting from violent homicides, little attention has been focused upon the huge number of deaths which are largely self-inflicted due to drunken driving. A recent report from the National Highway Traffic Safety Administration reported that in 2006, 13,470 deaths occurred which involved drivers and motorcycle operators with high blood levels of alcohol. The states of Florida, California and Texas accounted for more than a quarter of these deaths. The drunken driving fatalities in 2006 increased in 22 states and fell in 28 states. The number in 2006 was down slightly from 2005, when 13,582 people died in crashes involving drunken drivers.

Release on Parole Increases

Following many years where the number of violent felony offenders released on parole had dramatically declined, the first six months of 2007 have shown a significant reversal of this trend and a major increase in the number of parole petitions granted. During the first six months of 2007, 15% of defendants who were classified as violent felony offenders were granted release by a Parole Board. In the last month of this six-month period, to wit, June, the actual release rate was slightly over 26%. Under Governor Pataki's administration, violent offenders were being released at a rate of between 3 and 5%.

It appears that the administration of Governor Spitzer has made a conscious determination to be more flexible in the granting of parole requests and to not deny such requests simply based on the fact that the defendant had a prior history of violent felony offenses. The issue of whether the Parole Board had improperly been denying parole release to violent felony offenders has been the subject of a federal lawsuit and it appears that the current Parole Board, under its new chairman, George B. Alexander, will give more consideration to the rehabilitation history of the defendant, in addition to his prior criminal background.

The current Parole Board is composed of 17 members, with each one serving a six-year term at a salary of slightly over $100,000. The current Board consists of four Spitzer appointments, including the current Chairman, and 13 Commissioners who were appointed by former Governor Pataki. The figures provided on the number of defendants released on parole come from the New York State Division of Parole and additional information on the issue can be found in an interesting article in the *New York Law Journal* of August 16, 2007, at pages 1 and 2.

Governor Vetoes Traffic Ticket Plea Bargaining Bill

In a somewhat controversial move, Governor Spitzer in early August vetoed a bill that would have allowed State Troopers to resume the practice of plea bargaining traffic tickets they themselves had issued to motorists. The practice, under which District Attorneys in some 26 upstate counties designated State Troopers as prosecutors in traffic ticket cases, had been stopped in September 2006. Governor Spitzer stated in his veto message that the State Police should not be in a position of being both accuser and potential witness in traffic cases and that this situation would raise questions of impropriety and favor-

itism and possible corruption. Under these circumstances, it was entirely appropriate for the Superintendent of the State Police to prohibit this type of plea bargaining conduct. The Police Benevolent Association of the New York State Troopers had supported this practice and expressed disappointment in the Governor's veto.

Judge Ciparick Reappointed to New York Court of Appeals

In late November Judge Carmen Beauchamp Ciparick was reappointed to the New York Court of Appeals by Governor Spitzer. Judge Ciparick has served on the Court for 14 years and is the current Senior Associate Judge on the Court. When her term expired this year, she indicated that she wished to be considered for reappointment. Judge Ciparick was recommended to the Governor by the Judicial Nominating Commission and her reappointment was widely expected. The other candidates submitted to the Governor were Justice Helen E. Freedman and three partners of major law firms, to wit, George P. Carpinello, Steven C. Krane and Jeremy G. Epstein. Since Judge Ciparick's reappointment was widely anticipated, the number of persons applying to the Commission on Judicial Nominations was limited and only five applicants were submitted to the Governor for his selection. Judge Ciparick is 65 years of age and will serve on the court for an additional 5 years as a result of her reappointment.

Judge Ciparick is a graduate of Hunter College and St. John's University School of Law. She previously served as a New York City Criminal Court Judge and a Justice of the New York State Supreme Court. She was originally appointed to the Court of Appeals on December 1, 1993, by then–Governor Mario M. Cuomo and was confirmed by the State Senate and sworn in on January 4, 1994. Judge Ciparick has been a highly regarded member of the New York Court of Appeals and we congratulate her on her reappointment.

New Interim U.S. Attorney Named for Eastern District of New York

Following the Senate's confirmation of Roslynn R. Mauskopf as a member of the Federal District Court for the Eastern District of New York, it was announced that Benton J. Campbell would serve as the interim U.S. Attorney for the Eastern District. Mr. Campbell has been a member of the U.S. Attorney's staff in the Eastern District and has been serving as the Acting Chief of Staff of the U.S. Justice Department's Criminal Division in Washington. Mr. Campbell is 41 years of age and has been involved in several high-profile matters during his career. He has been a member of the Enron task force and has also prosecuted several murder cases. It may take several months before a permanent replacement for Judge Mauskopf is named, and several names are presently under consideration. We will report on any future developments in this matter.

New Clerk Named for Appellate Division, First Department

Presiding Justice Jonathan Lippman, who himself only recently became a member of the First Department, announced on October 17 that he has appointed John W. McConnell as the new Clerk of the Appellate Division, First Department. Mr. McConnell, who is 48 years of age, previously served at the Appellate Division, First Department, as former Presiding Justice Murphy's Executive Assistant. He also held significant positions in the State Attorney General's office and since 1999 has been in private practice. Mr. McConnell replaced Catherine O'Hagan Wolfe, who left the First Department last spring to become Clerk for the U.S. Court of Appeals for the Second Circuit. Mr. McConnell, who will be the First Department's top non-judicial administrator, will be receiving an annual salary of $136,500. We congratulate Mr. McConnell on his appointment and wish him well in his new position.

About Our Section and Members

Winter Annual Meeting

This year's Annual Meeting, Awards Luncheon and CLE Program will be held at the New York Marriott Marquis on Thursday, January 31, 2008. Details regarding the various programs have been mailed under separate cover and are also listed on pages 30 and 31 of this issue. Our members are urged to attend and participate in the various programs.

The Criminal Justice Section Welcomes New Members

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

Heather Marie Abissi
Seth H. Agata
Kristi Margaret Ahlstrom
Dino G. Amoroso
Christopher C. Anderson
Keith Anderson
Antony M. Anisman
Richard Askin
Pamela Aurelien
Ouzy Azoulay
Steven Baldassano
Michael H. Bauscher
Rayka Trifonova Belova
Paul A. Bender
Patrick Robert Bergin
Samuel A. Bernstein
Stuart Birbach
Heather Bird
Anna Maria Blenkle-Skomial
Alexander W. Bloomstein
Paul Edwin Bonanno
Wilhelm G. Boner
Jaevon Boxhill
Marian Lyia Brancaccio
Mark H. Brenner
Jared Brown
David A. Bythewood
Paul M. Callahan
Caroline Campomanes
Kendra Challenger-Nibbs
Hilary Chernin
David R. Cianci
Linda Claude-Oben
Deanna L. Collins
George P. Conway
Dominic Joseph Cornelius
Richard F. Corrao
Andrew David Correia
Delmas A. Costin
John M. Crane
Elizabeth Ava Culmone
Joseph W. Davids
Paul R. Delle
Arthur L. Delnegro
Elizabeth B. Di Stefano
Louis D. Dicarlo
William R. DiCenzo
Lauren DiLeo
Daniel Christian Doeschner
Sarah Elizabeth Eagen
Aaron Edwards
Gary Michael Ertel
Richard J. Essen
Kristin Farrell
Emmanuel O. Fashakin
Michael P. Felicetta
Jennifer Anne Fischer
Patrick J. Fischer
Ivan S. Fisher
James Gerard Flood
Jesse M. Furman
John H. Galloway
Mitchell Garber
Miguel Garzon
Kenneth S. Glasser
Jeremy Steven Glicksman
Michael S. Greifinger
Francis H. Griffin
Edward P. Grogan
Yolanda Guerra
Umit M. Gursoy
Victor Guzman
Jennifer Anna Handley
Joseph H. Harris
Benjamin D. Hecht
Guy L. Heinemann
Evan Michael Hess
Ian K. Hochman
Edward Francis Kammerer
Frederick D. Kastner
Shane Martin Kelly
Daniel M. Killelea
James E. Kleinbaum
Agatha Kluk
Daniel Korobkin
Latoya Sheriece Krider
Seth L. Levine
Michael Anthony Liddie
Robert Andrew Liguori
Evan Loren Lipton
Jack T. Litman
Gregory M. Longworth
Natasha Dominique Marosi
Jason Andrew Masimore
Diana Lynn Masone
Mindy Ellen McDermott
Matthew John McLaren
Robert Graham McNamara
John Nichols McPadden
Kevin S. Mednick
Jordan Meisner
Catherine Meza
Christopher Scott Milito
James F. Miller
Laura M. Miranda
Gerald A. Moore
Carol K. Morgan
Michael Anthony Namikas
Alan Nelson
Kafahni Nkrumah
John R. Nuchereno
Susan E. Park
Rosemary R. Philips
James Frederick Piazza
Mishael Minnie Pine
William Pixley
Warren W. Quaid
Steven J. Questore
Antonio J. Ramos
Michael John Reck
Lacy Jade Redwine
Elizabeth I. Robbins
Sharon P. Rose
Bryan Rounds
Jason L. Russo
Andrew H. Schapiro
Douglas Mark Schneider
Frank R. Seddio
Joseph A. Sena
David B. Shanies
Bashist M. Sharma
Jonathan Leighton Shih
Robert Dean Siglin
Ilana Rachel Silverglade
Benjamin Silverman
Timothy John Smith
Jennifer Sara Somer
Lesley N. Stone
Eric W. Stowe
Michael D. Tarbutton
Keren Tenenbaum
Talitha Thurau
Jonah Triebwasser
Robert Tudisco
Matthew Thomas Tulchin
Susan L. Valle
Thomas C. Viles
Anne L. Von Fricken Coonrad
Robert S. Walczyk
Carmen Marie Warner
Paul N. Weber
Judith H. Weil
George Weinbaum
Reid H. Weingarten
Heejin Woo
Aminie Lyn Woolworth
Bernard Zimnoch

Criminal Justice Section
Annual Meeting

THURSDAY, JANUARY 31, 2008 New York Marriott Marquis 1535 Broadway, New York City	
Executive Committee Meeting **8:00 - 11:30 a.m.** Ziegfeld Room, 4th Floor	**Reception, Luncheon and Awards Ceremony** **12:00 p.m.** Upper Terrace and Marquis C, 9th Floor **Afternoon CLE Program** **2:00 to 5:15 pm** Marquis A and B, 9th Floor

IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of up to 3.5 credit hours, consisting of 3.5 credit hours in areas of professional practice. **This program will not qualify for credit for newly admitted attorneys because it is not a basic practical skills program.**

Discounts and Scholarships: New York State Bar Association members may apply for a discount or scholarship to attend this program based on financial hardship. Under that policy, any member of our Association who has a genuine financial hardship may apply in writing not later than two working days prior to the program, explaining the basis of his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact: Linda Castilla at: New York State Bar Association, One Elk Street, Albany, New York 12207.

SECTION CHAIR
Jean T. Walsh, Esq.
New York Stock Exchange, Inc.
New York City

PROGRAM CHAIR
Spiros A. Tsimbinos, Esq.
Queens

12:00 - 12:30 p.m. **Cocktail Reception**

12:30 - 2:00 p.m. **Luncheon and Awards Ceremony**

Welcoming Remarks
Jean T. Walsh, Esq.
New York Stock Exchange, Inc.
New York City

Presentation of Awards
Norman P. Effman, Esq.
Executive Director, Attica Legal Aid
Wyoming County Public Defender
Attica

NYSBA

CLE Program at Annual Meeting

"New York's Sentencing Structure and Proposals for Reform"

Over the years, New York's sentencing structure has grown increasingly complex with various types of imprisonment terms, enhanced sentencing for special offenders, and numerous rehabilitation and non-incarceratory types of sentences. The Sentencing Commission, which was recently established by Governor Spitzer has highlighted the need for certain modifications and changes in our sentencing statutes and has recently issued its proposals for reform. Our CLE Program presents leading criminal law practitioners and members of the Sentencing Commission, as they discuss the present sentencing scheme and the merits of the proposed reforms.

2:00 - 2:05 p.m.	**Introduction of the Program** **Spiros A. Tsimbinos, Esq.**, Queens
2:05 - 3:00 p.m.	**An Overview of New York's Present Sentencing Structure, Determinate vs. Indeterminate Terms of Imprisonment, the Need for Simplification and the Creation of the Sentencing Commission**
Speakers:	**Paul Shechtman, Esq.** Stillman, Friedman, Shechtman, P.C., New York City
	Denise E. O'Donnell, Esq. Commissioner, NYS Division of Criminal Justice Services, Albany
	John P. Amodeo, Esq. Chief Counsel, Sentencing Commission, Albany
3:00 - 3:10 p.m.	**Refreshment break**
3:10 - 4:00 p.m.	**Enhanced Sentencing for Special Offenders - Sex Crimes and New York's New Civil Commitment Procedure for Sex Offenders**
Speakers:	**Madeline Singas, Esq.** Chief, Special Victims Bureau, Nassau District Attorney's Office
	Peter Dunne, Esq. Queens
4:00 - 4:25 p.m.	**Recent Appellate Court Decisions Relating to Sentencing—Post Release Supervision as Part of The Determinate Term, Consecutive vs Concurrent Terms, Waiver of Appeal**
Speakers:	**John M. Castellano, Esq.** Chief, Appeals Bureau, Queens District Attorney's Office
	Spiros A. Tsimbinos, Esq. Queens
4:25 - 4:50 p.m.	**Recent U.S. Supreme Court Cases and Their Impact on Judicial Discretion and New York's Persistent Felony Offender Statute**
Speaker:	**Honorable John Gleeson** Judge, U.S. District Court, Eastern District of New York, Brooklyn
4:50 - 5:15 p.m.	**Judicial Discretion and Appellate Review of Sentencing**
Speaker:	**Honorable Steven W. Fisher** Associate Justice, Appellate Division, Second Department

If you need assistance relating to a disability, please contact the NYSBA Meetings Department sufficiently in advance so that we can make every effort to provide reasonable accommodations.

For questions about this specific program, please contact Linda Castilla at 518-487-5562. For registration questions only, please call 518-487-5621.

Section Committees and Chairs

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

Mark R. Dwyer
New York County District Attorney's Office
One Hogan Place
New York, NY 10013-4311
dwyerm@dany.nyc.gov

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

Capital Crimes
Barry I. Slotnick
Buchanan Ingersoll & Rooney PC
1 Chase Manhattan Plaza, 35th Floor
New York, NY 10005
barry.slotnick@bipc.com

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

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

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

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

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

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

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

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

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

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

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

Edward M. Davidowitz
Supreme Court, Bronx County
851 Grand Concourse
Bronx, NY 10451
edavidow@courts.state.ny.us

Federal Criminal Practice
H. Elliot Wales
52 Riverside Drive
New York, NY 10024
elliotwales@aol.com

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

Juvenile and Family Justice
John C. Rowley
Tompkins County Court
P.O. Box 70
Ithaca, NY 14851-0070
jrowley@courts.state.ny.us

Eric Warner
MTA
347 Madison Avenue
9th Floor, Legal Dept.
New York, NY 10017
warners5@aol.com

Legal Representation of Indigents in the Criminal Process
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007-2914
malvinanathanson@nysbar.com

David Werber
The Legal Aid Society
199 Water Street, 5th Floor
New York, NY 10038
dwerber@legal-aid.org

Legislation
Hillel Joseph Hoffman
350 Jay St., 19th Floor
Brooklyn, NY 11201-2908
hillelhoffman@verizon.net

Membership
Erin P. Gall
1 Elizabeth Street
Utica, NY 13501-2209
egall@courts.state.ny.us

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

Newsletter
Spiros A. Tsimbinos
857 Cambridge Court
Dunedin, FL 34698-6102

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

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

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

Sentencing and Sentencing Alternatives
Susan M. Betzjitomir
507 Fish Hill Road
Beaver Dams, NY 14812
lawyer@betzjitomir.com

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

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

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

Transition from Prison to Community
Malvina Nathanson
30 Vesey Street, 4th Floor
New York, NY 10007
malvinanathanson@nysbar.com

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

NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

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

Name:_____

Daytime phone: _____Fax: _____

E-mail: _____

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

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

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

Publication and Editorial Policy

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

Publication Policy: All articles should be submitted to:

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

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

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

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

Visit Us on Our Web Site: www.nysba.org/criminal

NEW YORK CRIMINAL LAW NEWSLETTER

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

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

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

ADDRESS SERVICE REQUESTED

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