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New York Criminal Law Newsletter

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

Inside

NYSBA

Message from the Chair

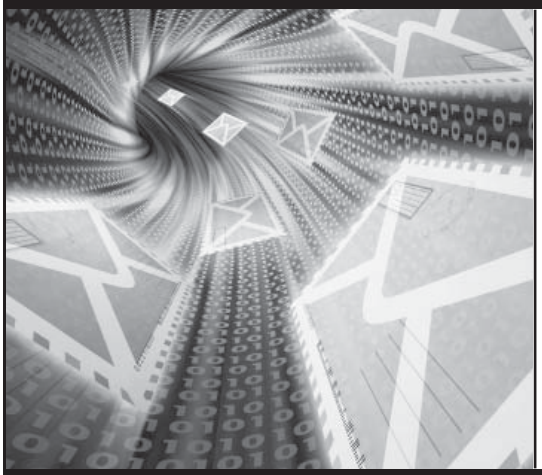
In order to promote greater participation by the membership of this Section, a survey was formulated and forwarded to the members of the Executive Committee by e-mail. The issues raised and the responses of those who submitted answers are as follows:

1. WHICH DAY OF THE WEEK BEST SUITS YOUR SCHEDULE? The overwhelming majority of respondents answered Thursday, with Tuesday and Friday following.
2. WHAT TIME OF DAY BEST SUITS YOUR SCHEDULE? Both 5:00 p.m. and 6:00 p.m. were the top choices, closely followed by 2:00 p.m.
3. WOULD YOU OBJECT TO A MEETING WITHOUT FOOD IF CONDUCTED AT 2:00 P.M.? The no responses exceeded yes responses by more that 2-to-1.
4. WOULD YOU BE LIKELY TO ATTEND IF SOME MEETINGS WERE CONDUCTED IN VENUES THAT MAY HAVE AN EXPENSE FOR THE SECTION—EXAMPLE, THE HARVARD CLUB? By a 3-to-1 vote, the answer was no.
5. WOULD YOU BE WILLING TO ATTEND A MEETING IN CENTRAL OR WESTERN NEW YORK? The plurality said yes.
6. WOULD YOU BE WILLING TO ATTEND A CLE PROGRAM OUTSIDE OF THE METRO NEW YORK CITY AREA? The majority said no.
7. WOULD YOU BE WILLING TO TRAVEL TO NIAGARA-ON-THE-LAKE, ONTARIO, CANADA FOR A SECTION CLE/SECTION MEETING THIS FALL? A curious response here, since less people said no than indicated in question No. 6 regarding attending outside of the metro New York City area. In any event, half of the respondents said no, with approximately one-third saying yes and the rest undecided.
8. WHAT CLE PROGRAM TOPICS ARE OF THE GREATEST INTEREST TO YOU? The largest request for CLE was for Court of Appeals and Appellate Courts updates, with a suggestion to include Supreme Court decisions involving criminal law. Motion practice was second, and trial preparation and witness examination tied for third.

My deepest appreciation to Kevin Kerwin and Barbara Mahan of the State Bar for their assistance in developing the survey and compiling its results. In the coming weeks, I will be working with other members of the Committee to attempt to implement those desires as much as is possible. We will be providing details regarding the programs that our Section will be holding, based upon the survey results, in the next few months, in a separate mailing to our members. As always, I welcome your suggestions, recommendations, questions or criticisms, and I thank our members for their continued support.

James P. Subjack

Request for Articles



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

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

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

www.nysba.org/CriminalLawNewsletter

Message from the Editor

In early February, the Sentencing Commission presented to the Governor and the Legislature a detailed report containing eight major recommendations for changes in New York's sentencing structure. It appears that the Governor and the Legislature have focused only on a small portion of the Commission's recommendations, to wit: changes in the sentencing structure for drug crime defendants. Thus, in early April, as part of a legislative agreement, further modifications to the Rockefeller Drug Laws were enacted, and the Governor signed the new legislation indicating his strong approval of the changes which were enacted. The new provisions were adopted as part of the budget bill, and basically focus on two major areas—increased judicial discretion in the sentencing of drug offenders, and the elimination of the requirement of prosecutorial consent before certain defendants can be diverted to court-operated rehabilitation programs. Some of the new legislation is effective immediately, and other provisions are effective as of November 1, 2009. In this issue, we are pleased to again present the annual legislative review of changes in New York's criminal law presented by Judge Barry Kamins. Judge Kamins discusses in detail the new drug crime legislation which was enacted.

We also present, in our For Your Information section, the details of the recommendations of the Wrongful Conviction Task Force, which was headed by Judge Kamins, who has long been active with our Section. The recommendations of the Task Force were approved on April 6, 2009 by the New York State Bar Association House of Delegates, and efforts are currently under way to have some or all of the recommendations enacted into legislation. Speaking on behalf of our Section at the House of Delegates meeting in support of the Task Force's recommendation were Section Chair Jim Subjack and Vincent E. Doyle, III, who served as a member of the Task Force Committee.

Both the U.S. Supreme Court and the New York Court of Appeals were quite active in the last few months in rendering decisions in the criminal law area. The Supreme Court continues to be divided, usually on a 5-4 basis, with respect to search and seizure and right-to-counsel decisions, and we report on the latest cases which have emanated from that Court. Further, with respect to the U.S. Supreme Court, the last few months saw the announcement by Justice David Souter that he was retiring from the Court, and the nomination by President Obama of Sonia Sotomayor as his replacement. We provide details on this important development, as well as a short biographical review of the newly appointed Supreme Court Justice. The New York Court of Appeals has recently dealt with several cases dealing with search and seizure issues, including the warrantless use of GPS devices, and various Brady issues. These cases are reviewed in our New York Court of Appeals Section.

Chief Judge Jonathan Lippman, in the first few months of his tenure, has moved quickly to enact certain structural changes in the Office of Court Administration. He has also played an activist role in bringing about legislative changes with respect to the sentencing of drug crime defendants, and has moved to improve the quality of representation for indigent defendants. Details regarding these recent developments are covered in our For Your Information section.

I am still in need of feature articles, and I again request that our members, including some of our new members, consider submitting an article for possible publication. We are completing our sixth year of publication, and I thank our members for their continued support of and interest in our *Newsletter*.

Spiros A. Tsimbinos

New 2009 Drug Crime Legislation—Drug Law Reform Act of 2009

By Barry Kamins

On April 7, 2009, Governor David Paterson signed a new drug reform law[1] that was designed to overhaul the Rockefeller Drug Laws enacted in 1973 and signed by then-Governor Nelson Rockefeller. The prior laws, providing some of the toughest drug sentences in the country, were a reaction to the drug epidemic experienced in the early 1970s in New York City and elsewhere. The more recent Drug Law Reform Act of 2004[2] slightly modified the Rockefeller Laws by increasing the quantity of narcotics required for a class A-I and A-II felony possession charge and expanding drug treatment opportunities for certain defendants, with the court's permission and the prosecutor's consent. The 2009 version dramatically changes the Rockefeller Drug Laws and provides for substantial amelioration of their harshest provisions. This article will discuss the major provisions of the new law. The reader is encouraged to review the legislation for the specific details of its extensive changes.

The new law was signed on April 7, 2009 and has numerous features with various effective dates. One significant provision is the change in the Penal Law's sentencing structure for certain drug offenses. This change was effective April 7, 2009 and is applicable to offenses committed on or after that date and offenses committed before that date if the sentence was not imposed on or before April 7.

One notable revision in the sentence structure is that imprisonment is no longer mandatory for first-time Class B felony drug offenders or a Class C second felony drug offender with a prior non-violent felony conviction. Thus, a court can sentence these individuals to probation for five years over the objection of the prosecutor. Class B, C, D and E felony drug offenders with prior non-violent felony convictions are now eligible for judicial diversion (discussed below) over the prosecutor's objection. Successful completion of drug treatment programs through judicial diversion can lead to a sentence of probation or even a dismissal of the indictment.

Where a sentence of incarceration is imposed, Class B felony drug offenders are now eligible for a definite sentence of one year or less, as well as a sentence of parole supervision, commonly known as the Willard Parole Supervision Program. In addition, Class B and Class C second felony drug offenders with prior non-violent felony convictions will also be eligible for lower minimum determinate sentences. The minimum determinate sentence for a Class B second felony offender is reduced from 3½ years to 2 years. The minimum determinate sentence for a Class C second felony offender is reduced from 2 years to 1½ years.

There has been a substantial expansion of the six-month SHOCK incarceration program for defendants convicted of drug felonies. Under this program, graduates receive an earned eligibility certificate and are immediately eligible for conditional release. First, inmates who have not reached the age of 50 are now eligible—the prior cut-off age was 40. Second, the sentencing court may order a defendant directly placed in the program; previously the court had no authority to do so. Finally, inmates will now become eligible for the SHOCK program when they are within three years of their parole eligibility dates; inmates who were sentenced to determinate sentences imposed for drug felonies will now become eligible when they are within three years of their conditional release dates. This "rolling admission" changes the prior law under which defendants who were more than three years away from their parole or conditional release date when they transferred to Department of Corrections custody were automatically barred from participating in the SHOCK program.

"The 2009 version dramatically changes the Rockefeller Drug Laws and provides for substantial amelioration of their harshest provisions."

The centerpiece of the new legislation permits a court, *without* the prosecutor's consent, to divert defendants charged with most offenses under Penal Law Article 220 or 221 (drug and marijuana offenses), as well as defendants charged with numerous other "specified offenses"[3] who have identified substance abuse problems, to treatment programs in lieu of prison. This diversion program, effective October 7, 2009,[4] is also permitted for second felony offenders with prior non-violent felony convictions. The prosecutor's consent is required, however, when a defendant is a second *violent* felony offender, a persistent violent felony offender, or has a conviction in the past ten years for a violent felony offense or a Class A felony drug offense.

Judicial diversion begins with an evaluation that may be ordered by the court anytime after arraignment but prior to a guilty plea or trial. The defendant may refuse to participate in the evaluation at any time. Upon receipt of the evaluation either party may request a hearing on the eligibility of the defendant to participate in judicial diversion. At the hearing the court may consider oral and written arguments, testimony offered by either party or any

relevant evidence, including a statement by the victim of the crime.

Upon completion of the hearing, a court must make findings of fact as to the eligibility of the defendant. In addition, the court must determine the defendant's history of substance abuse and whether this abuse is a contributing factor of the defendant's criminal behavior. Finally, the court must determine whether judicial diversion could successfully address such abuse or whether incarceration may be necessary to protect the public.

Once the court determines that a defendant should be offered treatment, it issues an order of judicial diversion. However, prior to issuance of the order, the defendant must plead guilty to the charge. The only exception to this requirement is when both the prosecution and the court consent that no guilty plea is necessary or when the court finds that exceptional circumstances exist, i.e., where the plea is likely to result in severe collateral consequences. As part of the judicial diversion order, the defendant must agree on the record to any release conditions set by the court which can include extensive monitoring of the defendant's progress. The court accepting the plea retains jurisdiction of the case for the duration of treatment.

Upon successful completion of treatment, the court has a wide range of alternatives with respect to sentence, depending upon the terms of the agreement. At the time the defendant is first accepted for diversion, the court must state the terms and conditions of the agreement, including the proposed final disposition. The disposition may include withdrawal of the guilty plea and dismissal of the indictment or entry of a plea to a misdemeanor. In addition, the sentence can include a period of probation.

If the court has reasonable grounds to believe that the defendant has violated a condition of the agreement, the court shall direct the defendant to appear or issue a bench warrant. If the court determines that the defendant violated a condition, the court can modify the conditions of release, reconsider the bail conditions or terminate participation in judicial diversion and sentence the defendant to a period of incarceration. It is interesting to note that the legislation requires the court, in determining what action to take for a violation of a release condition, to consider that individuals who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from substance abuse. The court is therefore required to consider a system of graduated and appropriate responses or sanctions, designed to address such behavior.

A third feature of thee new legislation permits conditional sealing of certain eligible cases following a defendant's successful participation in judicial diversion programs.[5] This provision was effective on June 6, 2009 and is the first time in New York that a court may conditionally seal a record and then unseal it if the defendant is subsequently arrested for a new crime.

The new law permits a court, on its own motion, or upon motion of a defendant, to conditionally seal the current case and up to three prior misdemeanor convictions for offenses under Penal Law Articles 220 or 221. The sealing may be done in cases where the defendant has been *convicted* and *sentenced* after successfully completing a judicial diversion program, or a drug treatment program that was in existence prior to the judicial diversion program. Thus, this provision allows defendants who have completed drug treatment in existing drug treatment courts around the state to immediately file motions for conditional sealing. It should be noted that the conditional sealing statute does not apply to defendants whose cases were *dismissed* after successfully completing drug treatment. Those cases can be sealed pursuant to CPL § 160.50; however, the defendant's *prior* cases cannot be conditionally sealed.

A court may not conditionally seal a *prior* case unless there is documentation that a sentence has been imposed in that case. In addition, if the conviction occurred in another county, the prosecutor in that county must be notified of the court's intention to seal the case. The prosecutor must be given at least 30 days to comment on the proposed sealing.

Upon sealing, all official records relating to arrest, prosecution and conviction shall be sealed. However, the Division of Criminal Justice Services will retain the defendant's fingerprints and photographs. The sealed records will be available to courts, prosecutors, probation departments and law enforcement agencies as well as prospective employers of police or peace officers. If a defendant is later arrested for *any* new crime, the conditionally sealed cases *shall* be unsealed immediately and remain unsealed. However, if the new matter is dismissed or disposed of by a violation, the previous convictions will be conditionally sealed again.

The conditional sealing provision will present technological difficulties for the court system. In addition, it has promoted a debate over the wisdom of sealing these convictions. Opponents argue that prospective employers should be aware of an applicant's criminal background before making a decision to hire an individual. Proponents argue that sealing is not mandatory and is completely within the court's discretion. In addition, it is argued that the purpose of sealing is to promote the reentry of those individuals who have rehabilitated themselves through drug treatment.

A fourth feature of the new law authorizes discretionary re-sentencing of inmates who were convicted of Class B drug offenses committed prior to January 13, 2005 and sentenced to an indeterminate sentence with a maximum term of more than three years, e.g., 2–4 years.[6] The inmate

may petition the sentencing court for re-sentencing under the new determinate sentencing structure. The re-sentencing procedures will be similar to the procedures established by the 2004 Drug Law Reform Act. While motions for re-sentencing cannot be made until October 7, 2009, as of April 7, 2009 inmates have the right to appointed counsel to prepare and file such motions.

Certain defendants are not permitted to apply for re-sentencing—those who are second violent felony offenders or persistent felony offenders. In addition, inmates are excluded if they are serving a sentence for, or were previously convicted in the past ten years of, a violent felony offense or certain enumerated felonies.

A fifth feature of the new law is the enactment of two new crimes that are effective November 1, 2009. The first crime, Operating as a Major Trafficker, is a Class A-I felony and applies to "directors" and "profiteers" of "controlled substance organizations" as those terms are defined by the new statute.[7] The statute, directed at "kingpins" in the drug industry, is violated when a person either sells drugs worth at least $75,000 in a six-month period, or acts as a principal or leader of an organization that sells drugs worth $475,000 in a six-month period. The sentence for this crime is a minimum of 15 to 25 years and a maximum of life except if the court finds that sentence to be unduly harsh. In such cases the sentence shall be a determinate sentence of 8 to 20 years.

The second crime, Criminal Sale of a Controlled Substance to a Child, is a Class B felony and is committed when an individual over the age of 21 sells a controlled substance to any individual under the age of 17.[8] It is punishable by a determinate sentence of 2 to 9 years.

A sixth feature of the Drug Reform Act increases the availability of a parole supervision sentence (also referred to as the Willard Parole Supervision Program). Pursuant to this sentence a defendant is placed on parole supervision after spending 90 days at Willard. The prosecutor's consent is no longer required for Class B first felony drug offenders and Class C, D and E second felony offenders when the prior felony is nonviolent.[9]

Finally, eligibility for medical parole has been expanded to include individuals serving sentences for Murder in the First Degree and any sex offense.[10] The inmate must have served at least one-half of the minimum period if it is an indeterminate sentence of one-half of the term if it is a determinate sentence.

In addition, eligibility for medical parole has been expanded to include prisoners who are so cognitively incapacitated, as well as physically, as to create a reasonable probability that he or she does not present any danger to society. Finally, the new law creates a more formalized process for the granting of medical parole, including specific criteria for approval, prior notice to the victim and prosecutor, and an investigation into the diagnosis that underlies the application for medical parole.

It is important that criminal law practitioners become familiar with the new drug crime legislation. I hope that this article will assist in that goal.

Endnotes

1. L. 2009, Ch.56.
2. L. 2004, Ch.738.
3. L. 2009, Ch.56 § 8; CPL § 410.91(5).
4. L. 2009, Ch.56 § 4; Article 216, CPL, *eff*. 10/7/09.
5. L. 2009, Ch.56 § 3; CPL § 160.58, *eff*. 6/6/09.
6. L. 2009, Ch.56 § 9; CPL § 440.46, *eff*. 10/7/09.
7. L. 2009, Ch.56 § 29; PL § 220.77, *eff*. 11/1/09.
8. L. 2009, Ch.56 § 28; PL § 220.48, *eff*. 11/1/09.
9. L. 2009, Ch.56 § 7,8; CPL § 410.91, *eff*. 4/7/09.
10. L. 2009, Ch.56 Part J, Executive Law § 259-r(1)(a).

Barry Kamins is the Administrative Judge for Criminal Matters in the Second Judicial District. He is co-chair of the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure, and author of *New York Search and Seizure*. He has also been a frequent contributor to our *Newsletter*.

Is Life Imprisonment Without Parole for Juvenile Offenders Who Have Committed Non-Homicide Crimes Unconstitutional? An Analysis and a Prediction

By Spiros A. Tsimbinos

On May 4, 2009, the U.S. Supreme Court granted *certiorari* in two Florida cases, *Graham v. Florida,* No. 08-2714 and *Sullivan v. Florida*, No. 08-7621, where the issue involved is whether life imprisonment without parole imposed upon defendants who were juveniles at the time of the commission of the crimes and who committed non-homicide crimes constitutes cruel and unusual punishment in violation of the Eighth Amendment. Oral argument in the matter is scheduled for October or November 2009, and the Court's determination may establish a landmark precedent in the area of juvenile justice.

"[A]ttorneys representing juvenile offenders have strenuously argued that punishments imposed for juvenile criminal activity should not foreclose the possibility of rehabilitation and the leading of a productive life once the juvenile offender has reached adult status."

In the *Graham* case, the Defendant was 16 years of age when he was charged with armed burglary with assault or battery, a felony punishable by life imprisonment, and attempted armed robbery. He pleaded guilty to the offenses in return for a sentence of three years' probation, with the condition that he serve 12 months in the county jail. After his release from jail, the Defendant was charged with armed home invasion robbery and other offenses, and the State of Florida sought revocation of his probation for his earlier convictions. At the revocation hearing, the State presented evidence establishing that Graham and two co-Defendants entered the victim's apartment forcibly and that the Defendant held the victim at gunpoint while the co-Defendants robbed the home. Graham also confessed to having committed other similar robberies. The trial court revoked probation and sentenced him to life imprisonment without the possibility of parole. He was 19 years old at the time of sentencing.

In the *Sullivan* matter, the Defendant was convicted in 1986 of sexual battery and burglary of a dwelling. He was 13 years old at the time of the offense, but he was tried as an adult and sentenced to life imprisonment. The Defendant Sullivan, during the prior two years, had also committed numerous other crimes, including several felonies. Sullivan has already been in prison for more than 20 years, and is now in his mid-30s.

Over the last several years, scientific research and new studies have indicated that the brains of juveniles are not fully formed, and that some of their behavior is due to their youth, which is subject to change as they mature into adulthood. Based upon these premises, attorneys representing juvenile offenders have strenuously argued that punishments imposed for juvenile criminal activity should not foreclose the possibility of rehabilitation and the leading of a productive life once the juvenile offender has reached adult status.

The U.S. Supreme Court, during the last 20 years, has sought to address the issue of punishment for juvenile offenders. In a major decision, and one which it appears will have the greatest impact on the pending Florida cases, is *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), in which by a 5-4 decision, it held that the death penalty for juvenile offenders was unconstitutional. In *Roper*, Justice Kennedy delivered the majority opinion, joined by Justices Souter, Stevens, Ginsburg and Breyer. The majority specifically held that the Eighth and Fourteenth Amendments prohibited imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

In attempting to predict the outcome of the two pending Florida cases, Justice Kennedy must be viewed as a critical vote, and the logic he utilized in *Roper* as an important guideline as to where the Court may be heading. In deciding *Roper*, the majority focused on three general differences between juvenile offenders and adults, to wit: (1) A lack of maturity and an undeveloped sense of responsibility found in youth more often than adults and are more understandable among the young, and that these qualities often result in impetuous and ill-considered actions and decisions; (2) Greater vulnerability or susceptibility to negative influences and outside pressures, including peer pressure; (3) The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory and less fixed.

Citing to prior decisions and scientific studies, the Court's majority concluded that the three differences cited "rendered suspect any conclusion that a juvenile falls among the worst offenders." Further, the Court found that rather, "a greater possibility exists that a minor's character deficiencies will be reformed, and that since qualities of youth are transient as individuals mature the impetuousness and recklessness that dominates in younger years will subside."

Using this logic, the Defendants in the two pending Florida cases can similarly argue that life without parole effectively cuts off any opportunity for rehabilitation and reform, and the return by a juvenile offender to a productive life in society.

Also relied upon in the majority decision were the evolving and current attitudes, both internationally and among the various states, regarding the imposition of the death penalty upon young offenders. Justice Stevens and Justice Ginsburg, although joining Justice Kennedy's main opinion, also specifically issued a separate concurring opinion, in which they emphasize "the evolving standards of decency." (See 125 S. Ct. 1205). Based upon this approach, arguments advanced by the defense in the Florida cases should, and probably will, rely on statistical data which indicate that most industrialized nations and some states have abandoned life without parole for juvenile offenders.

A strong defense argument will be made that today the United States is alone in allowing the routine use of life-without-parole sentences for juvenile offenders. Although in most cases this punishment is reserved for homicide crimes, human rights groups have estimated that some 2,000 prisoners may currently be facing such sentences in the United States for crimes they committed when they were 17 or younger.

In its petition for *certiorari*, the defense has already revealed this line of attack by arguing that a sentence of life without parole for a 13-year-old offender was so "freakishly rare" as to be arbitrary and capricious and hence cruel and unusual punishment. According to the petition, Florida was the only state to have sentenced a 13-year-old offender "to die in prison for an offense in which the victim did not die." Citing *Workman v. Com.*, 429 S.W. 2d 374 (Ky. 1968), the petition stated that the only court that had expressly considered "the constitutionality of a life-without-parole sentence imposed on a young teen for rape" had found the sentence unconstitutional under the Eighth Amendment. The petition also asserted that *Roper* recognized an evolving scientific and societal consensus regarding the reduced culpability of juvenile offenders and that an international consensus existed that such sentences should be prohibited.

Based upon the defense arguments, the pronouncements in *Roper*, and their prior voting record in criminal cases, it would clearly appear that Justices Stevens, Ginsburg and Breyer are potential votes for the defense in the Florida cases. Newly appointed Justice Sotomayor is, however, an unknown factor at this point. It has been rumored that her former prosecutorial background may make her more pro-prosecution in criminal cases than Justice Souter, who she has replaced. In fact, a study by the Senate Judiciary Committee revealed that as an Appellate Judge, she voted to affirm 92% of the criminal convictions that came before her. Justice Souter, in the last two years, had the lowest pro-prosecution rating of any member of the Court, so the State of Florida has a better chance of obtaining her vote than it would have had with respect to Justice Souter.

In *Roper*, Justice O'Connor issued a vigorous dissent in which she basically argued that the Court was not free to substitute its judgment for that of the various legislatures, and that only 20 years earlier, in various decisions, the Court had refused to strike down the death penalty for juvenile offenders between the ages of 16 and 18. Justice O'Connor chastised the majority and argued "the Court should not substitute its own inevitably subjective judgment for the judgments of the nation's democratically elected legislatures" (see 125 S. Ct. 1217). The arguments made by Justice O'Connor, who is still widely respected in the legal community, were quite forceful and may be instrumental in influencing the vote of Justice Sotomayor as she carefully weighs which side of the issue to vote on. In fact, a recent analysis of Justice Sotomayor's voting record while on the Second Circuit Court of Appeals revealed that several empirical studies have concluded that she is not particularly prone to overriding policy decisions by elected branches (see *New York Times,* June 20, page A-10). On the other hand, Justice Sotomayor's background and rise from humble beginnings could just as well lead her to utilize the logic employed in *Roper* to side with the defense. To use a currently popular term, it is clearly possible that she can, consciously or unconsciously, have some "empathy" for juvenile offenders.

Just as in *Roper* and numerous other criminal law decisions, Justice Kennedy may once again emerge as the critical fifth vote in the Florida cases. Although he voted for the defense in *Roper*, and employed language and logic which appears favorable to the Florida Defendants, it is unclear how Justice Kennedy will actually vote in the instant matter. Of great importance is that in the Kennedy opinion in the *Roper* case, there exists a declaration at 125 S. Ct. 1196, in which he appears to utilize the presence of life without parole as a justification or alternative to the death penalty. Thus he stated:

> To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

It appears that Justice Kennedy has a deep resentment against the death penalty, having voted in recent years with the defense in several cases involving the Texas death penalty statute, and in *Kennedy v. Louisiana*, 128 S. Ct. 2641, decided in June of 2008, in which he cast the critical vote striking down the death penalty for all non-homicide cases. Thus, although he employed logic which could extend beyond the death penalty situation, it may very well be that Justice Kennedy only sought to nullify

that particular punishment, and logically he may have difficulty escaping from his apparent endorsement of life imprisonment without parole as indicated above.

Justice Kennedy's logic that life without parole can act as a sufficient alternative deterrent in place of the death penalty can also be extended to non-homicide crimes which are of a serious or heinous nature. Thus, while the defense will stress the rehabilitative aspects of sentencing in making its argument, the prosecution should stress the factors of deterrence and public safety. While the argument can be made that some juvenile offenders may change for the better over the years, there is no guarantee that this would occur in all cases, and it is therefore reasonable for state legislatures to choose to err on the side of caution in order to protect their communities by utilizing life without parole as a sentencing option.

In making their argument, the State of Florida should stress it has not arbitrarily utilized the option of life without parole, and in fact it has only been imposed in rare instances. In the *Graham* case itself, it should be emphasized that the Defendant originally received great leniency and a very light sentence, and it was only after it became apparent that he was engaged in a routine and violent crime spree did the Court impose life imprisonment without parole. Whether in making his life-without-parole declaration in the *Roper* decision Justice Kennedy meant to allow it only as an alternative in homicide cases, or as an available option to be imposed with respect to other serious and violent crimes, is unclear. Thus, his vote in the upcoming Florida cases is one of the ones to watch, and as often in the past, his vote could prove to be the critical one.

It should also be noted that with respect to Justice Kennedy, he has often cast the critical swing vote in numerous major criminal law decisions in favor of the prosecution, including most recently and significantly, in the DNA case, *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, June 18, 2009, where he endorsed Chief Justice Roberts's argument that some policy decisions are best left to the legislatures, and not to justices. The State of Florida thus can have some hope that obtaining Justice Kennedy's vote is a reasonable possibility.

The four dissenters in the *Roper* decision were Justices O'Connor, Scalia, Rehnquist and Thomas. Justice Scalia and Justice Thomas issued a vigorous dissent, explicitly criticizing the majority for substituting their own personal judgment in the place of a legislative determination. Based upon their dissent in *Roper*, it appears clear that Scalia and Thomas will vote to uphold the Florida situation. Based upon their votes and expressed judicial philosophy in numerous other cases, it also appears that Justices Scalia and Thomas would be joined by Chief Justice Roberts and Justice Alito, making four votes in favor of the State of Florida.

In conclusion, it appears that the ultimate decision of the U.S. Supreme Court in the pending Florida cases will once again be a sharply divided Court with a split decision. Based upon my analysis, I am sticking my head out by predicting either a 6-3 or a 5-4 vote in favor of upholding the constitutionality of life without parole for juvenile offenders, with Justices Kennedy and Sotomayor constituting the two possible swing votes.

In opposing the *certiorari* petition, the State of Florida also raised some procedural issues which it claimed precluded Supreme Court review. In accepting the petition, it appears that the Supreme Court is prepared to rule on the merits. However, as sometimes happens, a small possibility exists that the Court may decide at the last minute to avoid determining the issue at the present time. By the time of our next issue, you and I may be in a position to learn whether I was right or wrong, or whether we will have to wait for another day to find out.

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

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 April 1, 2009 to July 1, 2009.

Waiver of Misdemeanor Information Claim

***People v. Kalin*, decided March 31, 2009 (N.Y.L.J., April 1, 2009, p. 26)**

In a 4-3 decision, the New York Court of Appeals held that the entry of a guilty plea by a defendant forfeited his claim on appeal that the misdemeanor information under which he was prosecuted was deficient. In a majority opinion written by Judge Graffeo, the Court found that since the Defendant had pleaded guilty to criminal possession of a controlled substance in the 7th degree, he had sufficient notice of the allegations which underlined the allegations in question and specified in the misdemeanor complaint. The Court found that since the accusatory instrument sufficiently pleaded each element of the charged crimes, it was not jurisdictionally defective, and the Defendant's challenge on appeal was forfeited by operation of the law upon his entering of a guilty plea. The four-Judge ruling overturned a determination of the appellate term and re-instated the judgment of the Criminal Court which originally handled the matter. Joining Judge Graffeo in the majority opinion were Judges Read, Smith, and Pigott.

Judge Ciparick, in a dissenting opinion, argued that the majority's decision was contrary to the Court's previous holding in *In re Jahron S.*, 79 NY 2d 632 (1992). Judge Ciparick found that the charging instrument was insufficient to meet the *prima facie* requirements of a misdemeanor accusatory instrument. The dissenting opinion also pointed out that no lab report or field test was ever filed prior to the entry of the plea, and that the Criminal Court failed to advise the Defendant that he was waiving the right to be prosecuted by information. Under these circumstances, the charging instrument in question did not apprise the Defendant with sufficient notice, and was jurisdictionally deficient so that a reversal of the Defendant's conviction was required. Joining Judge Ciparick in dissent were Chief Judge Lippman and Judge Jones.

Brady Violations

***People v. Fuentes*, decided April 7, 2009 (N.Y.L.J., April 8, 2009, pp. 6 and 26)**

In a 5-2 decision, the Court of Appeals held that a psychiatric report was not material evidence, and that the People's non-disclosure did not constitute a Brady violation. In the case at bar, the rape victim, in a hospital interview, had acknowledged that she had feelings of depression and used marijuana on occasion. The prosecution did not disclose this one-page psychiatric report which contained this information during the trial. The defense did not learn about this report until summation, and when prosecutors were questioned as to why they had not turned over the document, they stated that they believed it was privileged. The defense's request for a mistrial was denied. The five-judge majority in the Court of Appeals held that the value of the undisclosed information as admissible impeachment evidence was at best minimal. While criticizing the prosecution for their failure, the Court deemed it unnecessary to order a new trial in light of the minimal value of the document in question, and the fact that the presentation of the People's evidence taken as a whole demonstrated that it was unlikely that any change in the outcome of the proceedings would have occurred.

Judge Jones issued a dissenting opinion, finding that if the defense had been made aware of the document in question, it could have explored possible avenues to probe the victim's psychological infirmities, and the possibility that some or all of her testimony was subject to question. The undisclosed document was thus relevant Brady material, and the Defendant should be entitled to a new trial. Judge Jones was joined in dissent by Judge Read.

Probable Cause for Arrest

***People v. France*, decided April 2, 2009 (N.Y.L.J., April 3, 2009, p. 28)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction and denied his claim that he had improperly been denied a hearing on a suppression motion regarding the issue of probable cause. The Court of Appeals concluded that in the case at bar, the face of the pleadings, the context of the Defendant's motion, and the Defendant's access to information, taken as a whole, supported the conclusion that no hearing was required. The Court noted that the Defendant failed to dispute that the victim told the police that he had been robbed by the Defendant, and the victim identified the Defendant to the police immediately after the incident. Further, the Defendant admitted possessing a pawn shop receipt for the goods which had been stolen. Under these circumstances, the Court of Appeals concluded that the uncontested facts provided support for the conclusion that there was clearly probable cause for the arrest, and that a hearing on a suppression issue was unnecessary.

Undisclosed Material Not Subject to Brady Principles

***People v. Contreras*, decided April 7, 2009 (N.Y.L.J., April 8, 2009, p. 27)**

In a unanimous decision, the Court found that notes written by the Complainant did not have to be shown to the Defendant or produced during the trial, since a review of the documents in question led to the conclusion that they had nothing to do with the case. In the case at bar, when the issue regarding the notes first arose, the Court initially heard from the prosecution and the complaining witness in an *ex parte* hearing. It then held an additional hearing in which the Defendant's attorney was present but not the Defendant, and in which the trial court ordered the Defendant's attorney not to disclose the contents of the note to his client. The charges in question against the Defendant stemmed from a breakup of his marriage to the Complainant.

The Court of Appeals, in reviewing the record, determined that nothing suggested that the notes in question were either Brady material or Rosario material. Instead, there was no reasonable doubt that they were exactly what the Complainant said they were, notes written at a different time on another subject. They were therefore irrelevant to the case, and the procedure utilized by the trial court in this matter was totally proper and within the allowable discretion of a trial judge. The Defendant's conviction was therefore affirmed.

Use of GPS Device Requires Warrant

***People v. Weaver*, decided May 12, 2009 (N.Y.L.J., May 13, 2009, pp. 1, 2, and 34)**

On March 23, 2009, the New York Court of Appeals heard oral argument in the instant matter which involved the issue of whether a new technology system by police violated constitutional rights against unreasonable search and seizure. In the case at bar, police in Albany County had used a global positioning system device (GPS) to track the Defendant's vehicle. The police had been conducting an investigation into several burglaries which had occurred in the area, and their investigation focused upon the Defendant and his van. The GPS device was placed on the underside of the Defendant's van and tracked his movements for 65 days. In the course of that period, the Defendant burglarized a K-Mart, and subsequent to his arrest, his attorneys commenced a suppression motion arguing that the warrantless use of the GPS device was a violation against unreasonable searches and seizures under both the federal and state constitutions.

The New York Court of Appeals, in a 4-3 decision, held that the use of the GPS system without first acquiring a warrant violated constitutional protections provided under the New York State Constitution against unreasonable searches and seizures. The majority opinion, which was written by Chief Judge Lippman, stated that GPS devices represent an enormous unsupervised intrusion on the right of personal privacy granted to New Yorkers under the New York State Constitution. Judge Lippman was joined in the majority opinion by Judges Ciparick, Pigott, and Jones. Judge Robert S. Smith issued a dissenting opinion, arguing that the majority ruling was unsound and a totally unjustified limitation on law enforcement. Judge Smith was joined in dissent by Judges Read and Graffeo. The Court's decision in this case is an important development in the New York law regarding search and seizure, and is an indication that the Court may once again begin relying upon New York State constitutional provisions where it feels that U.S. Supreme Court rulings do not adequately provide civil liberties protections.

Suppression Hearing Required

***In re Elvin G*, decided May 7, 2009 (N.Y.L.J., May 8, 2009, pp. 2 and 29)**

In another matter, which was also orally argued in March, the New York Court of Appeals once again considered the issue of students' rights and warrantless searches in schools. In the instant matter, a 15-year-old student in the Bronx was found to have been carrying a knife after the school's Dean demanded that several students empty their pockets during a search for prohibited cell phones. The Defendant was charged with juvenile delinquency for unlawful possession of a weapon. In the Family Court, the Defendant's attorney moved to suppress the knife in question, but the hearing court denied the motion. At the Appellate Division, in a 3-2 vote, the search in question was upheld.

In the New York Court of Appeals, the Court determined that there was not enough information in the record to decide whether a suppression hearing should have been held to determine whether the knife was obtained in a constitutional manner. The Court, in a 5-1 ruling, remitted the matter back to the Family Court for further proceedings. The Court indicated that the Family Court should consider the factors discussed in *People v. Mendoza*, 82 NY 2d 415 (1993), and should issue a ruling as to whether the knife which was recovered was in plain view, or whether the Defendant had been specifically ordered to empty his pockets.

Judge Pigott dissented, finding that the Family Court had properly denied the request for a suppression hearing, and that the facts as already developed clearly indicated that the Dean was justified in directing several students, including the Defendant, to empty their pockets.

Altered Metro Card Subject to Forgery Conviction

***People v. Mattocks*, decided April 30, 2009 (N.Y.L.J., May 1, 2009, pp. 7 and 28)**

In the instant matter, the Defendant creased used Metro cards to reactivate their magnetic strips and sold them to riders who used them to obtain additional rides which were not paid for. The Defendant was charged with criminal possession of a forged instrument as a felony. He subsequently claimed on appeal that he had not falsely altered the card under the meaning of the felony forged instrument's law, because the bent cards no longer looked authentic to the human eye, even if they could trick the turnstile's electronic eye. The Defendant thus claimed that he could not properly be convicted of a felony, but only of the misdemeanor charge of unauthorized sale of transportation services. Courts that have dealt with this issue have been split on the question raised, and the Court of Appeals, in its decision, moved to clarify and finally settle the issue.

The Court of Appeals, in a unanimous decision, upheld the Defendant's conviction and stated that the forgery provisions of Penal Law Article 170 applied to Metro cards that were purposefully bent in order to obtain free fares. The Court found that the legislature intended to apply the forgery statutes in a broad manner, and to allow prosecutors considerable discretion in applying the statutes in question. The Court noted that the illegal use of worthless slugs in a mass transit system can amount to millions of dollars in lost fares, and thus constitutes a serious offense, which can be prosecuted under the forgery statutes. The Court's decision was written by Judge Graffeo.

Enhanced Sentence for Failure to Heed Parker Warnings

***People v. Goldstein*, decided April 30, 2009 (N.Y.L.J., May 1, 2009, p. 26)**

In a unanimous decision, the New York Court of Appeals affirmed an enhanced sentence given to a Defendant who had failed to heed Parker warnings regarding the failure to appear in court when required. In the case at bar, the Defendant had entered a plea agreement and the Defendant was informed that if he proceeded to trial he could face consecutive sentences with respect to the counts which were included in the indictment. The Court, however, mistakenly represented the length of the consecutive sentences which could be imposed.

He was further advised that as a result of the plea agreement, the sentences to be imposed would run concurrently. After accepting the Defendant's plea, the Court further warned the Defendant that his failure to appear for sentencing could result in an enhanced sentence. When the Defendant failed to appear on the designated sentence date, the Court imposed an enhanced sentence beyond that which was specified in the plea agreement. The Defendant subsequently moved to withdraw the plea in question. The Court of Appeals determined that there was no indication in the record that the misinformation regarding the length of the consecutive sentences figured in the Defendant's decision to plead. Further, due to the failure of the Defendant to appear as required, the sentencing court was within its discretion to impose the enhanced sentence.

Admissibility of Prior Uncharged Crimes

***People v. Leeson*, decided May 5, 2009 (N.Y.L.J., May 6, 2009, p. 29)**

In a unanimous decision, the New York Court of Appeals upheld a Defendant's conviction for various sex crimes, and determined that the trial court had not committed reversible error by admitting testimony as to the Defendant's prior bad acts. The Court of Appeals found that in the case at bar, the admission of the testimony in question was relevant to a material issue in the case, and that therefore, the Defendant was not denied a fair trial. The Court noted that the uncharged bad acts involved this very same victim, and covered the same time period as the crimes which were alleged in the indictment. Thus, the admitted testimony provided necessary background information on the nature of the relationship between the Defendant and the victim, and placed the charged conduct in context. The testimony was thus relevant for a purpose other than the Defendant's criminal propensity, and the trial court was clearly within its discretion to allow the testimony in question.

Ineffective Assistance of Counsel

***People v. Borrell*, decided May 5, 2009 (N.Y.L.J., May 6, 2009, p. 26)**

In a 6-1 decision, the New York Court of Appeals denied a Defendant's application for a writ of error *coram nobis*. The Court concluded that the Defendant had not established his claim of ineffective assistance of counsel, and that the Defendant's claim that a specific argument should have been raised was so uncertain of any possible success that the standards for ineffective assistance of counsel could not be met. Judge Pigott dissented.

Failure to Provide Proper Allen Charge

***People v. Alaeman*, decided April 30, 2009 (N.Y.L.J., May 1, 2009, p. 29)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction and ordered a new trial. The Court found that after receiving a note from the jury that it was hopelessly deadlocked, the trial judge failed to provide a balanced deadlock instruction. After receiving the jury's note, the Trial Court chided the

jury for not following the rules, and implied that certain jurors had violated their promise that they would comply with the Court's instructions. The Court then sent the jury home. When the jury returned the next day, it eventually rendered a guilty verdict. The Court of Appeals found, however, that the Court had not properly responded to the jury's statement that it was deadlocked, and that on the contrary, its strident remarks may have led the jurors to surrender their conscientiously held beliefs. The Court of Appeals thus concluded that a new trial was required.

Post-Release Supervision

***People v. Boyd*, decided May 7, 2009 (N.Y.L.J., May 8, 2009, p. 26)**

In a 4-2 decision, the Court of Appeals remitted the matter back to the Sentencing Court so that the effects of the newly enacted Penal Law § 70.85 can be considered as a possible remedy for the original failure to impose the required period of post-release supervision. The People had argued that in enacting Penal Law § 70.85, the legislature had created an alternative remedy authorizing the Supreme Court to re-sentence the Defendant to his original 12-year determinate sentence without post-release supervision as an alternative remedy to vacating the Defendant's plea and sentence. On remand to the original Sentencing Court, the Defendant can also raise the issue of the constitutionality of Penal Law § 70.85, an issue which was raised by Judge Pigott, who dissented from the Court's majority ruling. Judge Smith also issued a separate dissenting opinion.

Dismissal of Leave to Appeal Certification

***People v. Sevencan*, decided May 7, 2009 (N.Y.L.J., May 8, 2009, p. 29)**

In a unanimous decision, the New York Court of Appeals dismissed an application for leave to appeal an Order of the Appellate Division which affirmed a denial for resentencing, pursuant to the 2004 Drug Law Reform Act. The Court, relying upon its previous decision in *People v. Bautista,* 7 NY 3d 838 (2006), held that the Drug Reform Act did not make the Order in question appealable to the New York Court of Appeals as required by Criminal Procedure Law § 450.90 or § 470.60. Under these circumstances, an appeal could not be taken to the New York Court of Appeals.

Misdemeanor Hearing by Judicial Hearing Officer Valid

***People v. Davis*, decided June 11, 2009 (N.Y.L.J., June 12, 2009, pp. 6 and 36)**

In a 5-2 decision, the Court of Appeals held that Criminal Procedure Law § 350.20, which permits class B misdemeanors to be tried and determined by judicial hearing officers upon agreement of the parties, is constitutional. In the case at bar, the Defendant and his defense counsel had signed a consent form allowing the matter to be heard before a judicial hearing officer. On appeal, the Defendant challenged the constitutionality of such a procedure. The Court, however, determined that a valid public policy purpose is served by CPL § 350.20 in that it helps to alleviate the congestion and backlog in the state courts. The majority opinion was written by Judge Ciparick and was joined by Chief Judge Lippman and Judges Graffeo, Read and Pigott. Judges Jones and Smith dissented on the grounds that although a consent form to the procedure had been signed, there was no adequate court colloquy to determine whether the Defendant knowingly and intelligently waived his rights.

Identification Procedures

***People v. Marte*, decided June 11, 2009 (N.Y.L.J., June 12, 2009, pp. 1, 6 and 37)**

In a unanimous decision, the Court of Appeals held that it would not adopt a *per se* rule requiring the suppression of unnecessarily suggestive police-directed identification of criminal suspects where the police were not directly involved. In the case at bar, the victim's sister had shown the victim a picture of the Defendant, who she suspected was the person who had committed the robbery. Subsequently, the victim picked the Defendant out of a police lineup. The Court held that since the police were not involved in the initial suggestive viewing, it would not order suppression of the subsequent identification. Judge Smith, who wrote the Court's opinion, concluded "a *per se* rule prohibiting the use of evidence that results from private communications would deny much valuable information to the fact finder without any corresponding gain in the fairness of the means used to identify alleged criminals. Where no one in law enforcement is the source of the problem, nothing justifies the *per se* rule the Defendant seeks."

Forgery Charges

***People v. Bailey*, decided June 11, 2009 (N.Y.L.J., June 12, 2009, pp. 6 and 38)**

In a 5-2 decision, the New York Court of Appeals dismissed a Defendant's conviction for first degree possession of a forged instrument, finding that the evidence was insufficient to establish that the Defendant had the culpable mental state necessary to sustain a conviction for that crime. Judge Jones, writing for the majority, held that a suspect's intent is not presumed by possession of a forged instrument under Penal Law § 170.30, and that the evidence presented during the trial was not sufficient to provide the requisite proof of his intent to use three counterfeit $10 bills. Judge Jones pointed out that the statute requires the People to prove not only that the bills were counterfeit, but that a defendant intended to use them to

defraud, deceive or injure another. Although the legislature could have created a presumption in the statute, it failed to do so.

Judges Pigott and Smith dissented, finding that the Defendant had exhibited suspicious behavior shortly before his arrest, and that it was reasonable for the jury to conclude that there was no other logical explanation for Defendant's possession of the bills, except to pass them when the opportunity arose.

An Attempt to Commit a Crime

***People v. Cano*, decided June 11, 2009 (N.Y.L.J., June 12, 2009, p. 39)**

In a unanimous decision, the New York Court of Appeals held that the Defendant's actions were close enough to achieving his illegal goal, and thus justified his conviction for an attempt under Penal Law § 110. The Court found that the Defendant came dangerously near the commission of crimes when he arrived at the location of what he thought would be a sexual rendezvous with an underage boy. The proof of Defendant's intent and expensive preparation followed by his travel to the intended crime scene were sufficient to establish the conviction in question.

Sex Offender Registry Act

People v. Mingo

***People v. Balic*, decided June 9, 2009 (N.Y.L.J., June 10, 2009, pp. 6 and 34)**

In both of the above matters, the Defendants had challenged the use of hearsay contained in the files of their investigations or convictions by courts in setting the risk levels for use in the sex offender registry. The Court of Appeals, in unanimous decisions, held that hearsay could be relied upon. It affirmed the determination in *People v. Balic*, finding that a proper basis existed to consider a victim's statement which was prepared by a police officer under oath. In the case of *People v. Mingo*, however, it remitted the matter back to the trial court in order to allow the District Attorney's Office an opportunity to lay a proper foundation for the internal documents generated by the District Attorney's Office, which they were relying upon.

Speedy Trial Issue

***People v. Decker*, decided June 9, 2009 (N.Y.L.J., June 10, 2009, p. 33)**

In a unanimous decision, the Court of Appeals found that even though the prosecution in question did not proceed for some 15 years, the District Attorney had satisfied the "undue delay test," and the Defendant's conviction would be upheld. In the case at bar, the body of the victim had been found on December 3, 1987. Although the Defendant Decker was a suspect, and had been questioned by police, a decision had been made not to prosecute at that time. The case was reopened some 15 years later, in 2002. The police attempted at that time to obtain new evidence by using modern scientific techniques. Although no further evidence was obtained, they decided to prosecute using the evidence that was available in 1987. The Defendant then moved to dismiss the indictment based on the lengthy pre-indictment delay. The District Attorney's office alleged that it had decided not to prosecute in 1987 because it had largely circumstantial evidence and wanted to conduct further investigations. The District Attorney's Office also cited the problem that witnesses at that time were reluctant to testify and that some of them were drug addicts and therefore would possibly be viewed as unreliable. In 2002, some of these witnesses had overcome their drug additions and had indicated that they were willing to testify.

Reviewing all of the circumstances in the case at bar and balancing all of the relevant factors, the Court of Appeals concluded that the Defendant was not deprived by his due process right to prompt prosecution. Although the delay may have caused some degree of prejudice to the Defendant, the People had satisfied their burden of demonstrating that they made a good-faith determination not to proceed with the prosecution in 1987 due to what was at the time insufficient evidence. Accordingly, the Defendant's conviction was affirmed.

Criminally Negligent Homicide

***People v. McGrantham*, decided June 25, 2009 (N.Y.L.J., June 26, 2009, p. 37)**

In a unanimous decision, the New York Court of Appeals dismissed a count in the indictment which had charged the Defendant with criminally negligent homicide. The case involved the fact that a driver had missed the entrance ramp, and when he attempted to correct his mistake he made a U-turn across three westbound lanes of traffic. He had almost completed the turn when a westbound motorcycle struck his driver's side door, resulting in the death of the 20-year-old motorcycle operator. The police had established that the Defendant had not been drinking and had not been speeding. The Court of Appeals concluded that under these circumstances, the evidence, even when viewed in the light most favorable to the People, was insufficient to sustain a charge of criminally negligent homicide. The Court stated that the Defendant's decision to make a U-turn across three lanes of traffic to extricate himself from a precarious situation was not wise, but it did not rise to the level of moral blameworthiness required to sustain a charge of criminally negligent homicide. The Court did conclude, however, that the evidence was sufficient to support a charge of reckless driving, pursuant to Vehicle and Traffic Law § 1212.

Joint Bench and Jury Trial

***People v. Almetor*, decided June 24, 2009 (N.Y.L.J., June 25, 2009, p. 42)**

In a unanimous decision, the New York Court of Appeals reversed a Defendant's conviction for trespass as a violation, concluding that the trial court had improperly conducted at the same time a bench trial and a jury trial involving a misdemeanor assault charge which had also been lodged against the Defendant. In the case at bar, the prosecution had filed two separate accusatory instruments, one alleging trespass and the other charging assault, both based upon an incident which happened at the same time on October 18, 2005. After the parties had selected a jury with respect to the misdemeanor assault, the prosecutor raised the issue as to whether the trial court intended to render a decision on the trespass charge. The trial judge stated that it was his policy that if he had a violation charge before him, as well as a misdemeanor charge, he would have the jury handle the misdemeanor charge, and he would render a verdict on the violation. Defense counsel objected, stating he was not aware of this practice, and that no one had advised him that this would be the situation until he was in the midst of trial.

Subsequently, the jury acquitted the Defendant of assault, but the Court convicted him of the trespass. The Court of Appeals concluded that the Defendant was unaware that each of his offenses was being tried to a separate fact finder until the trial was nearly over, and that there had been every indication that both charges were being tried by the jury. Since the Defendant had not been given proper and timely notice as to the Court's intention to utilize separate fact finders, the violation conviction was reversed and the matter remitted to the trial court for further proceedings.

Use of Stun Belt During Trial

***People v. Buchanan*, decided June 30, 2009 (N.Y.L.J., July 1, 2009, pp. 1, 2 and 36)**

In a 6-1 decision, the New York Court of Appeals reversed a Defendant's murder conviction on the grounds that the trial judge had improperly forced the Defendant to wear a stun belt in court, even though the restraining device was not visible to the jury. The trial judge in the case at bar had stated that it was his policy, due to the nature of serious cases, to have a defendant either wear leg shackles or a stun belt that could deliver a shock, should a problem arise. Defense counsel objected, and the Defendant repeatedly protested, stating he hadn't done anything to warrant the use of the stun belt.

In the Court of Appeals, the Defendant had argued that the use of the stun belt deprived him of due process of law based upon the U.S. Supreme Court decision in *Deck v. Missouri*, 544 U.S. 622 (2005). The Court of Appeals concluded that as a matter of New York law, it was unacceptable to make a stun belt a routine adjunct of every murder trial, without a specifically identified security reason. In the case at bar, there was no specific finding of a security concern, and the trial judge in fact had acknowledged on the record that with respect to the instant Defendant, he had done nothing to warrant the situation. Under these circumstances, reversible error had occurred, and a new trial was required.

Judge Read dissented, stating that although the trial judge should have placed his reasons on the record, the belt in question was not visible to the jurors, and it did not compromise the fundamental fairness of the trial, nor did it impair the Defendant's ability to contribute to his own defense.

Search of Vehicle

***People v. Gomez*, decided June 30, 2009 (N.Y.L.J., July 1, 2009, pp. 2 and 36)**

In a unanimous decision, the New York Court of Appeals concluded that a police search of a Defendant's vehicle was invalid, since it was not designed to produce an inventory. Officers had stopped the Defendant's car after he had been driving erratically. A computer check revealed his driver's license had been suspended, and officers arrested the Defendant and impounded his car. A subsequent search of the vehicle found a plastic bag containing cocaine and other drug paraphernalia. The Court concluded that the police had violated their own guidelines on inventory searches, and had not sustained their burden of establishing a valid inventory search. The police had also failed to compile an actual inventory as to what was in the interior of the vehicle. Under these circumstances, the search was improper and the suppression of the evidence and the dismissal of the indictment were upheld.

A Summary of the 2008 Report of the Clerk of the New York Court of Appeals

By Spiros A. Tsimbinos

In late April, 2009, Stuart M. Cohen, Clerk of the New York State Court of Appeals, issued the Annual Report for the year 2008, providing detailed information regarding the workings of the Court during the past year. It was reported that the Court, in 2008, decided 225 appeals, 172 which were civil and 53 which were criminal. The Court also handled 1,459 motions and 2,637 criminal leave applications. The Court thus dealt with 4,321 matters. The number of appeals decided in 2008 was higher than the 185 decided in 2007. The number of appeals in civil cases increased by 37 and in the criminal area there was an increase of 3. The overall volume of the Court's docket thus increased slightly from the year 2007.

Despite the fact that in a few cases the Court exhibited sharp differences of opinion and 4-3 splits, the Court overall had a high degree of consensus, with 186 appeals being decided without any dissenting opinions. However, the number of dissenting opinions—to wit: 34—was slightly higher than in 2007. With respect to applications for leave to appeal, the Court granted permission in 6.8% of the civil cases, down from 7% in 2007. On the criminal side, the number of criminal leave applications granted was 53, an increase over the 36 granted in 2007. Since the Court received 2,637 applications for leave to appeal in criminal cases, the percentage granted is just about 2%, still an extremely low percentage.

The Court of Appeals continues to maintain a prompt and efficient method of handling its caseload. The average time from argument or submission to disposition of an appeal decided in the normal course was 38 days; for all appeals, the average time from argument or submission to disposition was 32 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately seven months. The average period from readiness (all papers served and filed) to calendaring for oral argument was approximately three months. The promptness of the Court's decision-making process improved over last year.

It was also reported that the total cost for the operation of the New York Court of Appeals and its ancillary agencies was slightly over $16 million, representing approximately a 5% increase over last year's operating budget.

In this year's report, Associate Judge Eugene F. Pigott, Jr. has written a foreword basically outlining some of the major events which were experienced by the Court, including the retirement of former Chief Judge Kaye and the appointment of Jonathan Lippman as Chief Judge in January 2009. Following Judge Pigott's message is an introduction by the Clerk of the Court. The structure of this year's report is that it is basically divided into four sections. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes various functions of the Clerk's Office and summarizes administrative accomplishments in 2008. The third section highlights selected decisions of 2008. The fourth part consists of appendices with detailed statistics and other information.

The Annual Report issued by the Clerk of the Court of Appeals provides a wealth of information regarding the activity of the New York Court of Appeals. It provides valuable and interesting reading and we are grateful to the Clerk and the Staff of the Court of Appeals for its annual production and with providing us with copies of the report each year for utilization in our *Newsletter*.

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

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

The United States Supreme Court, during the last several months, issued several significant rulings in the area of criminal law, especially on the issues of search and seizure, right to counsel, and the confrontation clause. These cases are summarized below.

***Arizona v. Gant*, 129 S. Ct. 1710 (April 21, 2009)**

In a 5-4 decision, the Supreme Court ruled that police need a warrant to search the vehicle of someone they have arrested if the person is locked up in a patrol cruiser and poses no safety threat to the officers. The Court's decision places some limitations on the ability of police to search a vehicle immediately after arrest of a suspect, particularly when the alleged offense is nothing more serious than a traffic violation. The Court's most recent decision appears to be a limitation on the expansion of the ability of police officers to conduct searches of vehicles and their occupants. It appears that under the new ruling, warrantless searches may be conducted if a car's passenger compartment is within reach of a suspect and the officers have some legitimate fear for their safety. The vehicle may also be searched if there is reason to believe that evidence will be found of the crime that led to the initial arrest. Justice Stevens, writing for the five-judge majority, stated, "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant." Joining Justice Stevens in the majority opinion were Justices Ginsburg, Souter, Scalia and Thomas.

Justice Alito issued a vigorous dissent, arguing that the Court's decision was changing police practices which have developed over the years based upon Supreme Court decisions. Joining Justice Alito in dissent were Chief Judge Roberts and Justice Kennedy. Justice Breyer also joined the dissenting opinion in part.

Based upon the Court's decision in *Arizona v. Gant*, the Court, during the last several months, granted certiorari, vacated the judgments, and remanded numerous cases involving vehicle searches in connection with arrests for further consideration in light of the Court's most recent decision.

***Flores-Figueroa v. United States*, 129 S. Ct. 1886 (May 4, 2009)**

In a unanimous decision, the Supreme Court held that undocumented workers who use phony identifications cannot be convicted of identity theft without proof that they knew they were stealing a real person's Social Security or other identifying number. The Court's decision was issued by Justice Breyer, and the Court's holding specifically rejected the government's argument that prosecutors need only show that the I.D. numbers belong to someone else regardless of whether the Defendant knew it. The Court's decision places some additional limitations on a 2004 federal law which was aimed at getting tough on immigrants who were picked up in workplace raids and were found to be using false Social Security and alien registration numbers.

***Kansas v. Ventris*, 129 S. Ct. 1841 (April 29, 2009)**

In a 7-2 ruling, the Supreme Court held that a Defendant's statement to an informant elicited in violation of his Sixth Amendment rights was nonetheless admissible to impeach his trial testimony. The majority opinion held that the use of the statement was proper in order to show that the Defendant's statement was inconsistent with his current trial testimony. Constituting the majority opinion were Justices Souter, Breyer, Thomas, Scalia, Alito, Kennedy and Chief Judge Roberts. Justice Stevens issued a dissenting opinion in which Justice Ginsburg joined.

***Montejo v. Louisiana*, 129 S. Ct. 2079 (May 25, 2009)**

In another 5-4 decision, the Supreme Court overruled a 1986 decision where the Court had stated that police were constitutionally barred from initiating interrogation of a criminal defendant once he or she had asked for a lawyer at an arraignment or a similar proceeding. The 1986 ruling in *Michigan v. Jackson*, 475 U.S. 625, has been a controversial one, and was often attacked by law enforcement officials as being unduly burdensome and difficult to implement. In the instant case, in a decision written by Justice Scalia, the five-judge majority held that the *Jackson* decision was poorly reasoned and had proven unworkable. Further, because of protections which had been created by the Court in *Miranda* and related cases, there was little if any chance that a defendant would be badgered into waiving his right to have counsel present during interrogation. The five-judge majority, in addition to Justice Scalia, consisted of Justices Alito, Kennedy, Thomas and Chief Justice Roberts.

Justice Stevens issued a dissenting opinion, calling the overruling of the *Jackson* decision unwarranted and stating that the Miranda warnings, in and of themselves, were not adequate to inform a defendant of his Sixth Amendment right to have a lawyer present at all critical stages. Justice Stevens was joined in dissent by Justices Souter, Ginsburg and Breyer.

***Safford Unified School District v. Redding*, 129 S. Ct. 2633 (June 25, 2009)**

On April 21, 2009, the Supreme Court held oral argument in a case of an Arizona school girl who was strip-searched on suspicion of carrying illegal pills. The case once again focused the Court's attention on the delicate balance between student privacy and the need for public school safety. In the past, the Court has basically followed a pattern of allowing school officials broad discretion in their supervisory role over students and the necessity to deal with the problem of drugs and illegal weapons in schools. After considering the matter for several weeks, the Court in June issued its decision and held that the search in question was unconstitutional. By an 8-1 vote, the Court found that school officials had gone too far in their search. The Court emphasized the difference between a routine search of a backpack and a search that exposes a student's private parts. The majority opinion, written by Justice Souter, found that a school official must have a reasonable suspicion of danger regarding the drugs sought and a belief that they could be hidden in a student's underwear before making the quantum leap from outer clothes and backpacks to exposure of intimate parts. Justice Thomas dissented, arguing that the decision was allowing judges to second-guess school officials who were trying to insure student safety.

Although ruling in favor of the Plaintiff on the search issue, the Court refused to award any monetary damages, ruling that the school officials were immune from being sued unless they blatantly violated clearly established law. Since this could not be sustained in light of the fact that several federal courts had come to conflicting conclusions on the issue, the majority of the Court concluded that no monetary damages could be awarded. Justices Stevens and Ginsburg dissented with respect to the immunity issue, and the failure to provide any monetary compensation.

***District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (June 18, 2009)**

In a 5-4 decision, the Court held that criminal defendants have no federal constitutional right of access to DNA evidence after they are convicted. The Court concluded that establishing rules on DNA evidence should be the job of legislators, not justices. Chief Justice Roberts wrote the opinion for the majority and stated "to suddenly constitutionalize this area would short circuit what looks to be a prompt and considered legislative response by the states and the Congress." Justice Roberts noted that 47 states and the federal government currently provide at least some post-conviction access to DNA evidence. Justice Roberts was joined in the majority by Justices Scalia, Kennedy, Thomas and Alito. Justice Stevens issued a dissenting opinion, arguing that the DNA test which the Defendant sought was a simple one which could be provided at modest cost, and that refusal to provide access to evidence which could prove innocence was wholly unjustified. Justices Souter, Ginsburg and Breyer joined in dissent.

***Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (June 29, 2009)**

In a 5-4 decision, the Supreme Court concluded that the Defendant's Sixth Amendment right to be confronted by witnesses requires that when drug, blood or other forensic reports are introduced by prosecutors at trial, the analyst who prepared the report must be available for cross-examination. Justice Scalia wrote the majority opinion and was joined by the unusual grouping of Roberts, Kennedy, Breyer and Alito. Often viewed as a pro-prosecution Justice in the area of confrontation, Justice Scalia has evidenced pro-defense tendencies and was the architect of the *Crawford* decision, upon which the Court's most recent decision is based. Interestingly, in the instant case, the usually pro-defense bloc consisting of Justices Ginsburg, Stevens and Souter voted in favor of the prosecution, where they were joined by Justice Thomas, making for another most unusual grouping.

Justice Souter Retires from Supreme Court at End of June Term; President Obama Nominates Judge Sonia Sotomayor as His Replacement

In early May, Justice David Souter announced that he was retiring from the Court as of the end of the June session. Justice Souter is currently 69 years of age, and had served on the Court for 19 years, having been appointed by Former President George H. W. Bush in 1990. Although initially considered a moderate-conservative, Justice Souter soon moved into the so-called "liberal camp," joining Justices Ginsburg, Breyer and Stevens in numerous decisions.

Justice Souter was a key vote in the *Roe v. Wade* decision involving abortion rights, and also dissented in the 2000 Supreme Court ruling upholding the election of George W. Bush as the winner of the disputed national Presidential election.

In our recent issues, we had raised the possibility that newly elected President Obama would soon have opportunities to make appointments to the Supreme Court. In fact, in our last issue, we speculated that Justices Ginsburg, Stevens, or Souter might be the subject of a forthcoming retirement. In line with our predictions, within 100 days of taking office President Obama had an early opportunity to have an impact on the Court's personnel. After issuing public statements as to how he would go about making his selection and what qualities he would consider, speculation on his actual choice had centered on the strong possibility that he would select a

woman or a member of a minority group, in an effort to achieve greater diversity on the Court. Early speculation as to a possible nominee focused on Judge Sonia Sotomayor, who sat in the Second Circuit Court of Appeals in New York and is also of Hispanic descent. Other leading candidates who also occupied positions on the various Courts of Appeals were Judges Merrick B. Garland, Kim McLane Wardlaw, and Diane Wood. Former Harvard University Law School Professor Elena A. Kagan, currently serving as U.S. Solicitor General, also emerged as a leading candidate.

President Obama early on indicated that he wished to move quickly in making his selection so that the new Justice could begin hearing cases with the opening of the Court's new term in October. He thus announced his choice of Judge Sotomayor on May 26, and the Senate began holding hearings to consider the nomination in July. After the confirmation hearings were held, the full Senate voted to confirm Justice Sotomayor by a large margin, 68 to 31, and she will begin sitting on the Court on October 5, 2009, when the Court begins its new term.

The selection of Justice Sotomayor is a historic one in many respects. She is the first Hispanic to serve on the Court, and is only the third woman who has been confirmed for a seat on the highest court in the country. Justice Sotomayor is also a prime example of fulfilling the American dream, having come from a humble background and working diligently to succeed within the legal profession. She is 54 years of age, and attended on various scholarship programs Princeton University and Yale Law School. Prior to her elevation to the Supreme Court, she had served as a Judge on the Second U.S. Circuit Court of Appeals for the last 11 years. She previously had experience as a private practitioner and as an Assistant District Attorney in New York County. Of special interest to New Yorkers is that Justice Sotomayor is a lifelong resident of New York City, having been raised in the Bronx. In fact, over the years 14 of the 110 Justices who have served on the Supreme Court have been New Yorkers. We congratulate Justice Sotomayor on her appointment, and wish her every success. We also thank Justice Souter for his many years of service on the Court, and wish him well in his retirement. As was indicated in our earlier issues, there is some strong possibility that President Obama will have the opportunity to make some additional appointments during the rest of his term. We will keep our readers advised of any such developments.

Supreme Court to Consider Whether Life Terms for Juvenile Defendants Constitute Cruel and Unusual Punishment

In early May, the Supreme Court voted to grant a *writ of certiorari* in two cases emanating from Florida which involve the question of whether juvenile defendants who have been convicted of non-homicide offenses can properly be sentenced to lifetime terms of imprisonment without any possibility of parole. In the first case, a 17-year-old Defendant, Terence Graham, was involved in an armed robbery at a person's home, and he had a prior conviction for a violent crime. In the second matter, involving Joe Sullivan, he was accused when 13 years of age of rape. He also had committed prior serious felonies in the years preceding the instant matter.

Defense attorneys in both matters are claiming that sentencing juveniles to spend the rest of their lives in prison without hope of ever being released constitutes cruel and unusual punishment and is contrary to recent rulings from the United States Supreme Court, which have limited death penalty sentences for juveniles. The instant case will be closely watched for any further trends in the Supreme Court regarding distinctions in sentencing between juvenile and adult offenders. It is expected that the case will be argued some time in the fall, and that a decision may be issued toward the end of the year. These two Florida cases are also the subject of a feature article in this issue which appears at page 8.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from March 31, 2009 to July 1, 2009.

People v. Assi **(N.Y.L.J., March 31, 2009, pp. 1 and 2, and April 1, 2009, p. 26)**

In a unanimous decision, the Appellate Division, First Department, held that New York State's Hate Crimes Law was applicable, even though a Defendant's actions are not directed specifically against a person, but against real property. In the case at bar, the Defendant was convicted of a hate crime on the grounds that he put a Molotov cocktail in front of a Riverdale Synagogue on the eve of Yom Kippur. The Defendant had argued that he did not know that the Synagogue was occupied when he attempted to set it on fire, and that under the provisions of the Hate Crimes Act of 2000, the prosecution did not prove that his acts were directed at a person. In an opinion written by Justice Acosta, the Appellate Court found that a review of the legislative history of the statute left no doubt that the legislature intended to include crimes directed against property which were motivated by prejudice. The strong possibility that the Defendant's actions, which were directed against an entire community, could have also resulted in injury to persons, brought the Defendant's actions within the scope of the statute. The Defendant's conviction for the hate crime was therefore properly obtained.

People v. Coston **(N.Y.L.J., March 31, 2009, p. 26)**

In a unanimous decision, the Appellate Division, First Department, held that a Defendant could be properly re-sentenced to a term of four months intermittent imprisonment to be served on weekends, plus five years probation and a fine. In the case at bar, the Defendant had originally been sentenced based upon a plea agreement, to a six-month intermittent sentence. Subsequently, on a re-sentence, the Court had modified the six-month period to one of four months. The Defendant argued on appeal that pursuant to Penal Law § 60.01, the original sentence of six months intermittent could not properly be coupled with a period of probation, and thus he had been subject to multiple sentences for the same crime, in violation of double jeopardy principles.

On appeal, the Appellate Division found that the defense had raised no issue regarding the current appellate claim at the time of plea or sentence, and that in either event a subsequent re-sentencing corrected any illegality which existed in the original sentence. Under these circumstances, the Defendant was not aggrieved by any of the failures and omissions which occurred. Further, the trial court had the inherent power to correct any illegalities which may have existed. Under these circumstances, the judgment of conviction and the re-sentencing which occurred was affirmed.

People v. Demagall **(N.Y.L.J., April 13, 2009, p. 18)**

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's murder conviction and ordered a new trial because the trial court had improperly handled the prosecution's failure to produce a psychiatric expert who had originally examined the Defendant. In the case at bar, the Defendant had asserted an insanity defense. The prosecution, during the trial, chose not to produce the very first expert who had examined the Defendant. The trial court refused to grant a missing witness charge, and had further told the jurors that they should not speculate on the expert's absence when they sent a jury note inquiring why the missing expert had not been called to testify. Defense counsel was also prevented from commenting upon the missing expert in his summation. Under these circumstances, the Appellate Division concluded that at least a missing witness charge should have been given, and that the cumulative effect of the trial court's errors denied the Defendant a fair trial. The matter was thus remitted to the County Court of Columbia County with a direction that it be tried before a different judge.

People v. Sarubbi **(N.Y.L.J., April 15, 2009, pp. 1 and 4, and April 16, p. 18)**

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's conviction for attempted robbery and ordered a new trial. The appellate panel concluded that the trial court committed reversible error in denying the defense's challenges for cause of two prospective jurors without first seeking further clarification of the panelists' remarks. In response to a question from defense counsel with respect to one prospective juror as to whether her experience as a victim of a crime might prevent her from being impartial, she answered, "It might." A second potential juror told the court that two of her grandsons had been murdered, and that serving on a criminal case made her a little uncomfortable. She further added that she was afraid she might struggle to be impartial. Although defense counsel challenged both of these prospective jurors for cause, the challenges were denied, and the trial court failed to make any further effort to clarify the jurors' remarks. In ordering a reversal, the First Department stated, "Where there is any doubt, the court should err on the side of disqualification because 'the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror.' Here, the court simply denied each of these challenges for cause without comment or further inquiry, leaving in doubt each panelist's ability to serve."

***People v. Fernandez* (N.Y.L.J., May 13, 2009, p. 25)**

In a unanimous decision, the Appellate Division, First Department, reversed a Defendant's manslaughter conviction on the grounds that the trial court had committed reversible error when it failed to provide the jury with a charge of criminally negligent homicide as a lesser included offense, which had been requested by the Defendant. The appellate panel concluded that in the case at bar, there was a reasonable view of the evidence which made it possible for the trier of fact to acquit the Defendant of the higher count, but still find him guilty of the lesser one. Under these circumstances, the trial court's refusal to provide a charge of criminally negligent homicide constituted reversible error, and a new trial is required.

***People v. Sullivan* (N.Y.L.J., May 21, 2009, pp. 25 and 26)**

In a unanimous decision, the Appellate Division, Second Department, held that bruises and scrapes which were suffered by a victim constituted physical injury for the purposes of the Sex Offender Registration Act. The Court thus found that it was appropriate to assess 15 points under the risk factor for use of violence, so as to increase the sex offender level pursuant to the Correction Law. Relying upon the definition of physical injury as set forth in the Penal Law, and various cases which have interpreted the statute, the Court found that the injuries inflicted in the case at bar caused the victim to suffer substantial pain, and that the manner in which they were inflicted clearly indicated a serious violent attack. Under these circumstances the higher level assessment was clearly justified.

***People v. Cassell* (N.Y.L.J., June 1, 2009, pp. 1, 4 and 33)**

In a unanimous decision, the Appellate Division, Second Department, reversed a defendant's conviction because a court officer had improperly conveyed a legal instruction to a juror. In the case at bar, a juror told a court officer during deliberations that she wanted to go home. The officer took the juror outside where she waited for about 15 minutes, and subsequently the trial court's law clerk told the court officer to return the juror to the jury room. The officer did so, but in the process told the juror, "I don't think you're going to go home." The Appellate Division considered these remarks the communication of an improper legal instruction, which mandated a reversal of the Defendant's conviction. The Appellate Division in its ruling stated that while a court officer can communicate with the jury in connection with his or her administerial duties, the instruction in question should have been given to the juror directly by the trial court in the Defendant's presence, and the failure to do so constitutes *per se* reversible error.

***People v. Miller* (N.Y.L.J., June 8, 2009, pp. 1 and 25)**

In a unanimous decision, the Appellate Division, Third Department, reversed a Defendant's conviction and ordered a new trial on the grounds that numerous recurring errors and omissions by his trial attorney denied him a fair trial. The Defendant had been convicted of burglary and had been represented at the trial by a court-appointed attorney. The Court concluded that a review of the trial record clearly indicated that his counsel had provided ineffective representation and had been ill-prepared, providing an incoherent opening and closing statement, and causing the trial court to repeatedly characterize defense counsel's arguments as silly and unfounded. The Court also found that defense counsel had failed to request an appropriate Wade hearing. Considering the totality of circumstances, the Court concluded that it could not say that the Defendant's representation was meaningful or even competent.

***People v. Pelkey* (N.Y.L.J., June 8, 2009, pp. 1, 2 and 25)**

In a unanimous decision, the Appellate Division, Third Department, invalidated a trial judge's order that the Defendant pay the cost of his extradition as part of restitution for crimes related to the theft of his father-in-law's identity. The Court found that no proper hearing was held on the issue, nor was there any clear indication in the record that the Defendant had agreed to make the restitution in question. The matter was therefore remitted to the Clinton County Court for further proceedings.

***People v. Diotte* (N.Y.L.J., June 19, 2009, p. 26)**

In a unanimous decision, the Appellate Division, Third Department, held that the trial court's jury instruction adequately cured any harm which may have arisen from the prosecutor's closing statement. In the case at bar, the prosecutor, during summation, suggested that defense counsel could have asked additional questions of the victim on cross-examination. The prosecutor also argued that some of the allegations against the Defendant were uncontroverted, to which defense counsel objected. Upon the completion of the prosecutor's summation, the defense counsel moved for a mistrial, or in the alternative for curative instructions. The Court then provided a curative instruction along the lines requested by defense counsel. Although finding that the prosecutor's comments were inappropriate, the Court concluded that they were brief and isolated and that further, in view of the Court's curative instructions, the Defendant's right to a fair trial had not been compromised.

For Your Information

State District Attorneys Express Concerns Over Recent Modifications in Drug Crime Sentencing

Following the legislature's recent passage of modifications in available sentences for certain drug crimes, various district attorneys throughout the state expressed concern that the new legislation might once again lead to increases in crime, and threats to the public safety. District Attorney Daniel M. Donovan, Jr., from Staten Island, who is presently serving as President of the New York State District Attorneys Association, in early April issued a public statement in which he expressed the view that the recent reforms of the Rockefeller drug laws represent a serious threat to public safety. Mr. Donovan further stated that the legislative package would likely result in higher crime rates and undermine the success of already established drug treatment programs.

One of the major revisions of the new legislation was to give judges the sole discretion to divert non-violent addicted drug offenders to treatment without obtaining the consent of the district attorney. In addition, the new legislation would allow defendants with multiple prior C and D felonies to also be eligible for probation. An additional provision also provides for the possible re-sentencing of some class B felony drug offenders. Mr. Donovan was not only critical of some of the changes made, but also expressed criticism regarding the procedure which was used to enact the legislation. The modifications in question were made as part of the budget bill, and were approved without much prior consultation or discussion. According to D.A. Donovan, "Any reforms should have been voted on as a separate bill, and not approved in the dead of night without serious debate." Details regarding the new drug law legislation are contained in our first feature article written by Barry Kamins.

New State Budget Provides for Caps on Criminal Caseloads

Another criminal law provision which was attached to the 2009-2010 state budget, which was approved in April, directs the Chief Administrative Judge to develop caseload limits for attorneys providing representation to indigent criminal defendants in New York City.

The caseload standards are to be established by April 1, 2010, and are to be phased in over a four-year period. Although no specific funding was included in the current budget to implement the caseload cap, the legislation provides that the Chief Administrative Judge can request additional funding for this purpose. Caseload caps are currently in effect with respect to Family Court matters, and it is expected that similar standards with respect to criminal cases will also be established. For several years, the Appellate Division, First Department, has also operated with some sort of caseload standard, basically involving caps of up to 400 misdemeanors or 150 felonies. The New York City Legal Aid Society has reported that despite the guidelines established by the Appellate Division, First Department, its caseload has usually been higher, and that it welcomed the new legislation, which again has focused on the issue. The attorney-in-charge, Steven Banks, of the Legal Aid Society, was quoted in a *New York Law Journal* article, announcing the new caps and stating, "The new caps represent a historic breakthrough to make sure that New Yorkers who are charged with crimes are represented by lawyers who have appropriate caseloads and can therefore provide the constitutionally mandated representation to which indigent New Yorkers are entitled." Chief Judge Jonathan Lippman, who played a key role in obtaining the new legislation, also was quoted as stating, "This is a breakthrough agreement that ensures, for the foreseeable future, meaningful, quality representation for criminal indigent defendants in New York City."

Chief Judge Lippman Returns Greater Authority to Local Administrative Judges

In early April, Chief Judge Lippman announced that effective immediately, he was abolishing the citywide positions of administrative judge for the criminal courts, and administrative judge for the civil courts. Instead, the administrative judges in the city's five boroughs will now oversee day-to-day management of the courts, and will not have to consult with a citywide coordinator. Judge Lippman's latest change is a further effort to streamline the court system, and to eliminate unneeded layers of oversight. Under the new system, administrative judges for civil matters will manage the Supreme Court civil terms and the Civil Court within their counties. They will also oversee the supervising judges for the Housing Court and Civil Court. Because of Staten Island's smaller size, one administrative judge in that county will oversee both criminal and civil courts. The new changes will not affect the Family Courts in New York City, which will remain under the control of supervisory judges in each of the five boroughs and will report directly to a citywide administrative judge. In making the changes, Judge Lippman

announced that they were made in consultation with the Presiding Justices of the First and Second Departments.

In late May, Judge Lippman also announced that he had appointed Justice Michael V. Coccoma from Otsego County as the Deputy Chief Administrative Judge for courts outside of New York City. Justice Coccoma is 56 years of age, and had previously served as Administrative Judge for the Sixth Judicial District. He is a graduate of Albany Law School, and a former district attorney of Otsego County.

In early June, a new appointment was also made with respect to the Administrative Judge for the Ninth Judicial District. Chief Administrative Judge Ann Pfau announced that Justice Alan D. Scheinkman had been named Administrative Judge of the five-county Judicial District. Justice Scheinkman was elected to the Supreme Court in 2006. He also served as Westchester County Attorney from 1998 to 2000, and from 2002 to 2006 was a partner in a prominent White Plains law firm. Justice Scheinkman is 59 years of age, and is widely regarded as a legal scholar, having written numerous articles and legal treatises. As Administrative Judge, Justice Scheinkman will receive a salary of $141,500.

Governor Paterson Announces Further Appointments to the Appellate Division

During the last several months, Governor Paterson has filled several vacant positions in the various Appellate Divisions. In late March, he announced the appointment of yet another Justice to the Appellate Division, First Department. This appointment involved Manhattan Supreme Court Justice Sheila Abdus-Salaam. With the latest appointment, the Appellate Division, First Department, is now up to its full strength of 18 Justices. Justice Sheila Abdus-Salaam is 57 years of age, and had been a Supreme Court Justice in Manhattan since 1994. She is a graduate of Columbia Law School, and previously worked as a staff attorney with the East Brooklyn Legal Services.

In early June, Governor Paterson also announced that he had authorized the appointment of an additional Justice in the Appellate Division, First Department, making that Court's total allotment 19 Justices. The additional seat was approved upon the request of Presiding Justice Gonzalez, who stated that an increasing number of complex commercial cases had been reaching the Appellate Court, and that these cases required an additional Justice. It is expected that Governor Paterson will announce his specific selection for the new seat in the next few months.

In late June, Governor Paterson also announced the appointment of Queens Supreme Court Justice Sheri Roman to the Appellate Division, Second Department. Justice Roman is 60 years of age, and has been serving in the Queens Supreme Court since 1992. She is a graduate of Georgetown University Law Center, and previously held major posts in the Bronx District Attorney's Office. She also served as a Criminal Court Judge from 1985 to 1992. Her appointment fills the last vacancy in the Appellate Division, Second Department, which has a complement of 22 Justices. The salary of Appellate Division Justices is $144,000.

Federal Caseload Declines in New York but Increases on a National Level

A recent report issued by the Administrative Office for the U.S. Courts indicated that during the fiscal year 2008, which ended on March 30, the workload of the federal courts on a national level increased by 4.3% in the District Courts, and 4.6% in the Courts of Appeal. Filings within the U.S. Court of Appeals for the Second Circuit increased by an even larger margin, reaching 9%. Within the Second Circuit Court of Appeals, filings in 2008 reached 6,904, up from 6,334 in the prior year. The report also revealed that on a nationwide basis, the District Courts had some 349,000 new filings, while the Circuit Court of Appeals took in 61,104 new cases.

A significant deviation from the national figures was the situation involving the New York District Courts, which actually saw a decline in filings from 29,117 in 2007 to 24,843 in 2008. Filings declined 22.6% in the Southern District and 7.1% in the Eastern District. They remain largely unchanged in the Northern District, while the Western District saw an increase of 9%.

National Salary Survey

In its annual survey of salaries that people earn, *Parade* magazine reviewed the salaries earned by people in the various states and in various professions. It reported that during the year 2008, the national average weekly income rose about 2.5%, from $598 in 2007 to $613 in 2008. It also found that the personal saving rate of various households rose from 0.9% in January 2007 to 5% in January 2009. The average U.S. household, however, still has a credit card debt of slightly over $10,000. Although the economic slump has lead to many layoffs and a rise in unemployment, the survey revealed that certain job categories are still bright spots, to wit: police officers, registered nurses, and auditors. The study also reported that the group that has been hardest hit by the economic downturn has been persons without a high school diploma, whose current unemployment rate has been set at 12.6%. Among the various states, the highest unemployment rate was found in Michigan, which currently stands at 14%, while the lowest unemployment rate was in Wyoming, with a rate of 3.7%.

With regard to the legal profession, the study reported that the profession overall has suffered a decline in

salary and income, but that a wide disparity still existed among the different sectors of the legal profession. Of interest to New Yorkers, the study specifically included Judge Theodore Jones, from the Court of Appeals, and Joshua Gropper, a trial attorney in New York. The photos of these gentlemen were specifically included in the *Parade* article, and their salaries and income were specifically listed. Judge Jones was listed as making $151,200 as a member of the New York Court of Appeals, and Mr. Gropper's income was listed as $400,000. *Parade* has been providing its salary study in the Sunday issues of various newspapers for several years, and its study is based upon both personal interviews and figures received from the U.S. Bureau of Labor Statistics.

The Lawyer's Fund for Client Protection Issues 2008 Annual Report

In early April, the Board of Trustees of the Lawyer's Fund issued its Annual Report covering the year 2008. The Fund reported that in 2008, 130 awards had been approved, involving a total of $6.8 million. At the end of the year, there were also 565 pending claims. The 2008 losses were caused by 48 attorneys who had either been suspended, disbarred or were deceased. The 48 offending attorneys who caused the 2008 losses amounted to less than one-third of 1% of the 244,000 attorneys who were registered in New York State. The Fund also reported that most of the losses were attributable to solo practitioners, and that the greatest number of complaints occurred within the geographical boundaries of the Second Judicial Department. Of the 130 awards which were made in 2008, losses in real estate transactions comprised the largest category, with a monetary payout of $4.8 million and the payment of 63 claims. Thefts of real property escrows continue to be the major source of claims.

Although the Fund is still facing over 500 claims at the end of 2008, the Fund reported that it had $5 million in reserves, and that the Fund was financially sound. A large number of the pending claims are attributable to three attorneys who were affiliated with a firm operated by Andrew F. Capoccia. The Client Protection Fund received $60 from each of the $350 biennial registration fees which are imposed on New York attorneys. Individual awards are currently capped at $300,000. The Fund is currently in its 26th year of operation, and has paid out a total of 908 awards involving $137.3 million. Since 1982, when the Fund was created, New York attorneys have contributed $132 million to the Fund, through the partial contribution from their registration fees.

The Lawyer's Fund for Client Protection is administered by a Board of Trustees who are appointed by the Court of Appeals. The current Board is composed of five attorneys and two business or community leaders. The trustees serve for three-year terms, which are renewable, and receive no compensation for their services.

Indigent Defense Services Experiencing Hard Times

The current economic downturn also appears to be having a national impact on the availability of defense services for indigent defendants facing criminal prosecutions. David Carroll, the current director of research at the National Legal Aid and Defenders Association, recently issued a public statement complaining about serious cutbacks which are occurring throughout the nation. Mr. Carroll stated, "Indigent defense services have never been a priority, even in good economic times. In bad times, it moves to a crisis state. Public defender services are among the first to be cut." The situation has apparently grown so desperate that the American Civil Liberties Union has commenced lawsuits in Connecticut, Washington, Montana and Pennsylvania, seeking to improve indigent public defense services and arguing that the current situation is denying defendants due process rights.

It was also reported that in Georgia, a class action suit has been filed by five defendants who are claiming that they have been held for months without access to an attorney. The Department of Public Advocacy in Kentucky also reported that it was facing a $4.7 million deficit in the current fiscal year, and that it was facing overwhelming caseloads. Despite the effects on indigent defense services caused by the current economic downturn, New York State appears to be moving in a more positive direction, with the recent announcement that caseload caps will now be considered when providing indigent defense services and the creation of a statewide Criminal Defense Services Agency with appropriate funding moving toward possible future legislative approval.

Salary Inequalities Continue to Exist

It appears that the current economic downturn has also had the effect of increasing income inequalities among different groups within the United States. A recent Census report indicates that blacks and Hispanics continue to lag behind whites in finding higher paying jobs, and that the disparity has increased in the last 10 years. The Census report indicated that blacks who had a four-year college degree earned $46,500, or about 78% of the salary paid to comparably educated whites. Hispanics with high school diplomas earned about 83 cents for every dollar whites earned, and Hispanics with bachelor's degrees had an average salary of $44,690, or roughly 75% of the amount earned by whites in a similar educational situation.

One positive note from the report was that women appeared to be narrowing the salary gap with their male counterparts, especially those holding governmental positions. A recent report from the Government Accountability Office stated that the current difference between the average annual salary for men and women in the federal work force declined from 19 cents to 11 cents on the dollar

between 1998 and 2007. Recent federal legislation regarding equal-pay provisions may also soon eliminate any still-existing differential between salaries paid to men and women.

Recommendations of Wrongful Convictions Task Force Approved by House of Delegates

On April 6, 2009, the House of Delegates of the New York State Bar Association approved the recommendations that had been issued by a Task Force seeking to reduce or eliminate wrongful convictions in New York State. The Task Force was headed by New York City Criminal Court Judge Barry Kamins, who has been a long-time active member of our Criminal Justice Section. The Task Force, which had 22 members, had been working diligently for many months and reviewed some 53 instances of possible wrongful convictions dating back to 1964. Before making its final recommendation, the Task Force also held several public hearings to obtain further input. Testifying at the hearings were several district attorneys, including Staten Island District Attorney Daniel M. Donovan, who is presently the President of the State District Attorneys Association, and Queens District Attorney Richard A. Brown. Also testifying were Barry Scheck and Peter Newfeld, Co-Directors of the Innocence Project, and Bruce Burket, who recently won the release of Martin Tankleff after he had served 17 years in prison for the alleged murder of his parents.

In addition to a report from Judge Kamins, also speaking on behalf of the recommendations and representing our Section were Section Chair James P. Subjack and Vincent E. Doyle, III, who was also a Task Force member. With the approval of the Task Force's recommendations by the State Bar Association, formal adoption of some or all of its recommendations by the State Legislature is now being sought. A bill has already been introduced in both the Assembly and Senate Codes Committees which would encompass many of the recommendations which have been made. The proposed legislation would establish a commission to examine wrongful convictions after they occur, study why they happened and recommend ways to prevent future mistakes. The commission would not be empowered to reopen cases in which wrongful convictions are suspected, but would attempt to learn lessons from cases where convicted defendants are exonerated based on DNA or other evidence. The major recommendations of the Task Force can be summarized as follows:

- Conduct photo array identifications and lineups by law enforcement personnel who do not know who the suspect is.
- Tell eyewitnesses that the person administering a lineup does not know who the suspect is, lowering the chances a witness will seek cues from the administrator.
- Use no more than one suspect per lineup.
- Video and sound record suspect identifications by eyewitnesses so judges and juries can assess the degree of certainty of the identifications.
- Record all station-house interrogations of suspects.
- Develop protocols for testing, storing and preserving evidence by police departments and prosecutors.
- Permit expert testimony in criminal cases about scientific research surrounding identification procedures, including the reliability of human memory.
- Have judges instruct jurors on issues related to the reliability of eyewitness identification.
- Allow the wrongfully convicted to prove their innocence even after pleading guilty.
- Establish an independent commission to minimize the incidence of wrongful convictions.

Chief Judge Lippman Appoints Task Force on Wrongful Convictions

Soon after the New York State Bar Association adopted several recommendations to eliminate or reduce wrongful convictions, Chief Judge Lippman also announced that he was appointing his own Task Force to study instances where defendants were wrongly convicted of crimes, and to recommend ways that mistakes can be avoided in the future. He announced that Court of Appeals Judge Theodore T. Jones and Westchester County District Attorney Janet Difiore will chair the Task Force, and that various members will also be added to the Task Force in the coming weeks. Judge Lippman expressed the views that all three branches of state government should be included in the Task Force, and that approximately 12 members should comprise the new Panel. It is expected that Judge Barry Kamins, who headed the Bar Association Task Force and who is a member of our Section's Executive Committee, will also serve on the new panel. Judge Lippman's Task Force is expected to make its first report by the end of the year.

State Bar Association Announces New Criminal Law Publication

In a recent mailing to its members, the New York State Bar Association announced a new publication in the area of criminal law. The new treatise is entitled *Criminal Law and Practice*, and it is written by Lawrence N. Gray, Esq., and former Judges Leslie Crocker Snyder and Alex M. Calabrese. The publication contains 158 pages of detailed material, including useful forms and charts. The various articles are written by experienced prosecutors, criminal defense attorneys and judges, and the publication is aimed at providing an excellent text of first refer-

ence for general practitioners. The new publication is being offered to Bar members at a discounted price of $72. The non-member price is $80. Those seeking to order the publication or to obtain further information can contact the CLE Registrar's Office of the New York State Bar Association at One Elk Street, Albany NY 12207, or by calling 1/800-582-2452, or 1/518-463-3724.

Bill Introduced to Provide a Defendant's Right to Appear Before an Attorney Justice in a Town or Village Court

Following up on a recommendation made by the Bar Association's House of Delegates, as well as a special commission on the future of the New York State Courts, which was appointed by former Chief Judge Judith S. Kaye, a legislative bill was recently passed by the Assembly's Judiciary Committee which would specifically provide that a defendant facing a misdemeanor charge in a town or village court can elect to have a justice who is an attorney assigned to his case. Currently, of the state's 2,150 town and village justices, only approximately 30% are attorneys. The bill has raised some concern that it would be difficult to implement, and that it might lead to forum-shopping by defendants who are displeased with their initial assignment of a justice. The bill appears to have the support of Senator Sampson, who is the Chairman of the Senate Judiciary Committee, and its prospects for final approval appear good. Opposition has been voiced, however, from many of the justices currently sitting in town and village courts, and some concern has also been voiced by Chief Administrative Judge Ann Pfau. We will keep our readers advised of any further action on this bill.

Chief Judge Lippman to Review Criminal Leave Applications

In late April, as part of his continuing examination of current court procedures, Chief Judge Lippman announced that he will review why the New York Court of Appeals currently agrees to grant only one or two of every 100 criminal leave applications it receives. Recent statistics clearly establish that during the last several years, only a tiny percentage of criminal leave applications have been granted, and this issue has been raised on numerous occasions by criminal defense attorneys. In 2004, for example, only 46 out of 2,644 applications were granted, or a percentage rate of 1.7%. In 2007, out of 2,371 applications, only 36 were granted, or a percentage rate of 1.5%. For the most recent year for which statistics are available, 2008, 53 were granted out of 2,637 applications, or a percentage rate of 2%.

Among the individual judges in the New York Court of Appeals, it appears that Judges Pigott, Jr. and Robert S. Smith are more likely to grant leave to appeal in criminal cases, and Judge Read is the least likely. Due to the limited number of cases which the New York Court of Appeals accepts, it appears unlikely that any review of the criminal leave application procedure will lead to any noticeable increase in the granting of leave to appeal. During the 1980s and early 1990s, the acceptance rate was slightly more than 3%, somewhat better than the figure in current years. Any review of the situation may prove helpful, and in either event, focus attention on the current situation.

Final Analysis of 2008 Presidential Election Confirms Historically High Turnout of Black Voters

The Pew Research Center recently issued its final analysis of the voting patterns in the November 2008 Presidential election. It concluded that black voters voted in historic numbers and had an important impact on the outcome of the election. According to the final report, black women had the highest rate of participation among all voters, with 69% of eligible black women voting. Black men had a voting rate of 61%, and among voters between the age of 18 and 29, blacks again had the highest participation rate at 58%, compared with an overall rate of 51% for that age group.

White women voters had a voting rate of 68%, and white men had a voting rate of 64%. The percentage of voting Hispanics was substantially lower than either blacks or whites. The report also showed an increasing gender gap between male and female voters, with women voting in larger numbers than men. Overall, the 2008 election saw a general overall increase in voter participation over the last two Presidential elections.

Commission on Judicial Conduct Reports Increase in Complaints

The Commission on Judicial Conduct recently issued its report regarding its workload for the year 2008. The Commission reported that in 2008, it had received a record 1,923 complaints against members of the judiciary in New York State. This was an increase of 460 above the number of 1,463 which were received in 2003. The number of judicial complaints in 2008 resulted in 262 investigations being conducted, from which public disciplinary action was taken in 21 cases. At the end of 2008, the Commission had 208 pending matters. The Commission reported that it has been able to keep up with its added caseload due to an increased budget and additional staff, which were authorized in 2007. The Commission currently is composed of 10 members, and currently has an annual budget of $5.2 million.

New York City Council Sets 2010 Fiscal Budget for Prosecutors and Legal Aid Society

In late June 2009, the City Council and Mayor Bloomberg agreed to a final fiscal budget for 2010, with

respect to the Legal Aid Society and the city's prosecutors. The Mayor had originally presented a proposed budget which provided for slight increases for some of the city's prosecutors and a decrease for the Legal Aid Society. The greatest percentage increases were allocated to the Queens District Attorney's Office, involving an 8.1% increase, and the Manhattan District Attorney's Office, involving a 5% increase. Overall, the Mayor's budget provided for a 2.5% increase for all of the prosecution offices in the City. On the other hand, the proposed budget for the Legal Aid Society represented a 13.6% decrease from the prior year's total.

After negotiations and final action by the City Council, the final budget for prosecutors in the city was set at $261.5 million, representing a decrease from the amount requested by the Mayor. The budget for the Legal Aid Society, on the other hand, was raised significantly to an amount of $85.3 million. Under the final arrangements agreed to by the Mayor's Office and the City Council, both the prosecutors' offices and the Legal Aid Society will wind up with a slight increase in their overall budgets over the prior fiscal year. The Legal Aid Society will be receiving an additional $2.6 million, while the prosecutors' offices will be sharing an increase of $5 million.

Census Bureau Report Indicates Changing Population Trends

Recently issued statistics from the U.S. Census Bureau indicate that the nation's overall minority population is continuing to rise steadily, so that at the end of 2008, 104.6 million people in the U.S., or 34% of the population, were from minority groups. There has been a 3.2 % increase in the Hispanic community during 2008, so that now 15% of the U.S. population is of Hispanic ancestry. The U.S. black population is 12.2%, and 4.4% is Asian. The report also revealed that a stark generation gap is developing between white baby boomers, who are now aging, and the young growing minority population. Currently, 47% of children under 5 are minorities, and 43% of people under age 20 are also members of minority groups. An analysis of the under-20 population shows that minority youths are in fact the majority in 505 counties in the United States, representing one in every six U.S. counties, and that 60 of these counties have reached that milestone in the last 10 years.

The Census report also indicated that since the year 2000, there has been a substantial increase in the number of interracial marriages, so that in 2008, 4.3 million such marriages occurred, reflecting a three-fold increase in eight years.

A separate Census report which was issued in June of 2009 also indicated that another population trend is the apparent movement of population back to the large cities. The report revealed that from 2000 to July 1, 2008, most of the nation's largest cities experienced population increases rather than declines which had occurred in earlier periods. New York City continues to be the largest city in the United States, with a population in 2008 of 8,363,710. The city had a population increase of 4.4% since the year 2000. The second largest city is Los Angeles, with 3,833,995, an increase of 3.8%. Some of the fastest growing cities are still in the South and West, with Houston now having a population of 2,242,193, an increase of 13.6%, and Phoenix, Arizona having a population of 1,567,924, an 18.6% increase. Among the five largest cities, only Chicago experienced a decline in population over the eight-year period. Chicago, which still has a population of 2,853,114, saw a decrease of 1.5%.

Governor Announces No Judicial Pay Increases Until Economy Improves, but Appellate Division, First Department, Orders Pay Increases

In early May, Governor Paterson officially stated what had already become apparent: that no judicial salary increases will be approved until the state's economy recovers from the current fiscal crisis. Although he stated that he believed the state's Judges deserved a salary increase, since they had not received any raises since 1999, the Governor stated that since the state is facing huge budget gaps and shrinking tax revenues, it did not appear possible that any judicial salary increases could be approved at the present time.

Several weeks after Governor Paterson's pronouncements on judicial pay increases, the Appellate Division, First Department, in a lawsuit commenced by several Manhattan Family Court and Civil Court Judges, ruled that the legislature's decade-long failure to provide a judicial pay increase violated the separation of powers, and improperly subjected Judges to the whims of political leaders. The court gave the legislature 90 days to adjust judicial compensation in a manner to reflect the cost-of-living increases since 1998. The ruling by the Appellate Division, First Department, is contrary to a decision several months ago by the Appellate Division, Third Department, in *Maron v. Silver*, which dismissed a similar lawsuit. It thus appears clear that the matter will eventually have to be decided by the New York Court of Appeals, and any pay increases will still be stalled for a substantial period of time until either the economy greatly improves or the Court of Appeals mandates their issuance. The decision of the Appellate Division was in the case of *Larabee v. The Governor*, and the decision appeared at page 36 of the *New York Law Journal* of June 3, 2009. In fact, on July 1, 2009, it was announced that the New York Court of Appeals had agreed to hear the appeal in the *Maron v. Silver* case with oral argument, and a decision expected in late December, 2009 or early January, 2010. It is expected that leave to appeal will also be granted in the *Larabee* case, and that both of these matters will be heard and decided together. It is most unfortunate that the issue of judicial pay increases has reached the state of active litigation

in the New York State courts, and we have the situation where courts themselves are ruling on the propriety of their own judicial pay increases. We will report on any further developments.

In light of the state's serious fiscal crisis, and the pending litigation, it still appears that any hopes for judicial salary increases will be stalled for at least a significant period of time.

Judge Wood Resigns as Chief Judge of the Southern District Court

In late May, Judge Kimba Wood announced that she was stepping down as Chief Judge of the Southern District after almost three years of service in that position. She stated that she desired to spend more time on the trial of matters and would return to the trial court. She will also shortly begin serving on senior status. Judge Loretta Preska, who is the next most senior active Judge, will become the next Chief Judge of the Southern District. The Southern District has a complement of 46 Judges, and is one of the busiest federal district courts in the country.

Judge Kaye Elected Chair of Judicial Nomination Commission

Governor Paterson announced in early May that he had appointed former Chief Judge Judith Kaye as a member of the Commission on Judicial Nominations. Later in that month, the members of the Commission unanimously selected Judge Kaye to serve as Chair of the Commission. The Commission had received some criticism with respect to their recommendation for Chief Judge, which resulted in the selection of Judge Lippman. The seven recommendations involved all male candidates and very few members of minority groups. Governor Paterson had criticized the Commission for the lack of diversity in its recommendations, and Judge Kaye, in accepting her appointment, stated that she looked forward to insuring that future members of the Court of Appeals continued to reflect the best of New York's talented and diverse legal community.

2008 FBI Statistics

In early June, the FBI issued its Uniform Crime Report covering the year 2008. It was reported that on a national level, the murder rate had decreased by 4.4%. Interestingly, any increase in the homicide rate occurred only in small towns having a population of less than 10,000. These communities showed an increase in murders of 5.5%. With respect to the overall violent crime rate, the FBI reported a drop of 2.5% and further stated that property crimes had fallen by 1.6%. The greatest decrease in property crimes had occurred in the Western region. Here in the Northeast, however, including New York City, the property crime rate had risen by 1.6%. Fortunately, the possibility of huge increases in crime due to the economic slowdown does not appear to have fully developed, and overall crime statistics within most large cities and throughout the country appear to have remained fairly stable between 2007 and 2008.

Appellate Divisions Begin Suspensions of Attorneys for Failure to Register

During the last few months, the *New York Law Journal* has repeatedly listed the names of thousands of attorneys who are facing suspension because of failure to register with the Office of Court Administration as is currently required. It appears inconceivable that attorneys would risk the embarrassment and damage to their professional reputation by failing to comply with this simple task. We once again urge all of our readers to comply with the registration requirements.

Weak Economy Leads to Higher Foreclosure Rate and Increasing Unemployment

It was reported in early June that the weak economy and the continuing decline of home prices has led to a record 12% of all U.S. homeowners who are now behind in their mortgage payments. The Mortgage Bankers Association recently indicated that the foreclosure rate on prime fixed loans doubled in the past year, and that it wasn't expected that things would begin to improve until the end of next year. The Association also reported that almost half of all adjustable-rate loans which were made to borrowers with shaky credit are now past due. The States experiencing the worst real estate problems are California, Florida, Nevada and Arizona, which together account for 46% of new foreclosures in the country. Recent government efforts to provide for modification and refinancing of loans facing foreclosure have only been of slight assistance and do not appear to have significantly improved the real estate crisis being faced by the nation.

A separate report issued by the Labor Department at the end of June indicated that the national unemployment rate continues to rise and has reached over 10% in various sections of the country. The West surpassed the 10% unemployment rate for the first time in 25 years, with a rate of 10.1%. The worst unemployment rate is still in Michigan, with a rate of 14.1%. The Midwest region also had an unemployment rate in June of 10.1%, and the State of California, which has had serious economic problems, has reached an unemployment rate of 11.5%. Other states with high unemployment rates are Florida, Georgia, North Carolina, Oregon, Rhode Island and South Carolina. By region, the Northeast continues to be in a somewhat better position with its unemployment rate listed at 8.3%. As of the month of June, only the State of Nebraska reported a jobless rate which had dipped during the last month. Overall, the national unemployment rate at the end of June was 9.4%. There have been some recent positive signs that the economy may be reaching a

turnaround point and it is hoped that the unemployment rate within the next few months may begin to level off.

Senate Judiciary Committee Reviews Disciplinary Procedures

State Senator John L. Sampson, who is the Chair of the Senate Judiciary Committee, announced in late May that he would begin holding hearings to examine how New York attorneys and judges are disciplined for misconduct, and to determine whether legislative changes are needed in this area. Mr. Sampson reported that his Committee had received many complaints during the last year regarding the procedures utilized by disciplinary agencies, including the issue of confidentiality regarding the proceedings. The hearings to be held will focus on the Commission on Judicial Conduct and the Attorney Disciplinary Committees of the four appellate divisions. The first hearing was held in June in Albany with several additional hearings scheduled in the Fall within New York City and Buffalo. We will report on any legislative proposals which develop from the hearings in question.

U.S. Circuit Court of Appeals Operating with Several Vacancies

The U.S. Court of Appeals for the Second Circuit, which covers New York, recently reported that it was facing numerous vacancies within the next few months which would make it difficult to keep up with its caseload. Judge Sonia Sotomayor recently left that Court to accept an appointment to the U.S. Supreme Court, and several other Judges on the Second Circuit have either announced their retirement or have taken senior status. There are thus four openings on the Court, which has a normal complement of 13. Since filings within the Second Circuit have increased by 9% within the last year, operating with only about 75% of its judicial complement could pose some serious administrative problems for the Court. It is hoped and expected that the currently existing vacancies will be filled within the next few months.

Healthful Hints

Several recent studies have highlighted the dangers that Americans are facing from a variety of factors, such as overwork, stress, lack of sleep and poor dietary habits. Specific groups such as the medical and legal professions have been especially singled out as having high risks due to one or all of these factors. In a report by the National Sleep Foundation, it was concluded that most adults need between seven and nine hours of sleep, and that those who received less than seven hours have a greater likelihood of experiencing heart disease, obesity, cancer or a low immune response. Another study by the U.S. Department of Agriculture also revealed that too many Americans are now subsisting on food that is prepared away from home, and that as a consequence, they are ingesting foods which are overly high in calories and low in nutrition. The report found that 33% of calories consumed in the United States are in foods prepared away from home, and that Americans spend 44% of their food budgets on food which is prepared away from home. A recent separate study continues to highlight the problem of obesity in the United States, finding that currently almost one-third of Americans are overweight.

Since many in the legal profession work long hours, often eat on the run and not at home, have stressful practices and spend too little time exercising or in recreational pursuits, we hope that these helpful hints will serve to improve legal lifestyles. A piece of advice might be work less, exercise more, eat better and enjoy yourself.

U.S. Faces Wide Generational Gap

A recent study by the Pew Research Center found that adults 18 to 29 years of age have a wide divergence of views from that of persons over 60. A wide gap in the two age groups was found with respect to social values and questions of morality. Older Americans were also found to have a greater reliance upon religion than younger adults. About two-thirds of people 65 and older said religion was very important to them, while only 44% expressed the same conclusion with respect to people between 18 and 29. Younger people were also more likely to embrace and utilize technology, while many older adults were still reluctant to utilize such modern inventions as text messaging and cell phones. The two groups also appear to have a wide difference of opinion with respect to political matters. The study found that in the last presidential election, voters between the age of 18 and 29 voted overwhelmingly for Democrat Barack Obama to the extent of a 2-to-1 ratio. Older voters, on the other hand, voted in larger numbers for Republican John McCain.

The survey also indicated that the two groups have a different view as to what age constitutes old age. More than half of those who are under 30 stated that the average person becomes old when he reaches 60. Those 65 and older, however, did not feel old, and stated that old age commences at 75.

About Our Section and Members

Upcoming Activities

Our new section officers under the leadership of James Subjak, Section Chair, are currently planning and organizing several events and programs for the benefit of our members, to be held in the next few months. A fall CLE program at the Seneca Casino in Niagara Falls has already been preliminarily scheduled, and Executive Committee meetings have been set as follows:

- Thursday, September 17, 2009 at 2:00 p.m. in New York City.
- Saturday, October 31, 2009 at 1:00 p.m. at Niagara Falls.
- Tuesday, December 1, 2009 at 5:00 p.m. in New York City.
- Thursday, January 28, 2010 at 8:00 a.m. at the Hilton Hotel in New York City.

Detailed information regarding these programs will be forwarded under separate cover. We urge all of our members to participate in the upcoming activities.

Mark Dwyer Receives New Promotion

Mark Dwyer, the Secretary of our Criminal Justice Section, who has been serving for many years as Chief of the Appeals Bureau of the New York District Attorney's Office, was recently named Chief Assistant of that Office by Robert Morgenthau. Mark Dwyer replaces Daniel Castleman, who recently left the Manhattan office for private practice. We congratulate Mark on his recent appointment, and wish him every success in his new position.

Barry Kamins Becomes New Administrative Judge of Brooklyn Criminal Court

In early May, the Office of Court Administration announced that Barry Kamins had been appointed as the new Administrative Judge of the Brooklyn Criminal Court. Judge Kamins had been serving in the Criminal Court in Manhattan following his appointment as a Judge by Mayor Bloomberg in 2008. Barry has been a long-time active member of our Criminal Justice Section and has had a distinguished career in the legal profession. He is a past president of the Bar of the City of New York and the Brooklyn Bar Association, and practiced for many years in Brooklyn. He is also a legal scholar, well known for his treatise on search and seizure, and has contributed over the years to our *Newsletter*. In fact, his annual update on new criminal law legislation is a mainstay of our publication, and this year's article is our first feature presentation in this issue. We congratulate Judge Kamins on his new appointment and are certain that the citizens of Brooklyn will be well served by his appointment.

The Criminal Justice Section Welcomes New Members

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

Julian David Adler
Efrain Alvarado
Anna R. Anzalone
Constantine Bardis
Vicki Jo Beighley
Melisa Debra Bliss
Susan M. Cacace-Dibbini
Peggy Lyn Collen
Patrick Fallon Conti
Dominic S. D'Imperio
James F.X. Doyle
Ezekiel R. Edwards
Thomas C. Finnerty
Elizabeth Anne Fischer
Tara Ann Flynn
Rudolph J. Fusco
Jevon L. Garrett
Harvey Gee
Kimberly A. Georger
Marc H. Gerstein
Matthew Harris Goldsmith
Alison Klare Guernsey
Robyn S. Hederman
Owen Patrick Heslin
Kevin M. Kerwin
Jennifer Kim
Jeffrey Kirchmeier
Gerard Charles McCloskey
John C. Meringolo
Frederick C. Millett
Howard D. Pearle
John Pettinella
Steven A. Pilewski
Adam M. Pizer
Timothy A. Ralls
Carl Christian Refsal
Luba Reife
Patrick J. Reilly
Jonathan Seth Reiner
Jacqlyn Rebecca Rovine
Lisa Sapino Cuomo
Kristi Phillips Saretsky
Sean Phillip Shecter
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NEW YORK STATE BAR ASSOCIATION CRIMINAL JUSTICE SECTION

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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

Please return this application to:
Membership Department, New York State Bar Association,
One Elk Street, Albany, New York 12207
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Persons interested in writing for this *Newsletter* are welcomed and encouraged to submit their articles for consideration. Your ideas and comments about the *Newsletter* are appreciated as are letters to the Editor.

Publication Policy: All articles should be submitted to:

Spiros A. Tsimbinos
1588 Brandywine Way
Dunedin, FL 34698
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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 preferably in Word Perfect. Please also submit one hard copy on 8½" x 11" paper, double spaced.

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