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New York Criminal Law Newsletter

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Inside

NYSBA

Message from the Chair

As the recession lingers and New York State finances remain in disarray, the criminal law practitioner must confront the ever-growing reality of economic crunch. As an elected District Attorney for 12 years, I know how dependent the office is upon state and federal grants. While public safety is usually among the last item cut, I expect that prosecutors statewide are dreading the potential of drastic funding cuts.

New York Mayor Bloomberg's request for proposals to provide indigent defense services in the City not only threatens the financial livelihood of private attorneys serving on 18(b) panels, but also forces them to confront the stark reality of cost-cutting measures. In such dire financial times, no one can realistically expect that the State Legislature will act to increase 18(b) fees despite clear evidence that the cost of running a law office far exceeds the fees paid to 18(b) lawyers.

While the Court of Appeals has ruled that judicial pay increases should not be linked to raises for legislators, it seems unlikely that judges and, consequently, elected DAs will see any salary increases in the near future despite having no raises since 1999.

Pilot projects have demonstrated the value of electronic recording of interrogations. The pilot projects have had financial assistance. Surely no one truly expects that the hundreds of police agencies facing funding cuts will place the purchase of recording equipment and the training of its operators and officers and at the top of the departmental financial priority list. Similarly, no one can expect the 62 elected DAs to slash other services or personnel to purchase that equipment.

While I proffer no solution to our fiscal difficulties, I do know that elected politicians at all levels pay heed to the call of their constituents. As constituents, we need be active in contacting our representatives to tell them the hardships caused by imprudent decisions regarding criminal justice funding, and I urge you all to do so.

James P. Subjack

Message from the Editor

In this issue, we present an interesting, and what some may consider a controversial, article dealing with the issue of wrongful convictions and the suggestion that some of these convictions can be avoided by reinstituting a partial corroboration rule and a greater use of interest of justice dismissals. The article is written by Lawrence N. Gray, a former thirty-year prosecutor who has written extensively for various New York State Bar Association publications. We hope that his article may begin a civil and logical discussion on the matter. We also present an update on the necessity of having defense counsel advise alien defendants regarding the possibility of deportation when accepting guilty pleas. The Supreme Court recently spoke on this issue and the effect of the Supreme Court ruling on current New York law is analyzed in our second feature article. The United States Supreme Court has also issued several important decisions in other areas of the criminal law, and these cases are summarized for the benefit of our readers.

The New York Court of Appeals, which appears to be now granting leave in more criminal law cases, issued a large number of decisions during the last several months dealing with such matters as search and seizure, speedy trial and the ever continuing saga of post-release supervision. These cases are summarized in our Court of Appeals section. Our "For Your Information" section continues to deal with topical issues of general interest to our members. These include the latest information on judicial pay increases, prison inmate population and new governmental appointments, as well as a discussion of the recent decision from the Second Circuit Court of Appeals invalidating New York's sentencing provisions for persistent felony offenders. Updates on our Section's activities, and recent developments affecting our members are reported on in our final section. We were also pleased to learn that our Section's Secretary, Mark Dwyer, who served for many years in the New York County District Attorney's Office, recently received a judicial appointment to the New York Court of Claims, and is now serving in the Brooklyn Supreme Court. We congratulate him and wish him well in his new position.

As always, I hope that our readers are continuing to enjoy our publication. I always can use good articles, and I appreciate your comments and suggestions.

Spiros A. Tsimbinos

Request for Articles

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

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

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Reducing Wrongful Convictions by Reinstating a Partial Corroboration Rule and Making Greater Use of Interest of Justice Dismissals

By Lawrence Gray

Introduction

In the last few years, there has been much concern expressed about the problem of wrongful convictions, and both the New York State Bar Association and Chief Judge Lippman have established special committees to examine the issue and to make recommendations for the prevention of such convictions in the future. In reviewing the question of wrongful conviction, it appears that a significant number of these convictions involve rape prosecutions and other sex crime matters. Although the corroboration rule was abandoned several years ago, it may be time to consider the reinstitution of a partial corroboration rule as a means of avoiding future wrongful convictions. Prosecutors should also more carefully examine the merits of sex crime cases, and judges should not be afraid to issue dismissals in the interests of justice, where the circumstances warrant. Although these proposals may not be popular with various groups, it is at least important that we begin a dialogue on the issue, and consider concrete facts and circumstances in reaching an ultimate conclusion on the matter.

Rape and Corroboration—First Too Much, Now Too Little

Too many rape prosecutions prior to 1974 were disgracefully derailed by Penal Law 135.15's corroboration rule requiring proof, independent of the woman, of force, identity and penetration. Today, credibility-challenged, and worse, baseless rape prosecutions and convictions, are a problem. Often, defendants are convicted on the flimsiest of evidence and then appellate courts deferring to the jury's verdict have found the evidence to be legally sufficient. For example, only recently, in the case of *People v. Texidor*, 71 A.D.3d 1090 (3d Dept. 2010), the Appellate Division, Third Department, on March 4, 2010 affirmed the conviction and 21-year sentence of a man for various sexual abuse crimes, "despite the absence of any physical evidence or other independent corroboration." It is based on the uncorroborated testimony of a 16-year-old recounting sexual abuse during her visits to her mother in Plattsburgh from Connecticut where she lived with her father, "beginning in the summer of 2003" and during her intermittent visits "until the summer of 2006." The victim finally disclosed the abuse in May 2007 to her then-boyfriend, who told the father, resulting in a police report and defendant's arrest. See also *People v. Caba*, 66 A.D.3d 1121 (3d Dept. 2009).

Some of the instances of wrongful convictions with respect to rape allegations have been so egregious that they have received widespread media coverage. Some examples are as follows:

1. The *New York Post* reported "Judge Clears Man Who Served Time for Rape He Didn't Commit." Said Judge Richard Carruthers, "I want to convey my personal regret for having participated, albeit unknowingly, in this injustice." More than a "mistake" had been "sanctified by the verdict." (*People v. Kaufman*, 245 N.Y. 423, 429 (1927) (Cardozo, J.) A man spent four years in prison for a knifepoint rape. Truth is the woman lied. But for the divine intervention of her conscience, the man would still be serving 20 years. She pled guilty to perjury, receiving two years in prison. How did her lies snooker police, public, prosecutor, jury, counsel and a learned, moral, most decent and humane Judge?

2. The *New York Post* also reported about the Hofstra University rape case. Five undergraduate jerks were locked up and labeled rapists based on the lies of a co-ed. A friend on behalf of the family of one of the young men asked me to go to the Nassau County Jail and consult with him. As I was about to leave my home I received a phone call. Surveillance cameras showed the co-ed's consent and participation in debauchery. A damsel in distress was a "girl gone wild." Nassau District Attorney Kathleen Rice did not bring charges against the co-ed. One wonders why?

3. In December 2009, rape accusations based solely on the word of a woman resulted in a five-count indictment which reads: "On or about September 2008" the defendant raped a 23-year-old woman, and "on or about early February 2009" he raped her—and "on or about June 3, 2009" he raped her—and "on June 4, 2009," he assaulted her (sexually?) and "on or about June 5, 2009" he attempted oral-anal sex with her. Might one be curious to know if St. Lawrence County District Attorney Nicole Duve made any attempt to obtain an explanation for the gaps between the sexual assaults? A Motion to Dismiss in the interests of justice was based on dozens of sextexts and photos of the complainant's vagina taken by the complainant

herself and e-mailed by her to the accused soliciting intercourse and other wild and wooly sex that are dated before and after the dates specified in the indictment on which the woman swore to rapes by the accused. In a statement to a reporter, District Attorney Duve said "we have concerns about the defense's attempts to smear the victim." County Court denied the interest-of justice dismissal motion and held in abeyance a motion involving the Rape Shield Law. The court later dismissed the indictment because the grand jury proceeding was poisoned as per CPL 210.20(1) (c) and 210.35.

4. Further, who can forget the tragic situation involving the Duke University lacrosse players who were wrongfully accused of rape. That case, involving a lying victim and gross misconduct by a District Attorney, epitomizes the dangers of wrongful accusations and the rush to judgment which occur in many of these cases. In some cases, although not receiving media notice, the situation has been so bad that even appellate courts, often reluctant to reverse, have nonetheless done so. See *People v. O'Neil*, 66 A.D.3d 1131 (3d Dept. 2009) (Peters, J.); *People v. Roberts*, 66 A.D.3d 1135 (3d Dept. 2009) (Peters, J.P.); *People v. Jovanovic*, 263 A.D.2d 182 (1st Dept. 1999).

What Is Going Wrong and How It Might Be Mitigated

First, the sexual revolution has lowered the guardrails, and a more permissive society has increased the possibilities of false accusations of rape. In this context, prosecutors should more carefully examine and investigate these types of charges.

Second is bad prosecutorial judgment. In an effort to satisfy the political agenda of the day, prosecutors have often failed to deeply probe into allegations of rape, and in some instances, such as the Duke University matter, have purposefully engaged in serious misconduct in order to satisfy their own political agenda. While the People take their victims as they find them they are responsible for judging their credibility. One does not take a man to trial unless she or he is convinced to the bottom of his or her heart that the man is guilty. A prosecutor's job is not just to make the woman's story stick. Prosecutors should also note that consent is not synonymous with lack of resistance, but lack of resistance certainly suggests consent. Again, ask her "why?"

Prosecutors should also be aware that while the law rejects the notion that "a presumption of criminal persuasion is always to be imputed to a person with whom a dissolute female is domiciled" (*People v. Plath*, 100 N.Y. 590, 598 (1885)) it recognizes unhallowed liaisons and cohabitations which are "that of libertine and mistress and not of husband and wife" such that they place the credibility of both on a plane different from couples whose behavior is upright. (*People v. Webster*, 139 N.Y. 73, 84 (1893)). Damningly relevant relationships of a meretricious nature cannot be put to the side so as to vindicate sexual liberation but also cloud analysis that might smoke out a cock and bull story. *People v. Jovanovic*, 263 A.D.2d 182 (1st Dept. 1999) says as much. Prosecutors should be aware of these considerations when making their overall determination as to whether to proceed to a prosecution.

Third is the overreaction to an exaggerated risk that the former corroboration rule represented. But whatever one may feel about that former rule, it had "a good enough grounds in human experience." (*People v. Radunovic*, 21 N.Y.2d 186, 194 (1967) (Bergan, J. dissenting). "Cases arising out of a sexual transaction or context involve a special peril of unreliable testimony on the part of the complainant" but again "an immature jurisprudence…plac(ed) reliance on corroboration, however unreliable the corroboration itself (was), rejecte(ed) overwhelming reliable proof because it lack(ed) corroboration however slight, and however technical" while it "suppli(ed) only a formalistic bridge over a very real and profound discomfort…because of the many motivational or quasi-pathological reasons for distortion of the facts." (*Radunovic*, 21 N.Y.2d at 191) (Breitel J. concurring).

Fourth, failure to obtain prosecutorial input before the corroboration rule was abolished. Prosecutors were ignored in 1974. As an Assistant District Attorney in Bronx County from 1969 to 1973, I recall rape prosecutions that were stymied because of the identity portion of the corroboration rule. As I understood matters at the time, the legislature was not responsive to pleas urging identify's removal from the rule. Prosecutors did not want force and penetration eliminated. Only the identifying prong of the rule reflected an unwarranted mistrust of female victims. If force and penetration are corroborated, why would a woman intentionally accuse the wrong man? Prosecutors saw the dangers of what may now be labeled fashionable feminism.

Rape is as easily charged as it is difficult to disprove, just as women need special protection, just as "hell hath no fury like a woman scorned" and "all men are brutes" are misleading hyperbole. A legislative policy choice has made PL 130.15 history with "she-said—he did, he-said-he-didn't" rape trials being one consequence. The pendulum is now at the other extreme. No corroboration at all is required. (Compare *People v. Croes*, 285 N.Y.2d 279, 281 (1984) with *People v. Fuller*, 50 N.Y 2d 628, 639 (1980) with *People v. Groff*, 71 N.Y.2d 101, 107-109 (1987)).

Fifth, proper evaluation of prompt outcry. "Prompt outcry" is so natural as to be almost inevitable that a female upon whom the crime has been committed will

make immediate complaint thereof to her mother or other confidential friend; and…her failure to do so would be strong evidence that her affirmation on the subject…was false…" (*Baccio v. People*, 41 N.Y. 265, 271 (1869)). Prosecutors must press the woman for a credible answer "why?" Further, there should be some requirement that if prompt outcry is utilized, the jury is provided some jury instructions on its proper consideration.

Sixth, strengthen the traditional institutions that work, then watch rapes and false accusations thereof recede. Court of Appeals Judge Graffeo has it right. Stop fiddling with marriage, which is respected as an institution divinely ordained and sanctioned by the state. *See Hernandez v. Robles*, 7 N.Y.3d 338, 366 (2006) (Graffeo, J. concurring) and *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010).

Seventh, where a woman makes a provably false accusation of rape she is to be punished. One wonders why in the Hofstra University Nassau County case, and in the Duke University lacrosse player matter, the wrongful accuser who created such a tragic incident went unpunished. If the Penal Law is to be considered as having a deterrent effect in addition to providing punishment, it would appear that the actual prosecution of false accusers could serve as a meaningful way of reducing wrongful accusations and wrongful convictions.

Two Suggestions for Alleviating the Situation

1. Compete repeal of the former corroboration rule is one-third mistake. Identity was never anchored in experience. Ask yourself this question—if force and penetration, as many times bolstered by prompt outcry, are independently corroborated by science, aren't the overwhelming, probabilities—certainties—such that the woman will **not** knowingly accuse the wrong man? Isn't the answer to be found in experience?

   The former corroboration rule recognized "the ease with which the accusation may be made and the difficulty of defending by the party charted, be he **ever** so innocent." (*Baccio v. People*, 41 N.Y. 265, 271 (1869)). The total abolition of the corroboration rule went too far. Today, false rape charges are getting through the gate and courts are in a state of scrambled-eggs confusion when dealing with these matters. *See People v. Reome*, __ N.Y.3d __ (June 17, 2010).

2. A CPL 210.40 interest-of-justice dismissal of a rape indictment is counterintuitive, for rape is a crime where a man finds himself confronted at the very threshold with that subtle, pervasive and almost ineradicable prejudice which the bare charge of it engenders in the minds of those who are to pass on his guilt or innocence. (See generally *People v. Davey*, 179 N.Y. 345, 347-348 (1904)). One is predisposed to believe "it happened." But this is predisposition, not thought. Some prosecutions for rape are just plain nuts. Judges are not supposed to just sit there while a parade passes by. CPL 210.40's factors invite thought. Short of acquittal or ad hoc prosecutorial dismissal motion, only 210.40 remains for innocent rape defendants who once had some legitimate protection from two of the former corroboration rule's three prongs. The changes "were made in the belief that defendants are sufficiently protected from false charges by other safeguards…" (*People v. Groff*, 71 N.Y.2d at 109). "Other safeguards" cannot mean the usual accoutrements of trial. They exist. Carefully prepared—honest and documented—dismissal motions in the interest-of-justice will require a written response that does more than incant and reflect an uncanny grasp of the obvious which is rape's heinousness. If such a motion causes a prosecutor to take a closer look it has earned its keep. That it must be responded to before a neutral judge and public makes it worthy of its keep.

Conclusion

As a former 30-year prosecutor, lately pro bono defense counsel, I suggest that wrongful convictions of innocent men for rape are not "wrongful." They are miscarriages of justice visited on innocent men in part because the wisdom of experience has been partially trumped by political correctness. Lying women accusing innocent men of rape also endanger women. It is time to strike a proper balance, so that both men and women are equally served by the criminal justice system and the number of wrongful criminal convictions is drastically reduced.

Lawrence Gray is a former Bronx County Assistant District Attorney, and also served as a Special Assistant Attorney General in the Medicaid Fraud Unit. He has authored many periodicals and articles for the New York State Bar Association, and has for several years served as the Editor in Chief of *New York Criminal Practice* and its bi-annual supplements. He has also lectured widely on various criminal law subjects, and is a graduate of St. John's University School of Law, where he served as associate editor of the *Law Review*.

Advising Defendants of Deportation Possibilities—The Situation in New York Following *Padilla v. Kentucky*

By Spiros Tsimbinos

On March 31, 2010, the United States Supreme Court, in a 7-2 decision, held that an attorney's failure to advise immigrant Defendants regarding the possibility of deportation as a consequence of a guilty plea constituted ineffective assistance of counsel. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Defendant claimed that his lawyer had erroneously advised him that he did not have to worry about deportation because he had been in the country a long time. As it turned out, the crime for which the Defendant was convicted mandated deportation, and his counsel's advice was incorrect.

Justice Stevens, writing for the majority, stated that the serious consequences of deportation, both on the Defendant and his family, required that counsel fully discuss the consequences of a guilty plea, and that the failure to do so constituted ineffective assistance of counsel. In an effort to alleviate fears that the Court's decision would place an undue burden on defense counsel, Justice Stevens further declared that in those cases where the deportation consequences of a plea are unclear, a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry adverse immigration consequences. When, however, the deportation consequence is truly clear, the duty to give correct advice is equally clear.

Chief Justice Roberts and Justice Alito, who concurred in the result reached by the majority, nevertheless indicated that ineffectiveness should only be found when the attorney misled or misstated the facts to an immigrant Defendant regarding deportation. Justices Scalia and Thomas issued a total dissent, arguing that the protections against ineffective assistance of counsel were improperly expanded by the Court's ruling.

As a result of the Court's decision, the matter was remitted to the Kentucky Courts for further proceedings in order to determine whether the Defendant had been prejudiced, pursuant to the standards enunciated by the Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In effect, the Kentucky Courts were now asked to determine whether the Defendant would not have pleaded guilty but for the erroneous deportation information provided by defense counsel.

Our own New York Courts have grappled with this issue during the last several years, and the most recent Supreme Court decision will have a serious impact on many criminal law cases in our State. While New York has long had a Statute, CPL Section 220.50(7), enacted in 1995 and now in effect until September 1, 2011, indicating that Defendants should be advised of the possibility of deportation by the Court, the very same Statute stated that the failure to so advise would not effect the validity of the plea.

In the case of *People v. McDonald*, 1 N.Y.3d 109 (2003), our New York Court of Appeals ruled that erroneous advice as to the possibility of the Defendant's deportation was not sufficient to overturn a guilty plea because the Defendant had failed to show that had the inaccurate advice not been given, he would not have pleaded guilty. Although the Court of Appeals upheld the conviction under the facts of that instant case, the Court did indicate that under certain circumstances, erroneous advice on a deportation situation could be grounds for reversal on "ineffective assistance of counsel" grounds.

The Court of Appeals distinguished between the total failure of defense counsel to discuss the issue with the Defendant and the affirmative providing of misinformation regarding the possibility of deportation. In this regard, the Court of Appeals decision appears to have been more in line with the views expressed by Justices Roberts and Alito in the *Padilla* case. In an opinion written by Judge Ciparick and joined in by the rest of the Court, the Court specifically held that a defense counsel's incorrect advice as to deportation consequences of a plea can constitute ineffective assistance of counsel. In evaluating claims of ineffective assistance of counsel, the Court of Appeals referred to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in the same manner that the Supreme Court had done in *Padilla*. Although the first prong, involving a showing that counsel's representation fell below an objective standard of reasonableness, was established, the second prong, involving the issue of prejudice, and which focuses upon whether the ineffective performance affected the outcome of the plea process, was not met. In *McDonald*, the Court found that the Defendant had failed to establish any factual allegation that but for counsel's error the Defendant would not have pleaded guilty.

Since the majority opinion, as expressed by Justice Stevens in *Padilla*, apparently places an affirmative duty on defense counsel to explain the possibilities of deportation, it has gone somewhat beyond the narrower view expressed in *People v. McDonald*. Thus, following the *Padilla* ruling, it appears that many cases may have to be returned to the trial courts for hearing determinations on the issue of whether the Defendant can demonstrate prejudice, in that he would not have entered the plea but

for the erroneous advice presented by defense counsel. It also appears that hearings may have to be held despite the presence of a waiver of appeal. The Appellate Division, Third Department, recently rendered such a ruling in *People v. Williams*, which was discussed in an article in the *New York Law Journal* of April 26, 2010, at pages 1 and 2. The Third Department therein stated "inasmuch as Defendant asserts that he would not have pleaded guilty but for counsel's representation that doing so would not subject him to deportation, Defendant's ineffective assistance of counsel claim impacts the voluntariness of his plea and survives the waiver of his right to appeal."

In light of the Supreme Court decision, it appears that the New York Criminal Justice System and defense counsel will now have to be more careful in their defense of immigrant Defendants. The proviso in CPL Section 220.50(7) that the failure of the Court to provide the advice regarding deportation does not affect the voluntariness of the plea or the validity of the conviction is now of questionable validity, and the Statute itself is clearly subject to constitutional challenge. I would suggest that a good way of handling the current situation is to remove from CPL Section 220.50(7) the proviso that the failure to advise does not affect the voluntariness of the plea or the validity of the conviction, and to instead make it a mandatory part of the Court's colloquy in accepting a plea that the Court advise an immigrant Defendant of the possibility of deportation. By having the Court do so, it will also cure any lapse in defense counsel representation, since, if it appears on the record that the Defendant was so advised, the Defendant may not be able to establish the prejudice prong of the *Strickland* test, to wit: that he would not have pleaded but for the erroneous advice of counsel.

Even with respect to older cases which may have to be reviewed, in light of *Padilla*, the plea colloquy minutes should be carefully examined. If the Court did advise the Defendant of deportation consequences, any defense counsel lapse could be viewed by the Courts as having been vitiated, and the prejudice prong of the *Strickland* test not sustainable.

In a prophetic warning, we discussed the issue of advising immigrant Defendants regarding the possibility of deportation in our Winter 2006 issue, at page 25, and specifically raised the possibility that the failure to consider the deportation factor could subject a defense attorney to a claim of ineffective assistance of counsel. Now that the Supreme Court has acted and attorneys have been warned, let all pay heed, and the legislature would be wise to alleviate the situation by making the suggested change in CPL Section 220.50(7), as discussed above.

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New York Court of Appeals Review

Discussed below are significant decisions in the field of criminal law issued by the New York Court of Appeals from February 2, 2010 to May 6, 2010.

Search and Seizure

***People v. Edwards*, decided February 16, 2010 (N.Y.L.J., February 17, 2010, p. 43)**

In a unanimous decision, the New York Court of Appeals determined that police officers had properly stopped a Defendant's vehicle based upon probable cause to believe that a traffic infraction had occurred. During the course of the police investigation, cocaine residue was observed on the Defendant's hand. After Defendant was arrested, crack cocaine was also found in his pocket and a subsequent search of the vehicle revealed a half pound of drugs hidden in the car. Disagreeing with the Appellate Division, the Court of Appeals found that the initial stop of the vehicle was permissible, and that based upon the officers' additional observations there was a valid basis for the arrest and subsequent search. A suppression motion should therefore not have been granted, and the items found were admissible into evidence.

Inquiry Regarding Defendant's Drug Treatment Discharge

***People v. Fiammegta*, decided February 16, 2010 (N.Y.L.J., February 17, 2010, pp. 6 and 41)**

In the case at bar, the Defendant claimed that he had been improperly expelled from a treatment program without due process of law based upon unproven allegations. Because he did not complete the program, he received an eight-year prison term. The Defendant claimed that he should have been granted a hearing based upon the allegations which lead to his removal from the drug treatment program. The Court of Appeals unanimously determined that it was not practical to require an evidentiary hearing every time a Defendant disputed discharge from a drug treatment program. It further stated that the situation in the case at bar was not the same as when a court changes the Defendant's sentence by revoking a sentence of probation or parole. Referring to its previous decision in *People v. Outley*, 80 NY 2d 702 (1993), the Court held that inquiries examining why offenders violated no arrest directives were different from the instant situation. The Court, however, remitted the matter back to the trial judge to determine whether the Defendant should have been granted the opportunity to withdraw his guilty plea before the imposition of sentence.

Notice to Defense Regarding Jury Note and Prosecutorial Misconduct

People v. Ochoa

***People v. Figueroa*, decided February 16, 2010 (N.Y.L.J., February 17, 2010, pp. 6 and 42)**

The Defendants in the case at bar contended that prosecutors were improperly allowed, upon redirect examination, to bolster the testimony of witnesses who had given inconsistent statements during direct examination. In a 4-3 decision, the Court of Appeals held that the prosecutor's actions did no more than explain and clarify the witnesses' prior testimony. The majority consisted of Judges Pigott, Jr., Smith, Read and Graffeo. In a dissenting opinion written by Judge Jones, the Court's minority took the view that the re-direct examination was clearly improper and had denied the Defendants a fair trial. Judge Jones was joined in dissent by Chief Judge Lippman and Judge Ciparick.

With regard to a secondary issue, the defense contended that the trial court had failed to apprise defense counsel of the contents of a jury note prior to speaking with the foreperson. The majority opinion found the note in question to be ambiguous and of a ministerial nature, which did not require notification to defense counsel. The dissenting opinion argued that reversible error had occurred by the conduct of the ex parte conference without the presence of defense counsel and without offering defense counsel an opportunity to be heard on the note.

Improper Joinder of Charges

***People v. Pierce*, decided February 16, 2010 (N.Y.L.J., February 17, 2010, p. 40)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction on the grounds that a charge of criminal possession was not properly joined with a charge of grand larceny. The Court found that the situation in question violated provisions of CPL Section 200.20(2). The Defendant had waived indictment and had pleaded guilty to a Superior Court Information which charged the two offenses in question. The issue in interpreting the application of the statutory provision was whether the criminal possession of stolen property count that was not charged in the Superior Court Felony

Complaint was the same or similar to the grand larceny offense, so that its inclusion in the Superior Court Information on a joinder theory complied with the statutory requirements. Comparing the two charges in question, the Court of Appeals found that there was little if any commonality and that in many respects they were quite different. Under these circumstances, the improper inclusion of an offense in a waiver of indictment and a Superior Court Information is a jurisdictional defect that requires a reversal of the conviction. Under these circumstances, the Defendant's guilty plea was vacated and the matter remitted to the trial court for further proceeding.

Guilty Plea

***People v. Brown*, decided February 18, 2010 (N.Y.L.J., February 19, 2010, pp. 10 and 41)**

In a unanimous decision, the New York Court of Appeals determined that the Defendant's case had to be remitted to the County Court for further proceedings. The Court found that as part of a plea bargain, the Defendant was granted a three-week furlough prior to any incarceration in order to spend time with his injured son. The Court of Appeals expressed concern that this portion of the agreement could have been coercive, and had improperly influenced the Defendant in accepting the plea deal. Chief Judge Lippman, who wrote the Court's opinion, emphasized that while the acceptance of such a pre-incarceration furlough does not represent a per se invalidation of the plea, a further hearing was required in order to determine whether the Defendant fully understood the repercussions of the plea deal. In the case at bar, the Defendant had previously maintained his innocence and had accepted a two- to four-year sentence based upon the understating that he would be able to see his son, who was in a coma during the time in question. The Court of Appeals basically concluded that under the circumstances herein, a more thorough and searching inquiry should have been made by the trial court.

Business Records

***People v. Kisina*, decided February 18, 2010 (N.Y.L.J., February 19, 2010, p. 42)**

In a unanimous decision, the New York Court of Appeals determined that a physician's conviction for falsifying business records in the first degree under Penal Law Section 175.10 was properly established, and the conviction in question should be affirmed. The physician in question had been charged with submitting fraudulent medical documentation to a no-fault insurance carrier for the purpose of receiving payments for treatments that were unnecessary or unperformed. The Court of Appeals concluded that such documents constituted business records for the purposes of the Statute.

Ineffective Assistance of Counsel

***People v. Rivera*, decided February 18, 2010 (N.Y.L.J., February 19, 2010, p. 43)**

In a unanimous decision, the New York Court of Appeals found that the Defendant had not demonstrated the absence of a legitimate explanation why his appellate counsel had failed to brief the issue of whether his guilty plea should be vacated because of failure to advise, regarding the imposition of a term of post-release supervision pursuant to *People v. Catu*, 4 N.Y.3d 242 (2005). Under these circumstances, the claim of ineffective assistance of counsel cannot be sustained.

Speedy Trial

***People v. Price*, decided February 11, 2010 (N.Y.L.J., February 16, 2010, pp. 1, 7 and 37)**

In a unanimous decision, the New York Court of Appeals held that a speedy trial deadline would be imposed even in a situation where a Statute has been invalidated on appeal but then reinstated after nine months. In reaching its decision, the Court held that the "exceptional circumstances" waiver of deadlines under CPL Section 30.30 should only be allowed where prosecutors, for practical reasons beyond their control, cannot proceed with a legally viable prosecution. In the case at bar, the Defendant had been arrested on a felony charge of attempting to disseminate indecent materials over the internet. Six months later, the Second Department had ruled, in the case of *People v. Koslow*, that a prosecution under the same set of circumstances could not proceed. Based upon the Appellate Division decision, the Suffolk County District Attorney's Office had not moved the instant prosecution to trial. Subsequently, the Court of Appeals reversed the Appellate Division determination in *People v. Koslow*. The Suffolk County District Attorney's Office then continued with the instant prosecution. The Court of Appeals found, however, that prosecutors in Suffolk County were wrong in keeping the Defendant's case pending until the Court of Appeals ruling.

Judge Lippman, writing for the court, stated that the criminal complaint in question could have been withdrawn, and subsequently, after the Court of Appeals reversal in *Koslow*, the People could have attempted to recommence the prosecution. Since Suffolk County prosecutors had missed the six-month deadline, they could not be excused because of exceptional change in the governing law. Judge Lippman indicated that while the circumstances of the Defendant's case might be unusual, they were not exceptional under CPL 30.30. In conclusion, the Court found that "what is involved in the final analysis is prosecutorial inaction resulting in the prolonged pendency of a criminal complaint without any judicial intervention and any notification to Defendant of the status of the proceed-

ing". "This is precisely the sort of conduct the Legislature intended to curb when it enacted CPL 30.30."

Speedy Trial

People v. Zarate

People v. Luciere

***People v. Cozzani*, all decided on February 11, 2010 (N.Y.L.J., February 16, 2010, p. 13)**

All three of the above cases were unanimously affirmed, and the indictments dismissed, based upon the same issue involving the speedy trial violation discussed in *People v. Price* above.

Intent to Defraud

***People v. Taylor*, decided February 11, 2010 (N.Y.L.J., February 16, 2010, p. 39)**

In a unanimous decision, the New York Court of Appeals reinstated a conviction for offering a false instrument for filing in the first degree. The Court found, contrary to the Appellate Division ruling, that the intent to defraud requirement refers only to a Defendant's state of mind in acting with a conscious aim and objective to defraud. The Court found that the Appellate Division had issued its dismissal of the charges in question based upon an erroneous theory. It therefore remitted the matter back to the Appellate Division for consideration of the facts under the proper legal analysis.

Missing Witness Charge

***People v. Edwards*, decided February 11, 2010 (N.Y.L.J., February 16, 2010, p. 39)**

In a unanimous decision, the Court of Appeals upheld a Defendant's conviction and found that no reversible error had occurred due to the trial court's failure to provide a missing witness charge. The Court found that a party seeking a missing witness charge must sustain an initial burden of showing that the opposing party has failed to call a witness who could be expected to have knowledge regarding a material issue in the case, and to provide testimony favorable to the opposing party. In the case at bar, the Defendant argued that the uncalled witness could have either contradicted or corroborated the complaining witness, but did not demonstrate that her testimony would have been non-cumulative or expected to be favorable to the People.

Search and Seizure and Mixed Question of Law in Fact

***People v. Francois*, decided February 11, 2010 (N.Y.L.J., February 16, 2010, p. 39)**

In a unanimous decision, the New York Court of Appeals affirmed the Appellate Division determination which upheld the Defendant's conviction. The Court concluded that the Appellate Division's determination that the officer's conduct did not elevate his encounter with the Defendant from a common law inquiry to a seizure necessitating reasonable suspicion constitutes a resolution of a mixed question of law and fact that is supported by the evidence in the record. It is therefore beyond the power of the New York Court of Appeals to review.

Sufficiency of Evidence

***People v. McDade*, decided February 23, 2010 (N.Y.L.J., February 24, 2010, p. 42)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction of rape in the second degree, finding that the evidence was legally sufficient to support such a conviction. The Court, in reaching its decision, pointed to a combination of DNA evidence and eyewitness testimony. The Court concluded that the evidence provided a valid line of reasoning and permissible inferences that could lead a jury to conclude that the contact between the Defendant and the victim was sexual intercourse, so as to make the conviction of second degree rape supportable rather than any lesser included charge. The Court noted that the fact that some other inferences could have been drawn by the jury did not render the evidence legally insufficient.

Post-Release Supervision Addition to Original Sentence Is Invalid after Release from Prison

People v. Williams

People v. Hernandez

People v. Louis

***People v. Rodriguez*, decided February 23, 2010 (N.Y.L.J., February 24, 2010, p. 39)**

In a series of cases in the continuing saga of the post-release supervision fiasco, the New York Court of Appeals determined that the attempt to impose a sentence of post-release supervision upon Defendants who had been released from prison was constitutionally impermissible. The Court specifically concluded that once a Defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court and the time to appeal the sentence has expired or the appeal has been finally determined, there is a legitimate expectation that the sentence, although illegal under the penal law, is final and the double jeopardy clause prevents a court from modifying the sentence to include a period of post-release supervision.

These cases arose after the New York Court of Appeals had ruled in prior decisions that a sentence of post-release supervision was part of a mandated sentence and could not be administratively added to a Defendant's term by Correction Department action. As a result, many

Defendants were brought back for re-sentencing in order for the Court to impose the post-release portion of the sentence. In the instant cases, the Defendants had already served their time and had been released, and the New York Court of Appeals has now determined that the periods of post-release supervision could not legally be imposed upon them. It appears that the problem of the post-release supervision fiasco will be with us for several years to come. State prison officials have recently estimated that approximately 1,500 inmates who face post-release supervision have been released from prison since the directives established in *Matter of Garner* began. In about half of those cases, courts had the power to impose legally recognized terms of post-release supervision. In the other half, however, post-release supervision terms were ruled to be illegal and Defendants were released without supervisory control.

Several weeks following the decision, Manhattan District Attorney Cyrus R. Vance announced that he would seek to appeal the ruling of the New York Court of Appeals to the United States Supreme Court. Based upon the very limited number of cases which are granted certiori, and the apparent lack of federal and constitutional issues in the matter, it appears highly unlikely that the U.S. Supreme Court will accept the case in question.

Attorney Disqualification

***People v. Carncross*, decided March 25, 2010 (N.Y.L.J., March 26, 2010, pp. 7 and 45)**

In a 5-2 decision, the New York Court of Appeals upheld a trial judge's disqualification of a Defendant's Attorney, despite the Defendant's willingness to waive any potential conflict of interest. The Defendant had been indicted on various charges, including aggravated manslaughter and criminally negligent homicide. The incident involved the Defendant's use of a motorcycle which resulted in the death of an individual. The prosecution had moved to remove Defendant's counsel because counsel had previously represented the Defendant's father and girlfriend before a grand jury four months before trial, and at which time both witnesses placed the Defendant on a motorcycle the night the victim was killed.

The majority opinion in the Court of Appeals concluded that it was not unreasonable to assume that both witnesses would be called at the Defendant's trial, and that the defense could be conflicted during cross-examination by the Attorney's prior representation. The majority concluded that trial courts have broad discretion when considering motions to disqualify defense counsel, and the Judge in question did not abuse that authority in making the instant ruling. The majority opinion was joined in by Chief Judge Lippman, and Judges Ciparick, Graffeo, Read and Jones. Judges Pigott, Jr. and Smith dissented, claiming that any potential conflict was not serious enough to overcome the presumption in favor of affording Defendant his constitutional right to counsel of his own choosing. The dissent further emphasized that the Defendant was closely examined regarding his waiver of any potential conflict, and he steadfastly indicated that he wished to proceed with the attorney of his choice.

Ineffective Assistance of Counsel

***People v. Baker*, decided March 25, 2010 (N.Y.L.J., March 26, 2010, p. 46)**

In the case at bar, the Defendant claimed that his trial lawyer was ineffective because he did not ask the Court to instruct the jury that it should consider three homicide counts in the alternative. In a unanimous ruling, the Court found that the charges in question could have been considered simultaneously by the jury, rather than in the alternative. Thus trial counsel's failure to object to the Court's proposed charge with respect to the counts in question did not amount to ineffective assistance of counsel. In addition, the Court concluded that the Defendant had made no showing that there was no legitimate tactical reason for trial counsel's decision. Under these circumstances, the Defendant's burden of demonstrating ineffectiveness of counsel was not met, and the conviction should be affirmed.

Hate Crimes

***People v. Assi*, decided March 30, 2010 (N.Y.L.J., March 31, 2010, pp. 1, 2, 25 and 41)**

In a unanimous decision, the New York Court of Appeals held that New York's Hate Crimes Act broadly applies to a range of offenses, including religiously motivated property crimes. The Defendant had placed Molotov cocktails in front of a synagogue on the eve of Yom Kippur. Following his conviction, the Defendant had argued that the Hate Crimes Act, which was passed in 2000, pertained to crimes motivated by prejudice against persons and not structures. The New York Court of Appeals, however, noted that the Statute was meant to broadly apply to a range of offenses which are motivated by hate against a particular religion. The Court also noted that a specific Penal Law Section defines a person and a human being to also mean, where appropriate, a public or private corporation. The opinion, which was written by Judge Graffeo, concluded, "The attempted arson of a house of worship that is motivated by religious animus is covered by Penal Law Section 485.05(1)."

Credit Toward Probation

***People v. Zephrin*, decided March 30, 2010 (N.Y.L.J., March 31, 2010, p. 42)**

In a unanimous decision, the New York Court of Appeals held that a Defendant was entitled to receive credit toward his term of probation when he received jail time credit toward his sentence of imprisonment when he

received a split sentence of incarceration and probation. As a result of applying the jail time credit toward the probationary period, the Defendant's term of probation had expired prior to the filing of the declaration of delinquency. The Court determined that a Defendant's term of probation begins at the same time as, and runs concurrently with, the term of incarceration, so as to give appropriate effect to the split sentence statute. The result is that the Defendant's period of probation, reduced by the period of incarceration, begins on the day the sentence is imposed.

Search and Seizure

***People v. Tolentino*, decided March 30, 2010 (N.Y.L.J., March 31, 2010, p. 42)**

In the instant matter, the Defendant claimed that police had unlawfully stopped his car and illegally obtained his driving record from the Department of Motor Vehicles. The Defendant claimed that before the unlawful seizure by police, his Department of Motor Vehicle records would not have been obtained, and that therefore, they were the fruit of police illegality. The majority concluded that the officers in the case at bar learned of the Defendant's identify when they stopped the vehicle, and that this knowledge permitted them to perform a computer check that led to the retrieval of the Defendant's motor vehicle records. The majority further emphasized that the records in question were public records which were already in the possession of governmental authorities. The majority emphasized that its instant holding merely concluded that a Defendant may not invoke the fruit of the poisonous tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the Defendant's name.

In a dissenting opinion by Judge Ciparick and Chief Judge Lippman, the minority emphasized its belief that Dept. of Motor Vehicle records were subject to suppression if obtained by the police through the exploitation of a Fourth Amendment violation, namely an unlawful traffic stop of the nature which occurred herein.

Search and Seizure

***People v. Mothersell*, decided April 1, 2010 (N.Y.L.J., April 2, 2010, pp. 1, 7, and 44)**

The New York Court of Appeals unanimously determined that a warrant used by police to search a home suspected as a location for drug sales and to strip search everyone found on the premises was impermissibly vague. The Court found that the "all persons present" warrant was too broad to protect suspects from unreasonable search and seizure, and the strip searches which occurred were unauthorized by the terms of the warrant. The Court's ruling resulted in the dismissal of the Defendant's indictment, and the setting aside of his four year prison term for criminal possession of a controlled substance in the fifth degree. The Court issued its ruling in the form of a majority opinion written by Chief Judge Lippman and joined in by the rest of the Judges. Judge Read also issued a separate concurring opinion which was joined in by Judges Graffeo and Pigott.

Admission of Evidence of Prior License Suspension

***People v. Caban*, decided April 1, 2010 (N.Y.L.J., April 2, 2010, p. 44)**

In a unanimous decision, the New York Court of Appeals held that the trial court properly admitted evidence regarding the Defendant's prior license suspension. The Court found that the admission of the license suspension informed the jury about the Defendant's earlier misbehavior and was relevant on the issue of criminal negligence. The Court noted that when the issue is criminal negligence, a prior similar act for which a Defendant has been punished shows more than a propensity. A Defendant who is repeatedly negligent in the same way may be found to be unable or unwilling to learn from his mistakes. Thus, the prior conduct was directly relevant to the extent of the Defendant's negligence in the case on trial and went to the issue of mens rea.

Missing Witness Charge

***People v. Carr*, decided April 1, 2010 (N.Y.L.J., April 2, 2010, p. 45)**

In a unanimous decision, the Court of Appeals held that a trial judge was within his discretion to deny a Defendant's request for a missing witness charge which was made after the People had rested, and more than a week after the People had provided their witness list. The Court found that a party seeking a missing witness instruction has the burden of making the request "as soon as practicable." Whether such a request is timely is a question to be decided by the trial court in its discretion, taking into account when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay. In the case at bar, the Defendant was given ample notice that the People did not intend to call the witnesses in question, and waited too late before making his request.

Mode of Proceedings Error

***People v. Kadarko*, decided April 6, 2010 (N.Y.L.J., April 7, 2010, p. 35)**

In the case at bar, the Defendant was tried for allegedly robbing food deliverymen on five separate occasions. During the course of jury deliberations, the jury provided a note which indicated that they were still divided regarding several of the robberies in question, and indicated the breakdown of the deadlock. The trial judge explained the

note's contents to defense counsel, but did not show them the numerical breakdown of the vote. Neither counsel objected to the Court withholding the specific numbers. Defense counsel, however, did request that a mistrial be declared on the grounds that the jury was hung.

On appeal, the Defendant claimed that the trial judge had committed a mode of proceeding error when he failed to inform counsel of the full contents of the jury's note. The Court of Appeals determined that the alleged error in question did not amount to a failure to provide counsel with meaningful notice of the contents of the jury note, or an opportunity to respond. Defense counsel raised no objection, and any claimed failure of the trial court to read the full contents of the note was not a mode of proceeding error which could be viewed on appeal in the absence of objection. Under these circumstances, a reversal is not required on the grounds stated, and the matter was remitted to the Appellate Division for consideration of facts and issues which were not previously determined by that Court.

Sufficiency of Evidence

***People v. Pettigrew*, decided April 6, 2010 (N.Y.L.J., April 7, 2010, p. 35)**

In a unanimous decision, the New York Court of Appeals held that the People had provided, by clear and convincing evidence, proof that the Defendant was armed with a dangerous instrument for the purposes of classifying him a level 3 sex offender under the Sex Offender Registration Act. The Court held that the Defendant's display of a gun to the victim and its threatened use constituted clear and convincing evidence that he was armed with a dangerous instrument during the commission of a crime, so as to establish the classification in question.

Presumption of Regularity

***People v. Cruz*, decided April 6, 2010 (N.Y.L.J., April 7, 2010, p. 36)**

In the case at bar, the Defendant was charged with two counts of assault in the first degree for allegedly stabbing two men during a fight outside a bar. At trial, the Defendant raised the defense of misidentification. During jury deliberations, the jury requested to see a written statement that had been prepared by a police officer and signed by the Defendant, in which he made certain admissions. Although the exhibit was ostensibly only to be used to refresh the police officer's recollection, the Court received and marked the exhibit in evidence over the objection of defense counsel. Later, the trial judge reversed his ruling, and determined that the written statement was not evidence, and re-marked it as a court exhibit. Subsequently, the jury requested and received certain exhibits which had been marked in evidence. Later, it also requested to see the written statement signed by the Defendant. Nothing in the record, however, indicated that the trial judge received this final request or that he acted upon it. On this basis, the Appellate Division applied the presumption of regularity which attaches to a judicial proceeding, and failed to reverse the Defendant's claim that the jury may have improperly considered something that was not in evidence.

The Court of Appeals, however, concluded that the Defendant in the case at bar met his burden of rebutting the presumption of regularity by substantial evidence. The evidence established that there was no basis in the record to conclude that the jury was informed by anyone that the item was not in evidence, and the jury may have received the exhibit in error. In addition, no harmless error analysis could be applied, since if the jury received the unadmitted exhibit in error, the exhibit would have contradicted the Defendant's misidentification defense at trial. Under these circumstances, a new trial was warranted.

Search and Seizure

***People v. McBride*, decided April 29, 2010 (N.Y.L.J., April 30, 2010, pp. 6, 36 and 37)**

In a 4-2 decision, the New York Court of Appeals determined that exigent circumstances justified a warrantless search of an armed robbery suspect's home, which eventually led to the seizure of clothing and other evidence. In the case at bar, when police arrived at the Defendant's apartment, he refused to open the door. A few minutes later, a woman came out of the apartment, crying hysterically. The Defendant in question had a past criminal record and was on parole. Since the police officers were concerned regarding the danger to the woman, and had reason to believe that the Defendant was armed, the Court determined that the officers were justified in entering the premises without a warrant, under the theory of exigent circumstances. The opinion was written by Judge Ciparick, and was joined by Judges Graffeo, Read, and Smith. Judges Pigott and Jones dissented, arguing that there was sufficient time for the authorities to obtain a search warrant, and that the officers acted too precipitously. Judge Lippman took no part in the decision.

Modification of Sentence

***People v. Acevedo*, decided April 29, 2010 (N.Y.L.J., April 30, 2010, p. 37)**

In a unanimous decision, the New York Court of Appeals held that a trial judge had no authority to change the terms of a Defendant's sentence from consecutive to concurrent. In the case at bar, the Defendant had moved in the County Court for re-sentencing, pursuant to the Drug Law Reform Act of 2004. In addition to having received a sentence for drug possession crimes, the Defendant had also been sentenced on weapons possession convictions, which had been made to run consecutively to the drug convictions. As part of the re-sentencing, the trial court reduced the sentences for the drug crimes, but left

undisturbed the direction for the sentences for the weapons possession convictions to run consecutively. The Defendant argued in the Court of Appeals that the trial judge should have eliminated the consecutive portion of the terms. The Court of Appeals held, however, that the purpose of the Drug Law Reform Act was to ameliorate the harsh sentences required by the original Rockefeller Drug Laws. A Court that re-sentences a Defendant pursuant to that law does not possess the authority to determine whether the sentence is to be served concurrently or consecutively with respect to other sentences.

Invalid Waiver of Right to Appeal

***People v. Johnson*, decided May 4, 2010 (N.Y.L.J., May 5, 2010, p. 43)**

In a unanimous decision, the New York Court of Appeals determined that a Defendant's waiver of his right to appeal became invalid when the Court later decided not to honor two aspects of the Defendant's plea agreement. The trial court's modification of the sentencing terms voided the Defendant's prior waiver of appeal, and required the re-allocution of the waiver. The failure to do so entitled the Defendant to pursue an appeal challenging his sentence.

Concurrent Sentences

***People v. Alford*, decided May 4, 2010 (N.Y.L.J., May 5, 2010, p. 44)**

In a unanimous decision, the New York Court of Appeals ordered that a sentence imposed on a Defendant for predatory sexual assault against a child had to run concurrently with a sentence imposed on a lesser count in the indictment. The Court determined that under Penal Law Section 70.25(2), it appeared that both offenses were committed through a single act or omission which was a material element of both offenses. Under such circumstances, the sentences had to run concurrently.

Rosario Violations

***People v. Daly*, decided May 4, 2010 (N.Y.L.J., May 5, 2010, p. 44)**

In a unanimous decision, the New York Court of Appeals affirmed a Defendant's conviction on certain counts of an indictment, even though Rosario and Brady violations may have occurred with respect to the other counts. The Court found that there was no reasonable possibility that the evidence supporting the tainted counts which related to a robbery and shooting at an off-track betting parlor had a spillover effect on the other guilty verdicts relating to an attempted robbery and shooting at a gas station. The documents that the People failed to disclose related exclusively to the off-track betting parlor counts. Further, there was strong, independent proof of the Defendant's guilt on the gas station counts.

Refusal to Accept Partial Jury Verdict

***People v. Rivera*, decided May 6, 2010 (N.Y.L.J., May 7, 2010, p. 43)**

In a unanimous decision, the New York Court of Appeals determined that the trial court had violated the provisions of CPL Section 310.70 when it first instructed the jury to render a partial verdict in which the jury acquitted Defendant of four counts and convicted him of one, and thereafter refused to accept the verdict after it was announced in open court, and then ordered the jury to continue determinations on all counts which were submitted to it. In the case at bar, the New York Court of Appeals found that it was plain error for the trial court to take the pulse of the jury deliberations and then ask the jury to reconsider its decision.

Search and Seizure

***People v. Scully*, decided May 6, 2010 (N.Y.L.J., May 7, 2010, p. 43)**

In a unanimous decision, the New York Court of Appeals determined that the Defendant had failed to establish sufficient grounds to order the suppression of evidence which was discovered on him. The Defendant argued that a police officer searched him on the basis of a search warrant that had been issued without probable cause. The Court of Appeals found that the Defendant, in his original motion papers, had not provided factual allegations to support his claim that probable cause was lacking. Therefore he failed to raise an issue of fact to warrant a suppression hearing as to the weapon which was discovered. In addition, with respect to other evidence found on the premises which was searched, the Defendant did not assert a privacy interest in the apartment, either in his motion papers or at oral argument. Thus he did not meet his burden to establish standing to seek suppression of the drugs which were found in the apartment.

Failure to Provide Proper Jury Instruction

***People v. Zona*, decided May 6, 2010 (N.Y.L.J., May 7, 2010, p. 40)**

In a 5-2 decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial, on the grounds that the evidence presented at the trial and viewed in the light most favorable to the Defendant supported a good faith claim of right, and that therefore the defense was entitled to assert this defense, and a jury instruction to that effect should have been granted by the trial court once it was requested by the Defendant. The case involved the taking of certain tires from a BF Goodrich warehouse. Judges Pigott and Graffeo dissented, finding that there was no reasonable view of the evidence to support a defense that the Defendant took five brand new tires from a police warehouse, believing in good faith that he had a right to take them.

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

The United States Supreme Court issued several important decisions during the last several months in the area of Criminal Law. These cases are summarized below.

Florida v. Powell, 130 S. Ct. 1195 (February 23, 2010)

In a 7-2 decision, the United States Supreme Court reinstated the conviction of a Florida Defendant and upheld the use of statements made by the Defendant following the reading of Miranda warnings which the Defendant claimed were defective. The warnings were read from a form used by Florida police officers for several years, which advised suspects that they had a right to talk to a lawyer before questioning, and a right to invoke their rights at any time. However, the form did not say that a defendant had a right to have a lawyer present during questioning. Based upon this omission, the Florida courts had overturned the Defendant's conviction. The Supreme Court, however, found that a common sense reading of the form provided adequate notice to the Defendant regarding his rights. Judge Ginsburg, writing for the majority, stated that although the warnings were not the clearest possible formulation of Miranda rights to counsel advisement, they were sufficiently comprehensible, and comprehensible when given a common sense reading. Justice Ginsburg was joined in the majority opinion by Chief Judge Roberts and Justices Scalia, Alito, Kennedy, Sotomayor and Thomas. Justices Stevens and Breyer dissented.

Maryland v. Shatzer, 130 S. Ct. 1213 (February 24, 2010)

In a 7-2 decision, the United States Supreme Court limited a prior ruling it had made and held that police investigators may resume questioning a suspect who invoked his Miranda rights to a lawyer after the suspect has been out of police custody for 14 days. In the case at bar, the Defendant had waived his Miranda rights but had provided information 2½ years later, after being questioned by another Detective. Justice Scalia, writing for the majority, stated that once a suspect has been released from an interrogation and returned to his normal life, even as in the case at bar, when the suspect was still in prison, there was little reason to believe that the choice to speak at the second occasion was coerced. The Court's ruling establishes a 14-day bright line test and severely restricts the Court's earlier ruling in 1981 in *Edwards v. Arizona* 451 U.S. 4677 (1981). In applying the 14-day test, the majority held that they needed to set a standard for future cases and to provide guidelines for law enforcement personnel.

Although agreeing to reinstate the conviction, Justices Stevens and Thomas issued their own opinion somewhat departing from the Court's major ruling. Justice Stevens basically argued that the 14-day rule was too short, while Justice Thomas felt that it was too long, and that no bright time line should be set.

Bloate v. United States, 130 S. Ct. 1345 (March 8, 2010)

In a 7-2 decision, the United States Supreme Court determined that the time granted to a party to prepare pretrial motions in a criminal case is not automatically excludable from the Speedy Trial Act's 70-day limit for bringing the defendant to trial, and instead, such time may be excluded only if a court complies with the Act's requirement of making case-specific findings that the ends of justice served by granting a continuance outweigh the best interests of the public and the defendant in a speedy trial. Justices Alito and Breyer dissented. The dissenters argued that the Court's interpretation of the Speedy Trial Act was not supported by the text or legislative history, and that the majority's opinion has reached in a strange result.

Padilla v. Kentucky, 130 S. Ct. 1473 (March 31, 2010)

In a 7-2 ruling, the United States Supreme Court held that defense attorneys must tell their immigrant clients if pleading guilty to a crime carries a risk of deportation. Failure to do so constitutes ineffective assistance of counsel, and violates fundamental Sixth Amendment rights. Justice Stevens issued the majority opinion for the Court, and stated, "Our long-standing Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the impact of deportation on families demands that no criminal defendant is left to the mercies of incompetent counsel who has not fully discussed the consequences of a guilty plea." Specifically joining in Justice Stevens' decision were Justices Kennedy, Ginsburg, Breyer and Sotomayor. Although joining the majority decision, Chief Justice Roberts and Justice Alito disagreed with Judge Stevens' decision on how far a lawyer must go to explain potentially complex immigration law. They did agree, however, that a lawyer must not mislead an immigrant about deportation. Justices Scalia and Thomas fully dissented, arguing that the majority expansively interpreted the protections against ineffective counsel.

United States v. Stevens, 130 S. Ct. 1577 (April 20, 2010)

In an 8-1 decision, the United States Supreme Court struck down a federal law which has been in existence for ten years, which made it a crime to create, sell, or possess certain depictions of animal cruelty. The Court determined that the Statute was too broad and vague, and in its application violated the First Amendment. The Court, however, in issuing its opinion, left open the possibility that a new Statute more narrowly focused on crush videos might be found constitutional. Justice Alito issued a dissenting opinion.

Justice Stevens Announces His Retirement and President Obama Names Replacement

In early April, Justice John Paul Stevens announced that he would be retiring from the Court at the conclusion of its 2009–2010 term in July 2010. Justice Stevens, who recently reached age 90, has for several years been the subject of a possible retirement rumor, and his announcement was generally expected. Characterizing himself as a Republican, and having been appointed in 1975 by former President Gerald Ford, Justice Stevens in recent years has emerged as a leader of the so-called liberal group of Justices, consisting of himself and Justices Ginsburg, Breyer and Sotomayor.

Following Justices Stevens' announcement, President Obama indicated that he would move expeditiously to appoint a replacement for Justice Stevens. He in fact, on May 10, announced that he had chosen Elena Kagan, who had been serving as his Solicitor General, as his nominee to replace Justice Stevens. Ms. Kagan is 50 years of age, and was the former Dean of Harvard Law School. She has also held numerous positions in the Clinton administration. Of interest to New Yorkers is the fact that she was born in New York City and attended Hunter High School. Her selection would bring the number of female justices to three, and would leave the Court for the first time in its history without a member of the Protestant faith.

The Senate Judiciary Committee has set confirmation proceedings for some time during the summer, and her confirmation appears highly likely, so that she would be able to take her position on the Court when it opens its new term in October.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from February 1, 2010 to May 7, 2010.

People v. Grimm (N.Y.L.J., February 2, 2010, pp. 1, 2 and 43)

In a unanimous decision, the Appellate Division, Third Department, vacated a Defendant's guilty plea and the sentence imposed thereon, because the plea had not been knowingly, intelligently and voluntarily made because the trial court had failed to inform the Defendant regarding the length of the post-release supervision term which was to be imposed. The Third Department decision follows a long line of New York Court of Appeals' determinations dealing with the issue of post-release supervision. The high court has repeatedly held that the imposition of such a term is mandated by statute and is part of the overall sentence, so that only the sentencing court can impose the term in question, and a Defendant must be made aware of the imposition of such a term prior to the entry of a guilty plea. Over the last few years, the failure of many trial courts to properly follow the post-supervision release procedure has led to the overturning of numerous convictions and has literally created havoc in the criminal justice system. It appears that additional reversals based upon the post-release supervision are forthcoming.

People v. Bonville (N.Y.L.J., February 4, 2010, p. 20)

In a unanimous decision, the Appellate Division, Third Department, held that charges which were dismissed as part of a guilty plea were improperly resubmitted, and that their prosecution was barred by CPL Section 210.20. In the case at bar, a negotiated plea bargain had occurred in which all charges were dismissed except assault in the second degree. At the sentencing, however, the trial court informed the Defendant that based upon further review, it could not adhere to the agreed upon sentencing recommendation. The Defendant then accepted the offer to withdraw his plea and specifically objected to the reinstatement of the entire indictment.

The Appellate Division concluded that the Defendant should only have been tried on the remaining charge of assault in the second degree. It concluded that the remaining charges were dismissed upon his plea of guilty and were not properly resubmitted inasmuch as the Defendant withdrew his plea without agreeing to the reinstatement of the additional charges. The panel based its decision upon provisions of CPL 210.20(4), which it held barred the additional prosecutions. The Defendant's conviction was therefore reversed, and the matter remitted for a new trial solely on the charge of assault in the second degree.

People v. Grant (N.Y.L.J., February 8, 2010, pp. 1 and 2 and February 9, 2010, p. 18)

In a 3-1 decision, the Appellate Division, Second Department, upheld a trial court's reduction of robbery charges from first degree to third degree on the grounds that the Defendant's note to a bank teller, which read, "I have a gun, don't say anything, or I'll shoot," was insufficient on its own to support the claim that he used a dangerous weapon. The bank teller who had testified at trial stated that he never saw a gun, and the majority concluded that the statement on the note was insufficient to establish robbery in the first degree. Justice Fisher dissented, finding that the statement which was uttered by the Defendant in the course of the crime can be accepted by the jury as legally sufficient evidence that he was actually in possession of a dangerous instrument. Justice Fisher noted that the Defendant was apprehended at the scene immediately after the crime, and that the failure to recover a weapon was not sufficient to overcome the strong inference from the Defendant's own statement that he possessed a weapon. Based upon the interesting issue presented in this case and the strong dissenting opinion, it appears likely that the matter may be eventually determined by the New York Court of Appeals.

People v. Erb (N.Y.L.J., February 19, 2010, pp. 1, 6 and 44)

In a unanimous decision, the Appellate Division, Fourth Department, dismissed a conviction for criminally negligent homicide involving a Defendant who, after a woman passenger overdosed on heroin and passed out in his car, dropped her off on the lawn of her trailer park. The woman was subsequently taken to a hospital, where she died two hours later. The appellate panel concluded that the evidence failed to establish that the Defendant's act in any way caused the death of the victim. The Court noted that the Defendant did not procure or inject the drugs that caused the death of the victim, nor did he place her in a dangerous location. The appellate panel further found that the Defendant had no affirmative duty to act on the victim's behalf, and his actions did not make the receipt of medical assistance less likely. The District Attorney in the matter has already announced that he intends to seek leave to appeal to the New York Court of Appeals in this case.

People v. Rodriguez (N.Y.L.J., February 17, 2010, pp. 1, 11 and 45)

In a 3-2 decision, a Defendant's conviction for Manslaughter in Second Degree was reversed because the trial judge failed to charge the jury with the defense that his illegal entry into a truck was justified to prevent a serious accident as the truck rolled down a hill. The Defendant had received a minimum sentence of six years for the killing of a three-year-old, and the serious injury of other people, when the out-of-control delivery truck struck them. The three-Judge majority was comprised of Justices Tom, Degrasse and Freedman. The majority argued that the refusal to provide a justification charge was untenable and simply not the law based upon the circumstances of the case herein. Justices McGuire and Sweeny dissented. The dissent argued that the People's theory was that the Defendant was intoxicated, and their view of the case as presented in the summation upheld the conclusion that no justification defense was necessary. Based upon the closeness of the decision and the sharp disagreements among the Judges, it appears likely that this case will wind up in the New York Court of Appeals.

People v. Harnett (N.Y.L.J., February 26, 2010, pp. 1, 6 and 25)

In a 3-2 decision, the Appellate Division, Third Department, refused to set aside a Defendant's guilty plea, even though the Defendant claimed he was never advised during the plea colloquy that he would be subject to the State's Civil Sex Offender Management Program and could be confined for the rest of his life in a mental hospital once he had served his criminal sentence. The Defendant had pleaded guilty in 2008 to a charge of first degree sexual abuse. The three-judge majority, which consisted of Justices Malone, Cardona and Rose, concluded that the sentencing judge had fulfilled her obligation to explain the ramifications of the guilty plea, and did not have to address a situation which might occur after the Defendant's release from his incarceratory term. The majority ruled that the potential for the Defendant's ultimate longtime confinement as a dangerous sexual offender would not be an immediate definite automatic result of this guilty plea, and as such, be subject to the stringent inquiries that courts have found judges must make of defendants to determine if they understand their pleas.

The majority reiterated that the relevant determinations would not be based solely on the Defendant's admissions, but rather on the particular circumstances of his history and mental health at the time of his anticipated release.

Justices Stein and Garry vigorously dissented, arguing that although the provisions regarding the sex offender law are viewed as civil and not criminal, fundamental fairness dictated that Defendants be told that guilty pleas could one day result in substantial additional confinement. Based upon the sharp split in the Court and the importance of the issue, it appears almost certain that the New York Court of Appeals will have to eventually decide the issue.

People v. Porco (N.Y.L.J., March 16, 2010, p. 4)

In a unanimous decision, the Appellate Division, Third Department, affirmed the Defendant's conviction for murder in the second degree. The Defendant had raised the issue on appeal that evidence received from the Defendant's mother through the testimony of a Detective was improperly admitted, and constituted a Crawford violation. In the case at bar, the Defendant was charged with killing his father, and when police arrived at the home, the Defendant's mother, in response to questioning by a Detective, nodded her head, indicating that the Defendant's son had attacked her and her husband. The appellate panel held that the head nod testimony was not made spontaneously, but in response to probing, direct questions by the Detective, and as such constituted testimonial hearsay which should have been excluded. The panel, however, went on to conclude that the error was harmless, in light of the otherwise overwhelming evidence of the Defendant's guilt. The case in question had received a great deal of notoriety in upstate New York, since the victim of the slaying was the former law clerk to the presiding Justice of the Appellate Division, Third Department. Attorneys for the Defendant announced that they would be seeking to appeal the decision through the New York Court of Appeals.

People v. Hull (N.Y.L.J., March 29, 2010, pp. 1, 7, 17 and 33)

In a unanimous decision, the Appellate Division, Third Department ordered a new trial for a Defendant who claimed that his defense Attorney had rendered ineffective assistance of counsel because of the failure to produce expert testimony about the possibility that his firearm had a propensity to go off by accident. The incident involved a dispute between two men who lived in an apartment building. During the incident, the Defendant had produced a handgun which he contended had discharged by accident. The prosecution had produced a firearms expert, who testified that the gun could not have been prepared for firing without cocking it manually. Defense counsel had promised to produce his own expert, and had even been urged by the trial court to do so. However, he never did so, and the Defendant was eventually convicted of murder and sentenced to a 22-years-to-life sentence. The appellate panel also concluded that defense counsel should have objected to the prosecution questioning the Defendant on whether he belonged to gun owner's groups and believed in gun ownership rights. The Appellate Division stated that the questioning was

offered to inflame the jury, and had little or no probative value. Based upon the combination of incidents, the Appellate Court concluded that the Defendant had been denied a fair trial because of the ineffectiveness of defense counsel, and a new trial was required.

People v. Douglas (N.Y.L.J., April 5, 2010, pp. 1, 8 and 42)

In a unanimous decision, the Appellate Division, Second Department, held that intentional and depraved and indifferent charges can co-exist where an assault statute defines as an intentional crime, the infliction of serious injury upon someone other that the intended target. Justice Fisher, writing for the Court, stated that a Defendant may act with a specific intent directed at one person while at the same time being reckless with respect to a different person. The appellate panel's unanimous ruling basically carved out an exception to a long line of recent New York Court of Appeals decisions which have found incompatibility between charges based upon intentional conduct, and those alleging depraved indifference.

People v. Robinson (N.Y.L.J., April 5, 2010, pp. 1 and 4, and April 6, 2010, p. 18)

In a 3-2 decision, the Appellate Division, Second Department, held that a Defendant's guilty plea had to be vacated because the Defendant, during the allocution, had raised the possibility of a justification defense, and the trial court did not adequately question the Defendant before accepting a recitation of the facts that cast into significant doubt her guilty plea. The three-judge majority, consisting of Justices Dickerson, Leventhal and Lott, concluded that the trial court had a duty to inquire further to insure that the Defendant's plea of guilty was knowingly and voluntarily made. Justices Fisher and Angiolillo dissented, arguing that there was no indication that the Defendant believed that her use of deadly physical force was necessary to defend herself. Due to the sharp split in the Court, it appears likely that this case may eventually go to the New York Court of Appeals.

In re Tatiana N. (N.Y.L.J., April 9, 2010, pp. 1, 7, 25 and 39)

In a 4-1 decision, the Appellate Division, First Department, determined that the participation of an unarmed teenage girl in a melee outside of a Bronx theater was enough to hold her responsible as an accessory for the acts of a second teenager who wielded a knife during the incident. The four-judge majority concluded that the girl's actions support the inference that she was aware of her companion's possession and intent to use the knife, thereby supporting her conviction for the most serious delinquency charge. The four-judge majority consisted of Justices Saxe, Sweeny, Moskowitz and Abdus-Salaam. Justice Andrias dissented, finding that the record was equivocal as to whether the juvenile saw her male companion with a knife during the attack and supported its continued use thereafter.

People v. Santiago (N.Y.L.J. May 7, 2010, pp. 2 and 44)

In a 3-2 decision, the Appellate Division, First Department, affirmed the conviction of a Defendant who had slashed a college co-ed on a subway platform with a box cutter. The three-judge majority ruled that the testimony of two more eyewitnesses who provided identifications bore enough corroboration to satisfy the standard set forth by the Court of Appeals in *People v. LeGrand,* 8 N.Y.3d, 449 (2007), and that therefore the trial court was within its discretion to forgo the admission of an expert's testimony. The majority consisted of Justices Buckley and Saxe, with a concurring opinion by Justice McGuire. The majority indicated that the corroborating evidence could be obtained by additional eyewitness testimony and need not be forensic or physical. Justices Moskowitz and Acosta dissented, arguing that when the case turned on the accuracy of identification witnesses, the testimony of an expert regarding identification testimony should have been allowed. Due to the sharp 3-2 split, it appears that the New York Court of Appeals will eventually have to determine this case.

For Your Information

Governor Seeks to Merge Criminal Justice Agencies

Governor Paterson announced in late January that he was recommending that three state agencies which currently deal with different aspects of the criminal justice system be merged with the Division of Criminal Justice Services. The three agencies in question are the Crime Victims Board, the Office for the Prevention of Domestic Violence, and the Division of Probation and Correctional Alternatives. As part of his effort to reduce the State's budget deficit, the Governor has proposed that the merger of these three agencies would save approximately $1.9 million a year. If the merger is effectuated, the three agencies in question would be placed under the total control of the Division of Criminal Justice Services. The Governor has also suggested the possible merger of the Energy Management Office, and the Office of Fire Prevention and Control, into the Office of Homeland Security, which could possibly save another $15 million a year. The Governor's merger suggestions and his overall budget proposal must be acted upon by legislative leaders who are currently still considering and debating the situation.

Appellate Divisions Report on Their Decision Time

The four Appellate Divisions recently released statistics regarding the average decision time for cases once they have been placed on the calendar for oral argument or submission. The statistics released were for the work year that ended June 30, 2009. According to the statistics, the Appellate Division, First Department decided cases faster than any of the other three Departments. The average decision time for the First Department was 30 days after the case came before the Court for submission or oral argument. The Second Department reported taking an average of 53 days to decide appeals, which was the longest of all of the Appellate Divisions. The Third Department had an average decision time of 48 days, and the Fourth Department had an average of 33 days. The most dramatic improvement in the decision time was experienced by the First Department, which lowered its decision time from 76 days in 2006.

In reporting their decision times, the four Appellate Departments also revealed that the number of appeals filed has been increasing over the last several years, and that the backlog of cases has steadily grown. It was also reported that the longer decision time in the Second Department was largely due to the fact that it handles a much greater number of appeals than any other Department. The Second Department, in fact, decided 4,374 appeals for the calendar year 2009. This compared to 2,552 decisions from the Appellate Division, First Department. The Third Department decided 1,999 appeals and the Fourth Department decided 1,646 cases. Overall, despite the gradual increase in cases, the Appellate Divisions appear to be in good shape, and to be handling appellate matters in an expeditious and efficient manner.

Family Wages Overtaken by Inflation

Recent statistics from the Labor Department indicate that inflation is slowly rising, especially in the area of energy and health care costs. This rise has led to a situation where the weekly wages of workers, adjusted for inflation, actually fell in the year 2009 by 1.6%. The report indicated that energy costs for the 12 months which ended in December 2009 went up by 18.2%, the biggest jump since 1979. The recent winter cold spell which struck many areas of the Country will apparently only further aggravate the energy cost situation, and will probably be reflected in future labor statistics. The report also indicated that during the last ten years, inflation-adjusted wages grew only about 13%, the slowest pace in five decades. Hopefully things will improve in the near future.

U.S. Government Reports Record Drug Seizures for 2009

It was recently reported that as of the end of 2009, various federal agencies, including the Coast Guard, the FBI, the U.S. Customs and Border Protection Agency and the U.S. Attorneys' Offices, had effectuated drug seizures valued at more than $5 billion dollar. The seizures included 175 tons of cocaine and 35 tons of marijuana. Apparently criminal law practitioners, both defense and prosecution, were kept busy during the last year dealing with drug related cases.

Economic Concerns Leading to Demise of Death Penalty

The lengthy litigation and the economic costs associated with the imposition of the death penalty have caused several states during the last few years to reconsider its utilization. New Mexico, in fact, in 2009 voted to abolish its death penalty and specifically noted the tax dollars that would be saved by its action. In 2009, ten other states also began considering the end of capital punishment.

It has been estimated that switching from a death penalty sentence to life without parole over the long term could save a state $1.3 million for each inmate involved. Economic concerns and changing attitudes have in fact led to a sharp decrease in the actual imposition of death sentences. In 2009, for example, just 52 prisoners were executed. This is a substantial decrease from prior years. While several states appear to be moving toward the abolition of the death penalty as a matter of economics, the overall debate regarding the imposition of the death penalty on moral and legal grounds continues, and it appears that the argument, pro and con, will be with us for many years to come.

New York State Begins to Reevaluate Its Juvenile Justice System

It was recently reported that the State of New York is moving to close some of its youth prisons and is re-evaluating the manner in which juvenile defendants are prosecuted and incarcerated. It is estimated that currently, approximately 1,600 juveniles are held in New York facilities each year. Governor Paterson, in his budget proposal, recently announced plans to close two facilities, and has called for a review of the entire juvenile justice system in New York. It is currently estimated that under the present system, it costs the State of New York $210,000 for each incarcerated juvenile. Agencies such as the Office of Children and Family Services and the Legal Aid Society have been requested to provide input with regard to the projected changes, and a task force formed by the Governor in 2008 and headed by Jeremy Travis has been asked to provide recommendations for proposed changes.

New York County D.A. Vance Announces His New Senior Staff and New Policies

Soon after being sworn in as the new Manhattan District Attorney, Cyrus I. Vance, Jr. announced that he had selected three veterans in the criminal justice system to serve as members of his senior staff. Daniel R. Alonso was selected to serve as Chief Assistant District Attorney. Mr. Alonso previously headed the Criminal Division in the United States Attorney's Office for the Eastern District of New York, and had worked as a Manhattan Assistant District Attorney from 1990 to 1995. He most recently served as a partner at Kaye Scholer. For the position of General Counsel, Mr. Vance selected Caitlin J. Halligan. Ms. Halligan had been serving as a partner at Weil, Gotshal and Manges.

Chauncey Parker was selected to fill the position of Executive Assistant District Attorney for Crime Prevention Strategies. Mr. Parker most recently headed the New York/New Jersey office of the Federal High Intensity Drug Trafficking Areas Program. Previously Mr. Parker served as the Criminal Justice Commissioner under former Governor George Pataki. Mr. Vance recently replaced Robert Morgenthau, who served in the office for over 35 years. We wish the new D.A. and his staff all the best as they begin their terms of office.

Shortly after taking office, District Attorney Vance also announced the institution of a new policy with respect to funds seized pursuant to search warrants. At the end of April the head of his prosecutors' Forfeiture Unit announced that the office had put in place a new policy, which will no longer allow defendants to tap funds seized pursuant to search warrants for the payment of defense counsel attorney's fees. In announcing the new policy, the Manhattan District Attorney's office stated, "The office has now analyzed the matter in terms of broader policy considerations. We oppose the release of funds of any type of property that has been seized pursuant to a search warrant for attorney's fees and/or living expenses." The new Manhattan policy is set to be similar to the one adopted by the Brooklyn District Attorney's Office several years ago. Defense lawyers have voiced objections to the new policy, and we will keep our readers advised of any new developments on this issue.

Governor Paterson Makes Additional Appointments to Appellate Division

In early February, Governor Paterson announced that he had appointed Rose H. Sconiers to fill an opening on the Appellate Division, Fourth Department. Judge Sconiers has served as a Supreme Court Justice in the Eighth Judicial District since 1994, and previously served as a City Court Judge in Buffalo. She is a graduate of the University of Buffalo Law School, and is presently 64 years of age. Her salary as an Appellate Division Justice will be $144,000 per year.

During the same month of February, Governor Paterson also announced that he had selected John C. Egan, Jr. to fill a position on the Appellate Division, Third Department. Judge Egan had been serving on the Albany Supreme Court since 2005, and had previously served as an Albany City Court Judge. He is a graduate of Albany Law School, and had served for many years in private practice before assuming the Bench. With these two appointments, Governor Paterson has filled the last remaining openings on the various appellate divisions. Since his elevation to the position of Governor, Paterson has had the opportunity to fill many vacancies in the various Appellate Courts.

The Counting of Inmates for Census Purposes

In early February, the Census Bureau issued a ruling with respect to the counting of inmates for the purposes of the upcoming 2010 census. In previous years, inmates were counted as local residents in the towns or cities where the correctional facilities were located for the purposes of apportioning representation. In a recent decision, however, states will be allowed to have the option

of counting inmates within the local population or in the area where their home address is listed. The census will report where prisons are located and how many people are in them. If the states then determine to utilize the home addresses of inmates, they can consider those addresses for the purpose of population counting. The Census Bureau will provide the information to the states, and the individual states will be allowed to consider which option to use in apportioning districts for the 2011 and 2012 elections.

Illegal Immigration Drops in U.S.

In a recent report, the Homeland Security Department estimated that the number of illegal immigrants living in the United States fell to 10.8 million as of January 2009, a 7% drop from the prior year. This is the second year in a row that the overall number of illegal immigrants in the United States has fallen. The peak year appears to have been January 2007 when it was reported that 11.8 million illegal immigrants were in the United States. It appears that the economic downturn which has resulted in fewer jobs, as well as more effective law enforcement, has led to the decrease in question.

Appellate Division, Second Department Gets New Clerk of the Court

It was announced in early February by Presiding Justice A. Gail Prudenti that she had appointed Matthew J. Kiernan to assume the position of Clerk of the Appellate Division, Second Department. Mr. Kiernan joined the Appellate Division, Second Department, as an Associate Deputy Clerk in 2002. He is a 1986 graduate of Villanova Law School. Mr. Kiernan is assuming the position which was held by James Edward Pelzer. Mr. Pelzer had served for 39 years in the New York State Court System, the last ten of which were devoted to his duties as Clerk of the Appellate Division, Second Department. In announcing Mr. Kiernan's appointment, Justice Prudenti also praised Mr. Pelzer for his devotion to a lifetime of public service and his tradition of excellence. We congratulate Mr. Kiernan on his appointment and thank Mr. Pelzer for his many years of distinguished service.

New York City Begins Major Overhaul of Juvenile Justice System

New York City Mayor Michael R. Bloomberg recently announced that he is instituting a major overhaul of the City's Juvenile Justice System, which will seek to enforce better and more comprehensive services that provide alternatives to incarcerations for juveniles. As part of his new initiative, the Mayor announced the appointment of Laurence E. Busching as the Executive Deputy Commissioner of a new Division of Youth and Family Justice. Mr. Busching has been a veteran prosecutor who has handled juvenile delinquency cases. He previously served in the New York County District Attorney's Office and is a graduate of St. John's University School of Law. In his new position, Mr. Busching will make a salary of $175,000 per year.

Denise O'Donnell Resigns as Criminal Justice Services Commissioner and Governor Paterson Fills Vacancy

In late February, Denise O'Donnell announced that she was resigning as Commissioner of the Division of Criminal Justice Services. The resignation evidently occurred over a dispute with Governor Paterson and the Superintendent of the State Police over the improper handling of a domestic violence matter which involved one of the Governor's chief aides. The incident has also led to the resignation of the State Police Superintendent, Harry Corbitt. In addition to her Commissioner title, Denise O'Donnell was also elevated to the position of New York State Deputy Secretary for Public Safety in 2009, which granted her supervision over several state agencies. She previously served as the U.S. Attorney for the Western District of New York, and is a graduate of Buffalo Law School. She was highly regarded within the criminal law community, and it appears to be another indication of the deterioration of Governor Paterson's administration. Recently, Governor Paterson announced that he would not seek re-election, his decision evidently based upon a continuing series of embarrassing incidents and charges of ineptitude and a worsening economic crisis in the State. Commissioner O'Donnell's resignation came as a complete surprise. She had indicated in recent months that she might be interested in running for the position of Attorney General, but decided in June, however, not to enter the Attorney General race.

In early March, Governor Paterson announced that he had designated two officials presently serving in state government to fill the posts which were vacated by Denise O'Donnell when she resigned on February 25. Mary B. Kavaney was appointed to the position of Deputy Secretary for Public Safety, and Sean M. Byrne was designated as Acting Commissioner of the Division of Criminal Justice Services. Both of these two officials are veterans in the law enforcement area. Ms. Kavaney previously served as Denise O'Donnell's top assistant, and was an Assistant District Attorney in Orange County. Mr. Byrne is a founder of the New York Prosecutors Training Institute, and had served as an Executive Deputy Commissioner at the Division of Criminal Justice Services. We wish them well in their new positions.

Patriot Act Extended

Despite some efforts to derail or substantially modify the Patriot Act, Congress approved, and President Obama signed, a one-year extension of several of the key provi-

sions in the Patriot Act. The Act was due to expire at the end of February, and the President's signature forestalls any immediate elimination of its key provisions. The key sections which will remain in force are as follows:

- Authorize court-approved roving wiretaps that permit surveillance on multiple phones.
- Allow court-approved seizure of records and property in anti-terrorism operations.
- Permit surveillance against a so-called lone wolf, a non-U.S. citizen engaged in terrorism who may not be part of a recognized terrorist group.

Three Televisions in Every Home

Despite the economic downturn, a recent study by the Nielsen Company revealed that 55% of the households in the United States have three or more televisions. The recent upgrade to HDTV has provided a strong momentum for the purchase of new televisions. In addition, the average price of such sets has fallen drastically, so that it is now not uncommon for a 32" HDTV set to sell for under $500. The report also indicated that the average American watches almost 32 hours of television per week. Where the goal was once a chicken in every pot, it now appears we have three televisions in every home.

Wall Street Continues with Bonuses

Despite the economic recession, bailout programs and public outrage, Wall Street companies continue to provide lucrative financial bonuses to their employees. In a recent report issued by the Office of the New York State Comptroller, it was revealed that employees at Wall Street financial firms collected more than $20 billion in bonuses in 2009. This was in fact about 17% higher than the total paid out in 2008. One good thing about the higher bonus payouts is that they will help the State's revenue, since the government receives taxes on the amounts paid. In issuing his report, Comptroller DiNapoli stated, "Wall Street is vital to New York's economy, and dollars generated by the industry help the state's bottom line. The bonuses help state revenue tremendously as it faces an $8.2 billion dollar deficit." The huge bonuses are a bitter pill for most Americans, and New York families are still struggling to make ends meet.

New York Court of Appeals Issues Ruling on Judicial Pay Raises

On February 23, 2010, the New York Court of Appeals issued its long awaited decision in three cases involving the issue of judicial pay increases. In the cases of *Maron v. Silver*, *Larabee v. Governor* and *Chief Judge v. Governor*, the New York Court of Appeals, by a 5-1 vote, held that the New York State Legislature created a crisis that violated the separation of powers when it failed to grant a judicial pay increase, and linked such an increase to unrelated issues which threatened the judiciary' independence. The Court held that the issue of judicial pay increases must be decided solely on its merits, and not linked to any other matter. It thus directed the legislature to reconsider the issue in an appropriate and expeditious manner on the merits alone.

The Court declined to issue an order directing an immediate pay raise, or to fashion any other remedy; rather, in a somewhat politically astute maneuver, it placed the matter back in the hands of the legislature. Chief Judge Lippman, who took no part in the decision, immediately praised the majority ruling, and the Office of Court Administration indicated that it would move immediately to see whether the matter could finally be resolved in the legislative branch. Joining the majority opinion, which was written by Judge Pigott, were Judges Ciparick, Read, Graffeo, and Jones. Judge Smith issued a dissent, stating that he did not find a constitutional violation in the legislature's actions, and largely agreeing with the Appellate Division, Third Department, which had issued a ruling in the *Maron* case.

Although Chief Judge Lippman hailed the ruling and stated that he expects the legislature to act expeditiously and in good faith, he did note that the decision had set no time frame for the legislature to act, and left up to the legislature the ultimate decision of whether and to what extent it would increase judicial salaries. In light of the continuing economic crisis in the State, and the legislative deadlock in Albany, it still appears likely that a considerable period of time may pass before any judicial raises are actually realized.

Appellate Courts Determine Constitutionality of 2004 Merger of Bronx Courts

In an interesting and unexpected decision, the Appellate Division, First Department, in a 4-1 decision, declared that the 2004 merger of the Criminal Courts in the Bronx into a single court, with the jurisdiction to handle both felonies and misdemeanors, was unconstitutional. In issuing its opinion in *People v. Correa*, the majority opinion concluded that then-Chief Judge Judith S. Kaye and then-Chief Administrative Judge Lippman overstepped the bounds of the administrative and operational authority that they possessed under the State Constitution. The majority consisted of Justices Andrias, Nardelli, Catterson and DeGrasse. Judge Acosta dissented and warned that the majority's opinion could effectively endanger thousands of misdemeanor convictions in the Bronx which have occurred over the past five years. In fact, the Office of Court Administration has indicated that more than 148,000 misdemeanor convictions could be affected. Almost immediately after the announcement of the Court's decision, the Bronx Criminal Court and Bronx Supreme

Court Criminal Term were scrambling to revise their procedures and to attempt to deal with the suddenly changed situation. The Bronx District Attorney's Office which handled the *Correa* appeal sought leave to appeal from Judge Acosta as well as a stay and in June, by a 6-0 vote, the Court of Appeals upheld the merger as constitutional and within OCA's authority. Further details on the Court of Appeals decision will appear in our Fall issue.

States Take a Gamble

It appears that any moral considerations regarding gambling are quickly giving way to economic reality, as the states scramble to find means of raising new revenue. It was recently reported that some 25 states are now in the process of considering expanding their casinos and gaming options in the hope that gamblers can fill budget holes. For example, Kentucky is considering slot machines at race tracks, Maine is considering video gambling and Pennsylvania has recently allowed additional poker and blackjack tables, claiming that it will provide $140 million in additional revenue, and save 1,000 jobs. In 1980, gambling was legal in only three states. Today, every state except Hawaii and Utah has some form of legalized gambling, and revenues from gambling account for an average of 2.3% of state budgets.

Union Membership in Government Sector

The Bureau of Labor Statistics recently reported that union membership in the public sector has passed union membership in the private sector for the first time as of 2009. The number of union workers in government service in 2009 was listed at 7.9 million, as compared to 7.8 million in 2008. In the private sector, union membership was listed at 7.4 million, compared to 8.3 million in 2008. The changing situation appears to be largely related to the economic recession, where industries in the private sector with large union memberships, such as the automobile and steel industries, have experienced large declines, while employees in the governmental sector have been largely shielded from job loss in government service. In fact, it appears that in recent months, the number of both federal and state employees is on the rise. Further, in some states such as New York, the percentage of union workers is quite high, with many of them being concentrated in public service professions such as teachers, transportation and civil service.

Number of Minority Newborns Continues to Increase

A recent report from the U.S. Census Bureau indicates that minority groups make up nearly half the children born in the United States. As of 2009, minorities made up 48% of U.S. children born in the United States, and it is estimated that as of this year, the number of minority babies will outnumber babies born to whites. Since the new census is in the process of being conducted, further definitive information regarding the changing demographics in the nation should be shortly available. Recent estimates, however, have clearly indicated that minority groups in the nation might actually constitute a majority of the population by the year 2050.

Twenty-Seven States Experience Decline in Prison Population

A recent study by the Pew Center reported that between December 31, 2008 and January 1, 2010, twenty-seven states in the nation reported a decline in their prison populations. California and Michigan together reduced their prison populations by slightly more that 7,500 inmates. The State of New York also saw a reduction of slightly less than 2,000. The decline in prison populations among the various states was largely fueled by the economic crisis, with many states now looking to alternatives to incarceration as a means of saving budget dollars. The study reported that as of January 1, 2010, there were 1,403,091 inmates in state prisons. This was a reduction of slightly over 5,000 from December 31, 2008. One of the states which continues to have an increase in its prison population is the State of Florida, whose prison population grew by slightly more than 1,500 to a record number of 101,517. The State of Pennsylvania also experienced an increase of approximately 2,000 inmates. Despite the decline in the number of inmates in state facilities, the number of inmates in federal prisons increased by roughly 7,000, to 208,118, so that overall, the prison population in the nation increased by slightly less than 1.5%. The future trend continues to be for declining rates and it is estimated that by next year, the overall prison population in the nation may register its first overall decline in many years.

New Study on Life Imprisonment for Juvenile Offenders

A recent report by Florida State University College of Law surveyed the number of juvenile offenders currently serving life imprisonment terms throughout the United States. The report indicated that there are currently 2,574 inmates in the United States who are sentenced to life without parole for crimes that were committed when they were juveniles. One-hundred-nine of these committed non-homicide crimes. Of these 109, 77 were in the state of Florida. The youngest age of any juvenile who received a life sentence without parole was 13 years of age. Two of these inmates, who were 13 at the time of the commission of the crime, are serving life sentences for non-homicide crimes. The Florida Law School Report indicated that the figures provided were the best estimates that could be made, since they were unable to obtain reliable data from the States of Nevada, Utah and Virginia. The entire issue

regarding the constitutionality of life without parole for juveniles who committed non-homicide offenses, which in fact involves two Florida cases, is the subject of United States Supreme Court determinations which were just decided and which will be detailed in our next issue.

New York City 18-B Attorneys Fight Attempts to Curtail Program

In early March, New York City Mayor Michael Bloomberg announced plans to shift most 18-B cases to institutional providers, such as the Legal Aid Society, and private defender programs. Several years ago, the City entered into contracts with several private groups to provide representation for indigent services. This was in addition to the already existing system involving the Legal Aid Society and 18-B attorneys. It appears that under certain budget analysis, the City believes that it can save money by shifting more cases from the 18-B system to the private contract providers. The possibility that the number of cases assigned to 18-B lawyers will be drastically reduced has led to sharp criticism of the Mayor's proposal by both 18-B lawyers themselves and the five local county Bar Associations within New York City.

Under the current 18-B program, which is named after Article 18-B of the State County Law, private attorneys are paid $75 an hour for handling felony cases and $60 an hour for misdemeanors. The attorneys are selected from 18-B panels which are operated under the supervision of each local Bar Association. The original 18-B plan was established many years ago through agreements between the City and the local Bar Associations. In a joint resolution issued on March 15, 2010, the five county Bar Associations issued a joint resolution as follows:

> The undersigned Bar Associations renew their commitment to support quality and effective delivery of the constitutionally mandated right to the effective assistance of counsel…including but not limited to, adequate funding for every kind of provider, assigned private counsel, as well as institutional providers, to meet that constitutional obligation.

On April 10, 2010, at the behest of our Section, the New York State Bar Association also adopted a resolution by the House of Delegates expressing concern with the contemplated changes by the City's proposal, and reaffirming its commitment to providing quality representation for indigent defendants.

The Bar Association resolutions followed organized efforts by the 18-B lawyers themselves to block the Mayor's proposal. Some 50 private attorneys attended a hearing conducted by the Criminal Justice Committee of the City Council and raised serious objections to the proposed plan. The attorneys also announced that they are raising funds for a possible legal challenge to the Mayor's plan.

In initially announcing the recent proposal, Shari Hyman, the Deputy Criminal Justice Coordinator for the City of New York, reported that the average per case cost for institutional providers is $306, compared to $873 for private lawyers working under the 18-B program. Members of the 18-B panel have responded to the cost analysis by stating that 18-B lawyers take more cases to trial and spend more time on their matters. In other fiscal statistics released by the City, it was indicated that in the current fiscal year, the budget allocation for the Legal Aid Society and the six other contractor groups is $128.5 million. In 2008, payments to 18-B lawyers amounted to $47.8 million.

There currently are 1,109 attorneys certified on the 18-B panels in the First and Second Departments which represent indigent defendants at the trial level. The new City proposals will have a dramatic impact on these attorneys, as well as the system of representation for indigent defendants within the City. Despite announcing their proposed intentions, City officials have indicated that they are open to discussions and to ideas regarding developing the best system possible for the representation of indigent criminal defenders. Since this issue is of important concern to attorneys handling matters within the Criminal Justice System, we will closely monitor developments and will provide periodic updates on the situation.

Caseload Caps for Defense Counsel Provided to Indigent Defendants

Officials from the Office of Court Administration recently announced that they have filed rules to establish the first New York City-wide caseload limits for attorneys who provide services to indigent defendants. The proposed rules will set annual caseloads at no more than 400 misdemeanors, or 150 felonies, in a 12-month period. Chief Judge Lippman last year was involved in negotiations that led to the inclusion of case load caps in the 2009–2010 state budget. The caseload limits are to be phased in over the next 4 years and will not be fully implemented until April 1, 2014. The Legal Aid Society, which has been at the forefront of seeking caseload caps, stated that the new rules represent a huge breakthrough in the quality of representation which is provided to poor criminal defendants. It is estimated that an additional $40 million per year will be required to carry out the new caseload limits.

New York Court of Appeals Decides Case Involving Challenge to Indigent Defense System

On March 23, 2010, the New York Court of Appeals heard oral arguments in the case of *Hurrell-Harring v. State of New York*. The case involves a wide-ranging challenge to New York's system of providing legal representation to indigent defendants. The lawsuit, which was brought by the New York Civil Liberties Union, argued that the defense system is so under-funded and understaffed that within some counties there is an unacceptably high risk that poor defendants will not receive meaningful representation. The lawsuit was commenced on behalf of 20 Plaintiffs who faced criminal charges in several upstate counties in the mid-2000s. The Appellate Division, Third Department, issued a ruling denying the Plaintiffs' claim, and held that any reorganization of indigent services had to be left to the legislature and Governor. The decision in the Appellate Division, Third Department, which resulted in a 3-2 split, basically supported the State's contention that the New York State system adequately met the standard set by the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The case before the New York Court of Appeals had resulted in several amicus curiae briefs being filed with the New York State District Attorneys Association opposing the lawsuit, and the Brennan Center at New York University School of Law supporting the Plaintiffs. Our New York State Bar Association and the Association of Criminal Defense Lawyers had also filed briefs seeking to overturn the Third Department Ruling. It was expected that the ultimate decision of the New York Court of Appeals would have a significant impact on the future of representation for indigent defendants in criminal matters. On May 6, 2010, the New York Court of Appeals, in a 4-3 decision, decided the issue, but did so on narrow grounds. In a decision written by Chief Judge Lippman, the Court of Appeals modified the Appellate Division ruling so as to reinstate the portion of the civil suit claims that raised the issue regarding whether lawyers had not appeared for the Plaintiffs at critical stages of the criminal proceedings, or were otherwise unavailable to consult with their clients. Other challenges to the performance of the attorneys could only be considered in individual criminal cases after defendants are convicted. Joining Justice Lippman in the majority opinion were Judges Ciparick, Graffeo and Jones. Judges Pigott, Read, and Smith dissented, and basically supported the Third Department's position which dismissed all of Plaintiffs' claims. The dissenters argued that the Plaintiffs' claims are limited to a case-by-case analysis, and cannot be redressed in a civil proceeding.

Social Security Fund Begins to Operate in the Red

The recent economic recession, which has led to higher unemployment, has had a serious impact on the fiscal integrity of the Social Security Fund. It was recently reported that during this current year, it is expected that the Social Security System will pay out more in benefits than it receives in payroll taxes. It had originally been expected that the Fund would be able to operate at a surplus until the year 2016. Recent projections and analysis indicate, however, that more people are taking early retirement, thereby increasing the number of required payments, and fewer people are working, decreasing the amount of money coming into the Fund. Analysts are predicting that by the end of this year, revenues within the program will have fallen sharply. The shortfall is projected to amount to approximately $29 billion. Despite the expected loss for this year, the Social Security System still has adequate reserves to continue to make the necessary payments for at least the next several years. Most Social Security projections for the future have been based upon an average jobless rate of 8.2%. If the current rate of nearly 10% or more continues into the future, it is expected that even the reserves will begin to dwindle, and that major changes may have to occur in the system as the large number of baby boomers also begin to collect.

New U.S. Attorneys for Western and Eastern Districts of New York

In December 20009, President Obama nominated William Hochul, Jr. to serve as the U.S. Attorney for the Western District of New York. Mr. Hochul's nomination was confirmed by the U.S. Senate in the beginning of March, 2010, and he has recently assumed his new duties. The Western District covers 17 Counties in Western New York. Mr. Hochul is from Buffalo, New York, and has served for many years as a federal prosecutor. He has handled several high-profile matters, and since 2002 has supervised all international and domestic terrorism investigations in the Western region of New York

In late April, the United States Senate also confirmed President Obama's nomination of Loretta Lynch to serve as the U.S. Attorney for the Eastern District of New York. Ms. Lynch is 50 years old, and had previously served in the Eastern District. Prior to her recent appointment, she was with the firm of Hogan and Hartson, where she focused on commercial litigation and white collar criminal defense. The Eastern District covers the areas of Brooklyn, Queens, Staten Island and Long Island. We congratulate both Mr. Hochul and Ms. Lynch on their recent appointments.

U.S. Circuit Court of Appeals Nullifies New York's Persistent Felony Offender Statute

The issue of whether the discretionary imposition of a possible life sentence for repeat felony offenders authorized by New York's Persistent Felony Offender Statute violates recent rulings of the United States Supreme Court issued in *Apprendi* and *Cunningham*, has long been the subject of much litigation and discussion. Although our New York Court of Appeals has consistently upheld the constitutionality of the Statute on the grounds that the initial requirement that a defendant be convicted of three or more felonies removes it from the discretionary nature found objectionable by the Supreme Court cases, the United States Circuit Court of Appeals for the Second Circuit, after considering a case for more than a year, recently issued a lengthy opinion finding the New York Statute unconstitutional because the second requirement of the Statute allows the Court to consider factors which were not determined by the jury. The Second Circuit issued its ruling in *Besser v. Walsh* and four similar cases.

Although the United State Supreme Court had previously refused to grant certiori on earlier New York cases which involved the same issue, it appears likely that the Supreme Court will now have to address the matter, and to clarify the conflicting rulings between our own Court of Appeals and the federal panel. As a result of the Second Circuit ruling, state prosecutors in April began urging legislators to rework the Penal Law Statute in question, so as to remove any possible constitutional infirmities. The prosecutors have suggested that the provision requiring a judge to consider the history, character and criminal conduct of the defendant be deleted, and that judges be given the discretion to impose a persistent felony offender sentence based solely on the defendant's prior felony convictions. We will keep our readers advised of developments in this matter, either from additional judicial opinions or legislative action.

Lawyers Among Groups Paying Greater Share of Taxes

Recent reports have indicated that a smaller group of taxpayers are paying an ever-growing percentage of all income taxes. It was recently reported that in 1982, taxpayers with incomes in the top 1% paid 19% of all income taxes. Taxpayers with incomes in the top 10% paid 48.6% of all the taxes in 1982. By 2007 taxpayers with incomes in the top 1% were paying 40.4% of all income taxes, and taxpayers with incomes in the top 10% were paying 71.2% of all income taxes. Taxpayers with incomes in the bottom 50% have seen their overall percentage of tax payments drop dramatically. They were paying 7.4% of all income taxes in 1982, and in 2007, were only contributing 2.9% of all income taxes. The number of tax filers paying absolutely no income taxes has also risen dramatically, rising from 16% in 1969 to 36.3% in 2008. Income groups such as doctors and lawyers, who are traditionally at least in the top 10%, have thus seen a dramatic increase in their tax burden, and it appears that this trend will continue into the future.

Law Enforcement Council Issues Its 2010 Legislative Priorities

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The Council's members represent the leading law enforcement professionals throughout the State, including the Attorney General of the State of New York, the District Attorneys Association of the State of New York, the New York State Association of Chiefs of Police, the New York State Sheriff's Association, the New York City Criminal Justice coordinator, and the Citizens Crime Commission of New York City. Bronx District Attorney Robert T. Johnson, who serves as counsel to the Council, recently forwarded to us the group's legislative priorities for 2010. These priorities are summarized as follows:

1. Expand the State DNA Identification Index.
2. Provide Tools to Investigate, Charge, and Prosecute Gangs and Protect Witnesses.
3. Create a Requirement That All New Semi-Automatic Handguns Have Microstamping Technology.
4. Create a Felony-Level Child Endangerment Charge.
5. Deter Criminals with Greater Penalties for Aggravated Identity Theft.
6. Enhance Protections for Police Officers.

New York City District Attorneys Receive Budget Cuts

Due to the severe fiscal crisis, both in the State and City, Mayor Bloomberg's recent budget proposals for the year 2011 have resulted in significant cuts in the funding for the various prosecutors' offices within the City. The proposed cuts average approximately 16% for the five District Attorneys' Offices and the Special Narcotics Prosecutor. The Mayor has proposed a total budget of $218.8 million for fiscal year 2011, as compared to $260.5 million for 2010. Although traditionally in the past, the City Council has usually increased funding for the prosecutors, this year, due to the deteriorating financial condition of the City, it appears likely that all segments of the Criminal Justice System may have to accept some

decrease in funding. The fixing of the final budget allocations is expected some time in July.

The 2009 Annual Report from the Lawyers' Fund for Client Protection

The Lawyers Fund for Client Protection, which was established 27 years ago, issued its financial report for the year 2009. In 2009, 139 awards were made constituting a total of $5.6 million in order to compensate clients for losses caused by dishonest attorneys. The overwhelming majority of the payments made continued to be in the area of monies taken from real property escrow accounts. The awards which were issued were due to the misconduct of 59 attorneys who have since been suspended or disbarred. The report emphasized that there are currently 253,000 registered lawyers in New York State, and that the number of attorneys engaged in misconduct constituted only a tiny fraction of the overall number of attorneys. Since its inception, the fund has awarded some $142.9 million to cover losses incurred from attorney misconduct. The Lawyers Fund is administered by a Board of Trustees who are appointed by the Court of Appeals. The monies to sustain the fund are largely received from attorney registration fees which from 1982 have amounted to $138 million.

State Commission on Judicial Conduct Issues 2009 Report

The State Commission on Judicial Conduct issued its 2009 Annual Report relating to complaints and disciplinary action taken against New York State's Judges. The report indicated that the number of new complaints in 2009 amounted to 1,855, a 4% decline from the 1,923 complaints which were filed in 2008. Of the number of complaints filed, 471 in 2009 led to preliminary inquiries, a 25% increase over 2008. As a result of the preliminary inquiries, 257 investigations were conducted in 2009, a 2% reduction from the 262 investigations which were conducted in 2008. Disciplinary actions taken by the Commission involved 25 public sanctions, 2 removals, 10 censures, 9 admonitions and 4 stipulations that resulted in the resignation or retirement of Judges who were under investigation. The number and type of disciplinary actions were almost identical to the situation in 2008. The Commission also reported that the origins of the 1,855 complaints filed last year amounted to 40% from criminal defendants, 45% from civil litigants, 3% from attorneys, and 3% from the Commission itself. The remaining balance came from a variety of sources.

Mandatory Judicial Retirement

During the last several years, there has been a good deal of discussion regarding whether the mandatory retirement age for judges in New York State should be eliminated or modified. A recent report indicated that in addition to New York, 9 other states are considering changes in their mandatory judicial retirement policies. The National Center for State Courts reported that 20 states now require retirement at age 70, 4 at age 72, 2 at age 74, and 6 at age 75. The States of Kansas and South Dakota have recently increased their mandatory retirement age for judges from 70 to 75. The fact that U.S. Supreme Court Justice John Paul Stevens recently announced his retirement at age 90 has refocused attention on the merits of mandatory retirement ages for judges. In New York, any proposed change would require a constitutional amendment, and even though there has been some increased support for increasing the mandatory retirement age, it appears unlikely that any increased retirement age will occur in the near future.

About Our Section and Members

Mark Dwyer Appointed to Court of Claims

In early February, Governor Paterson announced that he had nominated Mark R. Dwyer to fill a seat on the New York Court of Claims. By the end of February, Mr. Dwyer's appointment had been confirmed by the New York State Senate, and he immediately began sitting in the Brooklyn Supreme Court, where he has been assigned to handle felony cases. Mark had served for many years in the New York County District Attorney's Office, most recently serving as Chief Assistant District Attorney to Robert Morgenthau. He also served as Chief of the Appeals Bureau and Legal Counsel to the Office. Mr. Dwyer graduated from Yale Law School. The salary of a Court of Claims Judge is listed as $136,700. Mark Dwyer has also been an active member of our Section's Executive Committee, and currently serves as Secretary of our Section. We congratulate Mark on his judicial appointment and wish him all the best in his new career.

Special Narcotics Prosecutor Visits Criminal Justice Section Executive Committee

At its April 20, 2010 meeting, which was held in Manhattan, the Executive Committee of our Section was pleased to have had as its guest speaker Bridget G. Brennan, who is the Special Narcotics Prosecutor for the City of New York. Ms. Brennan offered an analysis of the 2009 drug law reforms and how they affected her agency and the court system. She presented certain charts and statistics evaluating the narcotic situation during the last year, and also advanced certain proposals which she feels would improve the handling of narcotics matters. One of her key proposals was that a plea of guilty should be required before a defendant is evaluated for diversion, unless the prosecutor consents. Following an interesting and lengthy discussion, Ms. Brennan indicated that she would be happy to provide our *Newsletter* with an article summarizing her statistics and recommendations, so that all of our readers could have the benefit of her remarks. We hope to be able to publish this article within our next issue. We thank Bridget Brennan for appearing before our Section and providing us with the benefits of her remarks.

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.

Micole Allekotte
Lee D. Apotheker
Sofia Aranda
Alexander MacNeill Behr
Jeremy A. Benjamin
Heather Bird
Samuel Conroy Breslin
Scott Michael Brien
Kathryn Meryl Brittle
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Gennaro Dominick Calabrese
Julian Joseph Castignoli
Mark Vincent Cowen
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Ruchi Datta
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Select up to three and rank them by placing the appropriate number by each.

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____ Traffic Safety
____ Transition from Prison to Community
____ Victims' Rights

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

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

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

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