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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

Following its September 23rd Executive Committee Meeting in Manhattan at the New York County Lawyers Association, the pace of Criminal Justice Section (CJS) activity has quickened. At the request of NYSBA President Vince Buzard, the CJS has been actively and intensively involved in the federal habeas "reform," and a Presidential Task Force has focused upon the pressures which corporations encounter when they find themselves the subject of a Justice Department investigation to waive the attorney/client privilege.

With respect to legal issues of interest to the criminal justice community, we have been involved in the Senate-led attempt, under the guise of "reform," to "streamline" the federal habeas statute (28 U.S.C. §§ 2254 et seq.). We are also in the process of exploring whether our media should be afforded a "Journalist's privilege" to protect confidential sources.

With respect to the important issue of continuing legal education, we can all be pleased by the fine "Federal Sentencing Advocacy" programs produced under the leadership of the CLE Committee Chair Paul Cambria. Thanks also go out to Chuck Clayman and Dennis Schlenker for their services as Program Chairs for the Manhattan and Albany presentations.

On November 4th we moved up the Hudson Valley to Poughkeepsie where the focus of a Friday afternoon CLE program was on a survey of the significant Court of Appeals decisions involving criminal justice. This presentation by Ed Nowak of Rochester was then followed by a lively panel discussion focused upon the contribution and role of Judge Albert Rosenblatt. I am especially grateful to Steve Kartagener of Manhattan, who led the panel discussion, and ADAs Mark Dwyer (N.Y. County), Tony Girese (Bronx County), Robert Dean of the Center for Appellate Litigation, Albany Law School Professor Vincent Bonventre, and Defender H. Elliot Wales (Appellate Practice Section) whose participation made the panel discussion a success.

Lest you think that Section activity is all work and no play, we then had a delightful meal at the Culinary Institute of America in Hyde Park, and were addressed by Judge Rosenblatt at our concluding luncheon on Saturday afternoon. Following the luncheon, many toured the nearby Franklin D. Roosevelt Presidential Library in Hyde Park before returning home.

As we look toward the Annual Meeting on January 26th, I extend an open invitation to all CJS members to attend the Annual Meeting, join us at the Annual Award Luncheon (our Section's equivalent of the "Academy Awards"), and attend a useful three-hour CLE program being assembled by Vice-Chair Jean T. Walsh.

All in all, we are keeping busy and focused in ways and directions which are hoped to be consistent with your professional goals and needs. As with all service jobs, the ultimate test is you—in effect—our "customer." Accordingly, if you have thoughts, or suggestions, please drop me a note, or send me an e-mail. The satisfaction of the members is our overarching goal. My theory is simple: "The better you perceive what we are doing for you, the greater the likelihood you will encourage friends and colleagues to join and participate." As it is said: "Come on in . . . the water's fine!"

Roger B. Adler

Message from the Editor

This issue contains some important information regarding recent legislative changes that affect the criminal justice system. The Legislature at the end of August 2005 made additional modifications to the Rockefeller Drug Laws by providing for re-sentencing provisions for A-II felony offenders. In addition, the Legislature finally acted to extend the Sentencing Reform Act of 1995 to the year 2009, thereby avoiding the automatic nullification date of September 30, 2005 which was in the original legislation. Details regarding these and other legislative changes are covered extensively in several articles within this issue. These articles require the careful attention of criminal law practitioners.

Dramatic developments continue to occur with regard to the United States Supreme Court. On the very date that Justice John Roberts began his tenure as the new Chief Justice, President Bush announced his selection of Harriet Miers to succeed Justice O'Connor who had announced her retirement. After drawing criticism from several quarters, Harriet Miers, toward the end of October, withdrew her nomination without beginning the process of confirmation hearings and President Bush in November appointed Samuel A. Alito, Jr. as his new nominee to fill Justice O'Connor's seat. Details regarding these developments are covered within our United States Supreme Court section.

The New York Court of Appeals, which resumed hearing oral arguments on September 6, 2005 following its summer recess, has already issued several important decisions in the area of criminal law and these are reported within our regular section involving the New York Court of Appeals review.

Our Section held its Fall meeting in Poughkeepsie, NY, featuring the Honorable Albert Rosenblatt of the New York Court of Appeals as our luncheon speaker. Our Annual Meeting and special events which will be held on January 26 and 27, 2006 at the Marriott Marquis Hotel in New York City are quickly approaching and we urge our members to make their reservations as quickly as possible. Further details regarding these events and other information about our Section and members is included in the "For Your Information" section in this issue.

I thank our readers for their support of our publication which is now in its third year of existence. I wish everyone a Happy New Year and all the best for the winter season.

Spiros A. Tsimbinos

REQUEST FOR ARTICLES

If you have written an article, or have an idea for one, please contact *New York Criminal Law Newsletter* Editor

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Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Re-Sentencing of A-II Felony Drug Offenders

By Spiros A. Tsimbinos

On August 30, 2005 Governor Pataki signed a recently passed legislative amendment to the Rockefeller Drug Law Reform Act which became effective on January 13, 2005. The new amendment basically extends to A-II felony offenders the right to seek re-sentencing in a similar manner that was granted to A-I offenders as a result of the drug law reforms which went into effect earlier this year. The amendment provides A-II offenders who were serving indeterminate terms with a possible life-time maximum to receive earlier release through two mechanisms. First their amount of merit time allowances was increased, and second they can petition for re-sentencing under the new determinate term structure. The total merit time allowances for A-II offenders can now total up to one-third of the minimum sentence, and a re-sentencing application can be made by any A-II offender who has more than 12 months left on his term before being eligible for temporary release.

The procedure for the re-sentencing application is identical to the situation established for A-I felony offenders. The application for re-sentencing is to be made to the court that imposed the original sentence. If the original sentencing judge is not available, then the matter can be randomly assigned to another Justice. The court hearing the application can order a hearing and may consider facts and circumstances relevant to the imposition of the new sentence, including the institutional record of the confinement of the defendant. However, it is not necessary to order a new pre-sentencing report. The court must then issue written findings of fact and impose a new determinate sentence or deny the application. An appeal may be taken as of right to the various Appellate Divisions from the original court's determination either with respect to the denial of the re-sentencing application or the length of the new determinate sentence imposed. Of course, once the new determinate sentence is imposed, the defendant will be credited with any jail time already served.

As a result of the new Amendment, A-II felony drug offenders who were previously faced with a possible sentence as long as 8-1/3 to life imprisonment can now be re-sentenced to a much lower determinate term with the actual sentence being dependent on their past criminal history. A first-time felony drug offender for an A-II felony offense can now be re-sentenced to a determinate term which can range from 3 to 10 years. A class A-II felony offender who has a prior felony offense will now face a determinate term ranging from 6 to 14 years and an A-II felony offender who was previously convicted of a violent felony offense may be subject to a determinate term of between 8 to 17 years. In addition, the determinate term to be imposed must also include a period of post-release supervision for 5 years.

With respect to the awarding of additional merit time allowances for A-II felony offenders, the new Amendment was made effective retroactively as of December 27, 2004. With respect to the petitioning for re-sentencing, the new statute has an effective date 60 days after the Amendment became law, which was on August 30, 2005. The re-sentencing provision is thus effective as of October 30, 2005. It is estimated that the new amendment allowing re-sentencing for A-II felony drug offenders will apply to some 500 drug dealers and users currently incarcerated under the old Rockefeller Drug Laws. As a result of the re-sentencing provision for A-I felony drug offenders, which went into effect on January 13, 2005, some 184 inmates have already been re-sentenced.

"It is estimated that the new amendment allowing re-sentencing for A-II felony drug offenders will apply to some 500 drug dealers and users currently incarcerated under the old Rockefeller Drug Laws."

The amendments relating to increased merit allowances and re-sentencing petitions for A-II felony offenders were enacted by two separate bills. In the Senate the bill relating to merit allowances was designated by number S.5898 and the Bill authorizing re-sentencing bore the number S.5880. Although apparently acting in a piecemeal fashion, the Legislature and the Governor continue to modify and chip away at the Rockefeller Drug Laws. Additional changes may be forthcoming in the near future.

Spiros A. Tsimbinos has been a criminal law and appellate practitioner in New York for 37 years. He has authored many articles that have appeared in the *New York Law Journal*, the New York State Bar Association *Journal*, and is the editor of this newsletter. He is a graduate of New York University School of Law.

Sentencing Reform Act of 1995 and Its Progeny Extended to September 1, 2009

By Spiros A. Tsimbinos

In 1995, the passage of the Sentencing Reform Act of 1995 made sweeping changes in New York's sentencing laws. The thrust of the new enactments was to increase minimum sentences for violent felony offenders and repeat felony offenders and to substantially reduce the possibility of early release through the parole mechanism. In 1998, with the passage of additional legislation popularly referred to as Jenna's Law, increased sentences and restrictions on parole were extended to first-time violent felony offenders. Both legislative enactments largely accomplished their goal through the implementation of determinate sentences rather than indeterminate ones where the defendant was given a specific designated time period of incarceration and was required to serve 6 to 7 years of the sentence imposed.

"When the Legislature recently passed . . . the felony drug law which modified many of the Rockefeller Drug Law provisions, the fact that determinate sentencing was also applied to felony drug offenders was a clear indication that the Legislature and the Governor intended to extend and continue the sentencing structures adopted in 1995."

The passage of both the 1995 and the 1998 legislation specifically contemplated that after a period of application the effects of the legislation would be reviewed and the Legislature would revisit the issue to ascertain whether any changes or modifications were necessary. In fact, within the 1995 enabling legislation was a specific sunset proviso through which many of the provisions were deemed to be automatically repealed as of September 30, 2005 unless specifically renewed.

To help determine the effects of the legislation and whether the 1995 and 1998 enactments should be renewed, modified, or abandoned, the Sentencing Reform Act of 1995 also had a specific provision calling for the establishment of a Sentencing Commission. The commission was to consist of nine members, five of whom were to be appointed by the Governor. One of the Governor's appointments was required to be a member of the bar with significant prosecution experience, and another to be a member of the bar with significant experience in representing defendants. Two additional appointments were to have been made by the Chief Judge of the Court of Appeals, and one each by the Temporary President of the Senate and the Speaker of the Assembly. The members of the Commission were to serve without pay, although the Commission was authorized to incur reasonable expenses in order to conduct its work.

The Sentencing Commission which was established by the 1995 legislation was to have assumed its duties as of April 1, 1996 and was to have dissolved as of November 1, 2003. An interim report was to have been issued on or about December 1, 1999 and a final report was due on December 1, 2003.

During the last few years I noted in various articles that apparently reports from the Sentencing Commission were never prepared or issued and I expressed concern that through some oversight there would be a failure to act on the required extension or modification of the 1995 and 1998 legislation. When the Legislature recently passed in December of 2004 the felony drug law which modified many of the Rockefeller Drug Law provisions, the fact that determinate sentencing was also applied to felony drug offenders was a clear indication that the Legislature and the Governor intended to extend and continue the sentencing structures adopted in 1995.

Although accomplished with apparently no public notification, the Legislature and the Governor agreed in April of 2005 to an extension of the Sentencing Reform Act of 1995 and accomplished this purpose through the insertion of a paragraph within the extensive budget bill. Thus on April 12, 2005 the provisions of the Sentencing Reform Act of 1995 were extended to September 1, 2009. By their 4-year extension it appears that both the Legislature and the Governor contemplate proceeding with the concept of obtaining a detailed review of the effects of the legislation and leaving the door open for any changes and modifications before the next expiration date is reached. We will continue to keep our readers fully informed regarding any significant changes in New York's sentencing structure.

New 2005 Legislation Affecting the Practice of Criminal Law

By Barry Kamins

This article will review changes in the Penal Law, Criminal Procedure Law and several related statutes that were enacted in the last session of the legislature and signed by the Governor. Some changes which are viewed as minor or technical will not be discussed.[1] The reader should review the new laws carefully since this article will distinguish between legislation that has already been signed by the Governor and proposed laws not signed as of the time this article was published. Obviously, the reader should determine whether any proposed legislation has been signed before citing it as "law."

Additional Penalties for Drunken Drivers

In one of its most decisive and swift actions, the legislature responded to public outrage over an increasing number of hit-and-run vehicular accidents as well as an increasing number of deaths caused by intoxicated drivers. As a result, the legislature enacted "Vasean's Law" named after Vasean Alleyne, an eleven-year-old boy who was killed by an intoxicated motorist. While the motorist was intoxicated, he had not committed any additional traffic infractions that would support a theory of criminal negligence, e.g., running a red light, speeding, etc. Because the motorist could not be prosecuted for any crime more serious than intoxicated driving, the media waged a campaign against the prosecutor's "rule of two" which required an aggravating factor in addition to the act of intoxication. The legislature responded and under the new law, to convict a person of vehicular assault or vehicular manslaughter, prosecutors no longer need to establish any factor other than the act of intoxicated or impaired driving.[2] Thus, the law eliminates criminal negligence as an element of these crimes and by doing so, it creates a direct causal link between the act of intoxication and the injury or death. In addition, the law also creates a rebuttable presumption that permits the accused to rebut the causal link and present evidence that tends to show that it was a separate intervening factor that caused the physical injury or death.

A second related law increases the penalties for drivers who leave the scene of an accident. The law corrects an anomaly that had existed for many years. Previously, a person who was intoxicated and caused an accident resulting in death and who then remained at the scene faced a more serious charge than an intoxicated driver who was arrested after leaving the scene but who sobered up before being arrested. The new law corrects this anomaly by elevating penalties for crimes in which a motorist leaves the scene of an accident. A first violation for leaving the scene of an accident resulting in personal injury will now be an A misdemeanor (elevated from a B misdemeanor).[3] A second violation will now be an E felony (elevated from an A misdemeanor).[4] A first violation for leaving the scene of an accident resulting in serious physical injury will now be an E felony (elevated from an A misdemeanor).[5] Finally, leaving the scene of an accident resulting in death will now constitute a D felony (elevated from an E felony).[6]

Sex Offenders

In the last session, the legislature enacted a substantial number of laws addressing sex offenders. These laws will prohibit offenders from engaging in an increasing number of activities and increase the information that communities will receive about individual offenders. In new laws already signed by the Governor, sex offenders are prohibited from entering community service programs while serving a sentence as an inmate in a correctional institution.[7] Employers of summer camps are now required to cross-reference job applicants with New York's sex offender registry.[8] In addition, law enforcement agencies may disseminate a sex offender's alias as part of the information disseminated on the sex offender registry.[9] The Department of Corrections is now required to notify a local social services agency thirty days before a sex offender is to be released to a homeless housing facility.[10] A new law requires law-enforcement agencies to maintain and update a listing of vulnerable organizational entities in its jurisdiction to whom sex offender notification could be disseminated.[11] Finally, sex offender level determination hearings may now proceed even if the offender does not appear, as long as the offender had previously been notified of the determination hearing.[12] This conforms with prior case law, in which courts had held that an offender who voluntarily fails to appear for a hearing waived the right to participate and could not later overturn the result based upon that ground.[13]

Other laws, awaiting the Governor's signature, would prohibit sex offenders from working on ice cream trucks because these jobs normally bring people into close contact with children on a regular basis.[14] In addition, a new law would prohibit level-3 sex offenders who are on probation from entering school build-

ings, playgrounds, athletic fields and day-care centers while minors are present.[15]

New Crimes

As usual, the legislature has created several new crimes. One new law creates new crimes and penalties that target individuals who operate or assist in the operation of clandestine methamphetamine laboratories.[16] Over the past five years, New York police have seen evidence of a dramatic rise in the number of these laboratories which use controlled substance "precursors" that are not currently illegal to possess. The law is designed to curtail these laboratories in which the drugs are produced even if the lab operators are not caught with the finished product. In addition, the laboratories store large amounts of anhydrous ammonia that is a critical ingredient in the production of methamphetamine. This chemical is often stolen from farmers and when it is stored and used, the toxic gas can be unintentionally released, causing injuries to emergency responders, law enforcement personnel, the public and the criminals themselves.

Under the new law, four new crimes are created that address the "meth" epidemic. First, the possession of methamphetamine manufacturing materials now constitutes an A misdemeanor (the first conviction) and an E felony (the second conviction within five years).[17] Manufacturing material is defined as a "precursor" (ephedrine, pseudoephidune, or any derivative) or any "chemical reagent," "solvent" or "laboratory equipment" that can be used to manufacture methamphetamine.[18]

Second, the possession of "precursors" of methamphetamines, as well as a "solvent" or "chemical reagent," with the intent to use such items to manufacture methamphetamines constitutes an E felony.[19] Third, the unlawful manufacture of methamphetamines is divided into three classes of felonies, beginning with a Class D felony and rising to a Class B felony.[20] The Class D felony is committed when an individual possesses the following: two or more items of laboratory equipment and two or more precursors, chemical reagents or solvents; or one item of laboratory equipment and three or more precursors, chemical reagents or solvents; or a precursor mixed together with either a chemical reagent or solvent or with two or more reagents and/or solvents mixed together.[21] When an individual has a prior conviction for manufacture of methamphetamines within the past five years it becomes a C felony, and when it is manufactured in the presence of a person under the age of sixteen, the crime is elevated to a B felony.[22]

The fourth new crime related to "meth" is the unlawful disposal of methamphetamine laboratory material. This crime is committed when a person disposes of a "hazardous or dangerous material" in the furtherance of a methamphetamine operation, under circumstances that create a substantial risk to human health or safety or a substantial danger to the environment.[23] A "hazardous or dangerous instrument" means any substance that results from or is used in the manufacture of methamphetamine. This crime is a Class E felony.

A new crime already signed into law by the Governor creates the crime of Riot in the First Degree as it relates to conduct in correctional facilities.[24] Under prior law, the crime of Riot in the First Degree required proof that the riotous conduct caused public alarm. Thus, a riot in prison could only satisfy the statute if a prosecutor could prove that the conduct inside a prison also caused alarm in the surrounding community. The narrow statutory language precluded prosecutors from filing charges in 1998 against inmates at Mohawk Correctional Facility. As a result, the new law provides that when an individual in a prison incites a riot, he or she may be prosecuted without the prosecutor having to establish that the riot caused public alarm outside of the prison in the surrounding community.

A third new crime is Compelling Prostitution, a Class B felony.[25] This crime was the legislature's reaction to the increasing publicity about child prostitution and the number of runaway and abducted children forced into a life of prostitution by adults who prey on their vulnerability. A person is guilty of this crime when, being twenty-one years of age or more, he or she knowingly advances prostitution by compelling a person less than sixteen years of age, by force or intimidation, to engage in prostitution.

Sentencing Enactments

The legislature enacted several laws that will have an impact on sentencing. The most important measure expands last year's Drug Law Reform Act by authorizing discretionary re-sentencing of Class A-II drug offenders.[26] Earlier this year the legislature enacted a similar procedure for those inmates convicted of A-I drug offenses. The new bill will affect 513 inmates serving A-II sentences and will apply to those who are more than three years from a parole eligibility date (and 12 months from work release eligibility) and who are eligible for merit time. The law does not require that the inmate *earn* the merit time allowance before being able to apply for re-sentencing—it only requires that he or she be eligible to earn it. The procedure for re-sentencing is identical to the process created for A-I offenders.

The new statute creates a range of determinate sentences that may be imposed by a court upon re-sentencing the A-II drug offender. For a first offense the range

is between 3 and 10 years. For a second felony offender with a prior non-violent conviction, the range is between 6 and 14 years. For a second felony offender with a prior violent offense, the range is between 8 and 17 years. All sentences include five years of post-release supervision.[27] A second new law affecting sentencing expands the pool of inmates eligible to earn merit time. The law expands the program options available for earning merit time to include successful employment in a continuous temporary release program.[28]

Legislation Affecting Crime Victims

Each year the legislature enacts measures addressing concerns of crime victims and this year was no exception. Under these new laws, victims of violent felonies must be informed of the final disposition of their case and victims of all crimes must be informed of how to obtain updated information regarding an inmate's incarceration status.[29] In addition, a health services plan administrator will now be prohibited from disclosing information about an insured who has been injured when the insured provides an order of protection.[30] This will prevent a spouse from learning the address and phone number of the other spouse who has been injured in a domestic violence incident. One new law permits crime victims to be reimbursed for relocation expenses,[31] while another expands monetary awards by the crime victims board to cover victims of a crime who have a preexisting disability or condition that has been exacerbated by a crime.[32] Finally, a new law increases protection of crime victims when the offender petitions a court to change his or her name. Pursuant to a law enacted in 2000, crime victims must be notified when certain convicted felons petition a court to change their names. However, offenders convicted prior to the effective date of the law were not subject to the law. The new law will make the notification requirements applicable to offenders who were convicted before the effective date of the law and who have petitions pending in a court on or after such date.[33]

Changes in Criminal Procedure

Some new laws will effect certain procedural changes. One law changes the rules of evidence in the Grand Jury to accommodate an increasing number of individuals who are the victims of credit card fraud. Under current law, a person whose credit card has been physically stolen may submit an affidavit, in lieu of testifying before a Grand Jury. The affidavit alleges that the individual is the owner of the credit card and the person who stole it did not have permission or authority to use or possess it. However, a person whose credit card number was illegally used (without the actual theft of the card) must physically appear to testify. The new law also permits this person to submit an affidavit.[34]

A second procedural change will significantly increase the ability of individuals to make payments by the use of credit cards. Over the past 20 years, the legislature has authorized the use of credit cards to pay traffic fines, to post bail in traffic cases, to pay certain court fees, as well as fines in criminal cases and certain surcharges and administrative fees. The law has been expanded to permit individuals to use credit cards to pay court fees, fines, surcharges, and bail in all cases.[35] The law also permits the imposition of an administrative fee for the use of the credit card.

Increased Penalties

The legislature enacted two laws that will enhance penalties of existing crimes. First, the crime of cruelty to animals is elevated from an unclassified misdemeanor to an A misdemeanor.[36] This would require the arrestee to be fingerprinted and photographed upon arrest and would enable law enforcement officials to track an individual's history of this crime. Second, violations of child labor laws are elevated to an unclassified misdemeanor, providing for 60 days in jail for a first offense and up to one year in jail for subsequent violations.[37]

Increased Authority for Law Enforcement Personnel

As usual, the legislature expanded the authority of certain classes of law enforcement personnel. Under one proposed law, the legislature would grant police officer status to forest rangers in the service of the Department of Environmental Conservation.[38] A new law, already signed by the Governor, allows court officers to issue traffic summonses for parking violations in and around court buildings.[39]

Extension of Statutes

Each year the legislature extends the expiration (or "sunset") of various laws by enacting "sunset extenders." In an omnibus sunset extender, the legislature extended the following:

Jenna's Law until September 1, 2009;[40] the Sentencing Reform Act until September 1, 2009;[41] the SHOCK incarceration program until September 1, 2007;[42] Temporary Release Programs until September 1, 2007;[43] mandatory surcharges until September 1, 2007;[44] and various fees related to inmates until September 1, 2007.[45] The legislature extended a law requiring a six-month suspension of a driver's license of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudica-

tions.[46] In addition, the legislature extended a law requiring suspension of a parent's driver's license for failure to pay four or more months of child support.[47] Finally, a new law would extend the use of closed circuit television for the testimony of child witnesses in sex crime prosecutions.[48]

Endnotes

1. A technical change in the Criminal Procedure Law will permit the statewide non-personal service of appearance tickets for zoning or building violations; Criminal Procedure Law § 150.40(2), Chapter 642, effective August 30, 2005. Another change will permit a Jefferson County town or village justice to preside over arraignments in any location in the county; Uniform Justice Court Act § 106(10); Chapter 607, effective August 30, 2005.
2. Penal Law §§ 120.03, 120.04, 125.12, 125.12; Chapters 39, 92, effective June 8, 2005.
3. Vehicle and Traffic Law § 600(2)(c); Chapters 49 and 108; effective June 17, 2005.
4. *Id.*
5. *Id.*
6. *Id.*
7. Correction Law § 851(2); Chapter 252, effective July 19, 2005.
8. Public Health Law § 1392-a; Chapter 260, effective August 18, 2005.
9. Correction Law § 168-1(6)(b)(c); Chapter 318, effective October 24, 2005.
10. Correction Law § 72-c; Chapter 410, effective October 1, 2005.
11. Correction Law § 168-1(6)(b)(c); Chapter 680, effective November 1, 2005.
12. Correction Law § 168-d(2); Chapter 684, effective October 4, 2005.
13. *See*, *e.g.*, *People v. Brooks*, 308 A.D.2d 99, 763 N.Y.S.2d 86 (2d Dep't 2003).
14. Correction Law § 168-v; S.2795, effective immediately upon the Governor's signature.
15. Penal Law § 65.10 (4-a); A.8894, effective September 1, 2005 upon the Governor's signature.
16. While the new laws address the problem of a "meth epidemic," some observers have questioned whether the problem is as serious as the police allege. *See, e.g.,* "Debunking the Drug War," NY Times, 8/9/05 page A19. Others, however, point to a nationwide survey that established that "meth" is law enforcement's biggest problem. *See Letters to the Editor*, NY Times, 8/11/05.
17. Penal Law §§ 220.70, 220.71; Chapter 394, effective October 9, 2005.
18. Penal Law § 220.00 (16); Chapter 394, effective October 9, 2005.
19. Penal Law § 220.72; Chapter 394, effective October 9, 2005.
20. Penal Law §§ 220.73, 220.74, 220.75; Chapter 394, effective October 9, 2005.
21. Penal Law § 240.06(2); Chapter 294, effective November 1, 2005.
22. Penal Law § 220.73; Chapter 394, effective October 9, 2005.
23. Penal Law §§ 220.74. 220.75; Chapter 394, effective October 9, 2005.
24. Penal Law § 240.06(2); Chapter 294, effective November 1, 2005.
25. Penal Law § 230.33; Chapter 450, effective November 1, 2005.
26. Chapter 643, effective October 29, 2005.
27. *See* Criminal Procedure Law § 70.71.
28. Chapter 644, effective August 30, 2005.
29. Executive Law § 646-a(2)(g), Criminal Procedure Law § 440.50(1); Chapter 186, effective September 1, 2005.
30. Insurance Law § 2612(e)(f); Public Health Law § 4406-c(5-c); Chapter 246, effective November 16, 2005.
31. Executive Law § 621(23); Chapter 377, effective August 2, 2005.
32. Executive Law § 626(1); Chapter 408, effective August 2, 2005.
33. Civil Rights Law, Executive Law; Chapter 613, effective August 30, 2005.
34. Criminal Procedure Law § 190.30(3)(g); Chapter 690, effective October 4, 2005.
35. Judiciary Law § 212(2)(j); Criminal Procedure Law §§ 20.05, 520.10(1)(i); Chapter 457, effective August 9, 2005, except the provision for payment of bail will take effect on January 1, 2006. The entire law will expire five years after the effective date.
36. Agriculture and Markets Law § 353(1); Chapter 523, effective November 1, 2005.
37. Labor Law § 145; S.3250; Chapter 660, effective December 15, 2005.
38. Criminal Procedure Law § 1.20(u); A.7608, effective immediately upon the signature of the Governor.
39. Criminal Procedure Law § 2.20(j); Chapter 685, effective October 4, 2005.
40. Chapter 56.
41. Chapter 56.
42. Chapter 56 (Correction Law Article § 26A).
43. Chapter 56 (Correction Law §§ 851, *et seq*).
44. Chapter 56.
45. Chapter 56 (inmate filings, parole supervision fee, weekly incarceration fee).
46. Chapter 60 (extended from October 1, 2005 to October 1, 2007).
47. Chapter 60 (extended from June 30, 2005 to June 30, 2007).
48. Criminal Procedure Law Article 65; S.5280, effective immediately upon the Governor's signature (extends law from September 1, 2005 to September 1, 2007).

Barry Kamins is a partner in the Brooklyn law firm of Flamhaft, Levy, Kamins & Hirsch and is a past president of the Brooklyn Bar Association. He has served as an adjunct professor of law and is the author of the widely acclaimed treatise, "New York Search and Seizure." He has lectured extensively on criminal law and is the author of numerous legal articles. He has previously contributed several articles to this newsletter.

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Appearances of Impropriety Can Be Deceiving

By Brad Rudin and Betsy Hutchings

An Ethical Issue

As jury selection is about to begin, the ADA asks the court to disqualify you and appoint substitute counsel for the accused. The basis for this motion? A colleague in your public defender office once represented a bystander witness who will testify for the People. While the ADA does not cite any disciplinary rule in support of his motion to disqualify, he tells the judge that the prior representation creates an "appearance of impropriety."

"Certainly, the profession has a greater interest in preventing actual improper conduct than in prohibiting conduct that merely appears improper to uninformed or biased observers but is actually consistent with the Disciplinary Rules."

The ethical issue raised in this hypothetical is not uncommon because former clients frequently emerge as prosecution witnesses in criminal cases. Too often, judges presiding over criminal proceedings rely on the imprecise appearances principle to resolve ethical issues arising from counsel's current representation of the accused and prior representation of an accuser.

Undue reliance on the appearances principle in criminal proceedings results from inattention to the disciplinary rules governing conflicts arising from a prior representation. In criminal proceedings, the vague and advisory Canon 9 appearances principle has been allowed to trump the precise and mandatory rules[1] governing former client conflicts.

These disciplinary rules are too frequently ignored in criminal proceedings because virtually all appellate case law interpreting DR 5-108 arises in the context of civil litigation (the rules allowing interlocutory appeals in civil cases favor the development of appellate case law interpreting DR 5-108). The civil context of these cases has discouraged the criminal defense bar from delving deeply into the law of disqualification. Inattention to DR 5-108, in turn, has lead to an excessive reliance on the appearances principle.

The Allure of the Appearances Principle

While the appearances principle, because of its simplicity, has a superficial appeal, the drawback of the principle is that it subordinates the interests of the accused to the interests of the former client. In other words, a judge applying the appearances principle places a premium on the former client's confidentiality interests (even where such interests may not be threatened) and gives less weight to the current client's interest in staying with trusted counsel and avoiding the delay that inevitably results from disqualification.

Thus, when faced with a disqualification motion based on a prior representation, counsel should ask the court to look beyond the *appearance* of impropriety and instead determine whether there exists an *actual* impropriety under the Disciplinary Rules set forth in the New York Code of Professional Responsibility.[2] The basic argument that challenged counsel should make is that the court should apply the rules expressly designed to regulate former client conflicts rather than rely on the ambiguous principle set forth in Canon 9: "A Lawyer Should Avoid Even The Appearance of Impropriety."

This approach effectuates the distinction between canonical principles and disciplinary rules: The Canons of Ethics are pronouncements of principle issued by the New York State Bar Association while the Disciplinary Rules constitute the official standard (promulgated by the Appellate Division) of attorney conduct in the State of New York. Apart from this distinction, it should be argued that DR 5-108 provides a sounder basis of decision because the rule guards against *actual* impropriety while the Canon 9 principle seeks to prevent only *apparent* impropriety. Certainly, the profession has a greater interest in preventing actual improper conduct than in prohibiting conduct that merely appears improper to uninformed or biased observers but is actually consistent with the Disciplinary Rules.

Disciplinary Rule 5-108

Disciplinary Rule 5-108 provides that, with certain exceptions, a lawyer who has represented a client in a matter shall not, without the consent of the former client, and after full disclosure represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client[3] or use confidences or

secrets of the former client.[4] Thus, the Disciplinary Rules regulate—but do not prohibit—representations where a former client emerges as an adverse witness or party.[5]

Substantially Related Matters and Materially Adverse Interests

Where the current and prior representations are "substantially related," counsel is barred from representing a client whose interests are "materially adverse" to the interests of a former client.[6] Because counsel's current representation of the accused rarely has any relationship—much less a substantial relationship—to counsel's prior representation of the criminal defendant turned prosecution witness, the (A)(1) rule has limited application in criminal cases.

Nevertheless, where the subject matter of the former and current representation are substantially related, the court must determine whether the interests of the current client are adverse to the interests of the former client. A federal civil case, *Skidmore v. Warburg Dillon Read LLC*,[7] demonstrates that the scope of the adverse interests rule.

In *Skidmore*, plaintiff's counsel in an age discrimination case had previously represented another party who had settled his substantially related discrimination case against the same defendant. Subsequent to the settlement, the former client emerged as a likely witness against counsel's current client.[8]

Citing DR 5-108(A)(1), the Southern District denied the defendant employer's disqualification motion because " . . . [lawyer] Brickman's representation of [current client] Skidmore cannot be considered 'materially adverse' to [former client] Matthews under any possible interpretation of that term. Matthews' settlement with UBS [the pre-merger predecessor of the defendant] has long been completed and no argument has been made that any aspect of the ongoing Skidmore litigation can harm resolution of Matthews' case in any way."[9]

While acknowledging that lawyer Brickman's attempt to discredit Matthews "may be embarrassing to Matthews" and that cross-examination of a former client may appear "unseemly," the Southern District concluded that "there is no tangible prejudice that would result. . . ."[10] Considering the appearances principle, the *Skidmore* Court—restating Second Circuit doctrine—observed that "an appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases."[11]

Shifting our focus back to criminal litigation, it seems clear that, in the unlikely event that the current and prior representations share a common subject matter, the *Skidmore* Court's analysis of DR 5-108(A)(1) would allow counsel to continue the representation of a current client where the former client—now a prosecution witness—had no stake in the outcome of the trial. For example, opposing a motion to disqualify, counsel may argue that a prosecution witness who merely testifies about the color of the getaway car used in the robbery of a supermarket does not have "interests" opposed by the current client.

Confidences and Secrets

Far more likely to arise in a criminal context is the situation where representation of the current client may result in the use of the confidences and secrets of the former client.[12] While the (A)(2) rule simply prohibits counsel from using the confidences and secrets of a former client (subject to certain exceptions), the Court of Appeals has expanded the scope of the rule by holding that disqualification is required where there exists a "reasonable probability" that the impermissible disclosure of confidential information will result from the current representation.[13]

Yet the "reasonable probability" doctrine does not constitute a *per se* rule of disqualification. In the leading case on this issue, the defendant in a products liability case sought to disqualify the plaintiffs' law firm because a lawyer previously associated with that firm, Stroock & Stroock & Lavan, had represented the defendant asbestos manufacturer in a related case in another jurisdiction.[14] Reversing the disqualification order, the Court made a distinction between situations in which the challenged lawyer *personally* represents interests adverse to the former client and those in which the *firm* represents such interests but the lawyer who handled the prior representation has departed.[15]

Although the Court found that a presumption of disqualification applies in either situation, it found the presumption could be rebutted under the facts presented in *Solow*. ". . . [Plaintiffs' counsel] Stroock should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences and secrets of the former client."[16]

The *Solow* Court's *rebuttable* presumption of disqualification would seem to apply in a situation in which Public Defender A, before his departure from the public defender organization years ago, represented W, now a prosecution witness in a pending case where Public Defender B represents the accused. Under the reasoning set forth in *Solow*, the public defender organization should be allowed to rebut the presumption of disqualification by coming forward with facts showing that confidential information possessed by Public Defender A has not been disseminated through the organization.[17]

The presumption of disqualification may be rebutted even where the "tainted" lawyer remains with the challenged firm. In a case involving The Legal Aid Society of New York City, the respondent in a Kings County parental rights termination proceeding moved to disqualify the Legal Aid Juvenile Rights Division (JRD) because the Criminal Defense Division (CDD) of Legal Aid had represented her in a related criminal case in Bronx County.[18]

Denying the disqualification motion, Family Court—following the reasoning set forth in *Solow*—found that "there is virtually no danger that the Brooklyn JRD attorney may misuse the respondent mother's confidences to the CDD attorney who represented her in the Bronx case."[19] " . . . [T]here is no evidence that any information obtained by the Bronx CDD attorney ever was shared with JRD in Brooklyn. In fact, the [JRD] law guardian avers, without contradiction, that she obtained no information from Bronx CDD about the mother's prosecution."[20]

T'Challa D. may be cited by challenged counsel in those situations where the District Attorney seeks to vicariously disqualify a public defender organization on the grounds that a staff attorney employed by the organization previously represented a prosecution witness. Yet note that the facts in *T'Challa D.* strongly argued against disqualification of JRD: the two Legal Aid lawyers worked in two separate divisions (JRD and CDD) *and* in different counties (Kings and Bronx). Where possible, challenged counsel should point to facts showing the improbability of an impermissible disclosure of confidential information.[21]

The Rise and Decline of the Appearances Principle

The New York Code of Professional Responsibility was first promulgated in 1970. It was not until the Code was amended in 1990, however, that DR 5-108 was added to the Code. In the absence of a disciplinary rule expressly regulating former client conflicts during this 20-year period, the Canon 9 appearances principle (incorporated in the 1970 Code) emerged as the touchstone for the resolution of former client conflicts.

Yet after the 1990 amendment to the Code there was less reason to apply Canon 9 to disqualification cases based on former client conflicts. For one thing, Canon 9 stands as the ethical principle under which are set forth disciplinary rules unrelated to conflicts rooted in a prior representation. DR 9-101 applies to the conduct of lawyers who are present (or former) holders of public office while DR 9-102 regulates the administration of client funds.[22]

Much criticized by scholars, abandoned by the ABA's more recently promulgated Model Rules (not yet adopted in New York), spurned by federal courts in the Second Circuit,[23] the "mostly dead dog" of appearances[24] still lingers in New York jurisprudence pertaining to former client conflicts.

But the bark of the appearances principle is less loud since the 1990 amendment adding DR 5-108 to the Disciplinary Rules. The emphasis on the appearance of impropriety found in *Cardinale v. Golinello*[25] has been replaced with the *Solow* Court's careful attention to DR 5-108.[26]

The Flawed Subjectivity of the Appearances Principle

While beauty may lie in the eye of the beholder, the propriety of counsel's representation of accused should not be based on a similarly subjective evaluation. This is especially true where the ADA—the beholder of the purportedly disqualifying conflict—views counsel for the accused through the biased lens of an adversary. An appearance rooted merely in the bias of an adversary should not form the basis for disqualification.

Similarly, an appearance of impropriety based on the beholder's ignorance should not disqualify counsel from continuing in a case. Suppose John Q. Public—ignoring the disciplinary rules applicable to a former client conflict—concludes that counsel should be disqualified because the representation *appears* improper. Why should uninformed lay opinion about the propriety of a representation serve to disqualify a lawyer where that opinion is not consistent with the disciplinary rules?[27]

As Professor Wolfram observes, if the rules regulating conflicts of interest are soundly based "they should be followed—possible and ill-founded, adverse public opinion to the contrary notwithstanding."[28]

In any event, public opinion (and indeed legal opinion) about what constitutes an appearance of impropriety has little value because of the ambiguity of the appearances principle. Criticizing the vagueness of the appearances principle, another ethics treatise concludes that the "phrase is therefore not really a test but an invitation for *ad hoc* or *ad hominem* decision making."[29]

Responding to a Motion to Disqualify

When confronted with a motion to disqualify based on the Canon 9 appearances principle, counsel for the accused should ask the court to refrain from summarily

deciding the issue on the basis of this ambiguous doctrine and instead reach a decision based on an analysis of the disciplinary rules expressly promulgated to regulate former client conflicts.

Defense counsel should ask the court to require the People to come forward with facts showing that the confidentiality interests of the former client will be compromised by the current representation.[30] If the ADA knew (or should have known) about the purportedly disqualifying conflict well before the start of trial, defense counsel should ask the court to deny the motion because of the moving party's laches.[31]

Conclusion

Undue attention to the vague appearances principle too often distracts judges from paying careful attention to DR 5-108, the rule expressly designed to regulate lawyer conduct where a former client emerges as an adverse witness or party.

Remember that in life appearances can be deceiving. And so may be the appearance of impropriety.

Endnotes

1. S*ee* DR 5-108.
2. *Id.*
3. DR 5-108(A)(1).
4. DR 5-108(A)(2).
5. *See Jamaica Public Service Co. v. AIU Insurance Co.*, 92 N.Y.2d 631, 684 N.Y.S.2d 459, 461 ("The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients.").
6. DR 5-108(A)(1).
7. 2001 WL 504876 (S.D.N.Y. 2001).
8. *Id*. at *1.
9. *Id*. at *4.
10. *Id*.
11. *Skidmore* at *4.
12. *See* DR 5-108(A)(2).
13. *See Jamaica Public Service*, 684 N.Y.S.2d at 462 (finding no such probability where counsel's work for the former client was not related to the case at bar).
14. *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 610 N.Y.S.2d 128 (1994).
15. *Id*. at 133.
16. *Id*.
17. *See* DR 5-108(C) (limiting the impact of the DR 5-105(D) vicarious disqualification rule; *U.S. v. Reynoso*, 6 F. Supp. 2d 269 (S.D.N.Y. 1998) (denying the government's disqualification motion and finding the DR 5-105(D) vicarious disqualification rule inapplicable to public defender organizations).
18. *In re T'Challa D.*, 196 Misc. 2d 636, 766 N.Y.S.2d 500 (Family Ct., Kings Co. 2003), *aff'd*, 3 A.D.3d 569, 770 N.Y.S.2d 649 (2d Dep't 2004).
19. 766 N.Y.S.2d at 508.
20. *Id*.
21. *See Cummin v. Cummin*, 264 A.D.2d 637, 695 N.Y.S.2d 346 (1st Dep't 1999) (disqualification denied where the lawyer professed no memory of brief consultation six years before and the firm's records consisted only of a billing document).
22. *See Leber Associates LLC v. The Entertainment Group Fund*, 2001 WL 1568780 (S.D.N.Y. 2001) (noting that "Canon 9 does not confer a roving moral commission to disqualify attorneys based on conduct specifically treated in other Canons.").
23. *See Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979).
24. C. Wolfram, "Former Client Conflicts," 10 Georgetown Journal of Legal Ethics 677, Summer 1997 at 686.
25. 43 N.Y.2d 288, 401 N.Y.S.2d 191, 195 (1977).
26. *See Mulhern v. Calder*, 196 Misc. 2d 818, 763 N.Y.S.2d 741 (Sup. Ct., Albany Co. 2003) (noting that while the Court of Appeals "has not specifically overruled *Cardinale's* harsh and mechanical approach," the Court has more recently "established that more than the mere possibility of conflict is required for disqualification of attorneys.").
27. *See The Restatement (Third) of Law Governing Lawyers*, American Law Institute: 2001 § 121, Comment (c)(iv) at 250 (disapproving the appearances principle because of its application to "situations that might appear improper to an uninformed observer or even an interested party.").
28. C. Wolfram, *Modern Legal Ethics*, West: 1986 at 320–321.
29. R. Rotunda & J. Dzienkowski, *Legal Ethics*, West: 2005 at 444, fn. 4.
30. *See Aryeh v. Aryeh*, 14 A.D.3d 634, 788 N.Y.S.2d 622 (2d Dep't 2005) ("The party seeking to disqualify a law firm or an attorney bears the burden on the motion.").
31. *See St. Barnabas Hospital v. NYC Health & Hospitals Corp.*, 7 A.D.3d 83, 775 N.Y.S.2d 9 (1st Dep't 2004) (laches is a relevant issue because "inordinate delay" suggests the moving party's intent to seek a tactical advantage).

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A Report on the New York State Commission of Investigation

By Alfred D. Lerner and Anthony Cartusciello

Editor's Introduction: *An important State Agency which has received little public attention and which is largely unknown to criminal law practitioners is the New York State Commission of Investigation. In May of 2005 Governor Pataki appointed former Appellate Division Justice Alfred G. Lerner as the new Chair of this Commission. Justice Lerner and Anthony Cartusciello, the Chief Counsel of the Commission, were kind enough to provide us with the following informative report on the history and workings of the Commission. Their report follows below:*

The New York State Commission of Investigation is an independent, investigative and fact-finding law-enforcement agency. Created by the New York State Legislature in 1958, the Commission undertakes investigations of fraud, corruption, money laundering and mismanagement in New York State and local government. Additionally, the Commission is charged with conducting investigations into organized crime and labor racketeering and their relation to the enforcement of state law.

The Commission is comprised of six commissioners, who are appointed, two each, by the Governor, the Temporary President of the Senate and the Speaker of the Assembly. To ensure the Commission performs its functions in a bi-partisan manner, no more than three Commissioners may belong to the same political party. The Commission's investigative staff is composed of experienced attorneys, seasoned investigators and forensic financial analysts who conduct the fieldwork for the Commission's investigations. In addition, an experienced administrative staff assists the Commission by performing a number of administrative and clerical duties.

Pursuant to its enabling legislation, the Commission has the duty and power to conduct investigations in connection with:

a. The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

b. The conduct of public officers and public employees, and of officers and employees of public corporations and authorities; and,

c. Any matter concerning the public peace, public safety and public justice.

The Commission also assists the Governor in connection with the removal of public officers; the making of recommendations by the Governor to any other person or body, with respect to the removal of public officers; and the making of recommendations by the Governor to the Legislature with respect to changes in or additions to existing provisions of law required for the more effective enforcement of the law. Additionally, the Commission can investigate the management of affairs of state and local governmental bodies, advise and assist district attorneys or other law-enforcement officers, cooperate with the United States government in the investigation of violations of federal laws within New York State, and examine matters and exchange information with officials in other states relating to interstate law-enforcement problems.

To carry out its statewide functions, the Commission has been granted a variety of law-enforcement tools. Witnesses may be compelled by subpoena to testify under oath or affirmation at private and public hearings under threat of penal sanctions. The Commission may require the production of records or other evidence. All governmental bodies in the state are statutorily required to cooperate with and assist the Commission in the performance of its duties. The Commission also has the important power to confer immunity from prosecution in accordance with section 50.20 of the Criminal Procedure Law. With statewide jurisdiction, the Commission's investigative powers extend to more than 80 state agencies, divisions, boards and authorities, as well as over 1,500 political subdivisions of the State—including the State's 62 counties and more than 500 villages, 900 towns and 60 cities.

While reorganizing the importance of vigorous and unbiased investigation, the Commission is also mindful of its responsibilities to witnesses and subjects of Commission investigations. The Commission's investigations are highly confidential. Information gathered by the Commission during an investigation, including the names of witnesses, is protected from disclosure by several statutory rules of confidentiality. Violators of the confidentiality provisions of the Commission's statute are subject to penal sanctions. It is not always possible to dissuade witnesses and attorneys who appear before, or provide information to, the Commission from making statements while a matter is under investigation.

Nevertheless, the Commission vigilantly safeguards the confidentiality of its investigative work. Therefore, it is the Commission's usual policy not to confirm or deny the existence of any investigation.

The Commission is unique in that it is the only state agency with both investigative and "sunshine" mandates. This rare combination enables the Commission to address problems—and suggest legislative and administrative remedies—beyond the jurisdiction of other agencies. When evidence of criminal behavior is developed during an investigation, it is referred to the appropriate prosecutor. Evidence of wrongdoing or mismanagement that does not warrant criminal prosecution may be referred to the Governor, Legislature, Attorney General, or other state officials for appropriate action. Investigative findings concerning local matters may be reported directly to complainants, subjects of investigations, and authorities with the power to remove or sanction the officials involved.

Of equal importance is the Commission's responsibility as a "sunshine agency." In an effort to focus public attention on particular problems of local or statewide importance, the Commission has the authority to conduct public hearings and issue public reports. As a result, throughout its existence, the Commission has often been the catalyst for the passage of new laws and changes to existing laws.

Chair of the Commission, Alfred D. Lerner, prior to his retirement from the bench, had a distinguished judicial career which spanned 32 years and included service as the Presiding Justice of the Appellate Division First Department. He is a graduate of New York Law School and currently serves as Counsel to the Law Firm of Phillips-Nizer.

Chief Counsel Anthony T. Cartusciello was appointed Deputy Commissioner and Chief Counsel in October 2004 after serving as an attorney at the Commission for 12 years. Prior to joining the Commission, Mr. Cartusciello was an Assistant District Attorney in the Kings County District Attorney's Office, where he concentrated in the investigation and prosecution of long-term, major narcotics investigations.

New York Court of Appeals Review

Discussed below are significant decisions in the field of Criminal Law issued by the New York Court of Appeals from September 13, 2005 to November 1, 2005. In order to provide Court of Appeals decisions to our readers as quickly as possible, we previously cited to the *New York Law Journal* for all of the decisions for the 2004–2005 term, which were published in our last three issues. We are now providing as listed below the official New York Report citations to cover the Court of Appeals decisions from October 21, 2004 to September 6, 2005. The cases are listed in chronological order as they appeared in our last three issues, to wit, Spring, Summer, and Fall of 2005.

INEFFECTIVE ASSISTANCE OF COUNSEL

***People v. Fernandez*, decided September 13, 2005, (N.Y.L.J., September 14, 2005, p. 18)**

In a unanimous decision the Court of Appeals upheld a defendant's conviction and rejected the claim that he had been denied the effective assistance of counsel. The defendant alleged that a plea offer had been made and that defense counsel had failed to inform him of that offer which he would have been willing to accept. The Court of Appeals emphasized that the defendant has the burden of establishing an ineffective assistance claim. In the case at bar the Court found that the defendant proffered nothing to sustain his allegations except his own self-serving statement that he would have accepted the plea offer. The Court further found that the defendant had rejected a similar plea offer days before the trial. Trial counsel had also supplied an affirmation indicating that at the time of the plea offer he and the defendant believed that the charges would likely be dismissed because the people were having difficulty locating a necessary witness. The Court concluded that under the instant circumstances a hearing was not required regarding the defendant's claim and that the determination upholding the defendant's conviction should be affirmed.

ILLEGAL SEARCH AND SEIZURE

***People v. Dunbar*, decided October 20, 2005 (N.Y.L.J., October 21, 2005, p. 21)**

In a unanimous decision, the Court of Appeals upheld the suppression of evidence found as a result of a police search and seizure. The Court held that the police did not have a founded suspicion that criminal activity was taking place so as to justify an extended inquiry and subsequent search allegedly based upon the defendant's consent. The Court of Appeals determined that in the case at bar the defendant granted the police permission to search his person and his car only after questioning which reasonably led him to believe that he was suspected of criminality. The Court in issuing its ruling relied upon its prior decision in *People v. Hollman*, 79 N.Y. 2d 181 (1992).

FIRST-DEGREE MURDER

***People v. Shulman*, decided October 25, 2005 (N.Y.L.J., October 26, 2005, p. 20)**

In a unanimous decision, the New York Court of Appeals held that the element involving the killing of multiple victims in a "similar fashion" which elevates a homicide to first-degree murder does not rest solely on the conduct of the perpetrator prior to a victim's death, but that post mortem conduct may very well be relevant. Judge Reed writing for the Court indicated that "what counts is the similarity of the conduct not whether it occurred before or after the victim's death."

The case involved the serial killer Robert Shulman who had a pattern of dismembering his dead victims. The Court rejected the defense claim that the "similar fashion" provision related only to pre-death activities. The Court ruled that from a common-sense perspective, there is no reason to hold that similarity must be shown by the killing act alone.

SEARCH OF VEHICLE EXCEEDS SCOPE OF CONSENT

***People v. Gomez*, decided October 25, 2005 (N.Y.L.J., October 26, 2005, p. 19)**

In a 6-1 decision, the Court of Appeals held that consent to search a vehicle does not equate with consent to dismantle the vehicle or to render it in a materially different condition than when it was seized.

In the case at bar, a vehicle had been stopped because it had tinted windows. When the vehicle was inspected, a cut was discovered in the floorboard which was then covered over and the gas tank was freshly coated. After a series of questions, the defendant consented to a search of the car. The police, however, thereafter, used a crowbar to pry open part of the gas tank, discovering 1 ½ pounds of cocaine.

The majority opinion, written by Judge Ciparick, held that in the absence of circumstances indicating that the defendant authorized the actions taken by police, a general consent to search alone cannot justify a search

that impairs the structural integrity of a vehicle or that results in the vehicle being returned in a materially different manner than it was found. Judge Ciparick observed that a reasonable person would not have understood the officer's request to search to include prying open a hole in the floorboard and gas tank with a crowbar. According to the majority opinion, the officer clearly crossed the line when he took this action without first obtaining the defendant's specific consent.

Judge Reed dissented, stating that the majority was adopting the rule which was contrary to United States Supreme Court, Fourth Amendment precedent. Although the majority concluded that the search had exceeded the scope of the defendant's consent, it expressed no opinion as to whether the search was otherwise supported by probable cause since the Appellate Court had not reviewed the factual findings of the suppression court. The matter was thus reversed and remitted back to the Appellate Division for consideration of the issues which were not determined by the Court of Appeals.

Official Citations to Criminal Law Decisions from the Court of Appeals for the 2004–2005 Term

Covering Decisions Issued from October 21, 2004 to September 6, 2005

(Listed in Chronological Order)

Case	Citation	Issue Involved
People v. Carranza	3 N.Y.3d 729 (2004)	Right to Counsel
People v. Payne	3 N.Y.3d 266 (2004)	Depraved Indifference Murder
People v. Santi & People v. Corines	3 N.Y.3d 234 (2004)	Unauthorized Practice
People v. Henriquez	3 N.Y.3d 210 (2004)	Fair Trial
Norman D. (Anonymous) v. Commissioner of the N.Y. State Office of Mental Health	3 N.Y.3d 491 (2004)	Track Status of Insanity Acquittee
People v. Resek	3 N.Y.3d 385 (2004)	Uncharged Crimes
People v. Waver	3 N.Y.3d 748 (2004)	Right of Confrontation
People v. Rodreguez	3 N.Y.3d 462 (2004)	Notice of Alibi
People v. Inserra	4 N.Y.3d 30 (2004)	Order of Protection
People v. Duggins	3 N.Y.3d 522 (2004)	First Degree Murder
People v. Fabricio	3 N.Y.3d 402 (2004)	Right to be Present
People v. Marrero	3 N.Y.3d 762 (2004)	Re-sentencing due to Mutual Mistake
People v. Jones	3 N.Y.3d 491 (2004)	Duty to Retreat
People v. Prado	4 N.Y.3d 725 (2004)	Unpreserved Issue
People v. Parris & People v. Hoffler	4 N.Y.3d 41 (2004)	Loss of Minutes
People v. Marquez	4 N.Y.3d 734 (2004)	Loss of Minutes
People v. Nazario	4 N.Y.3d 70 (2004)	Closure of Courtroom
People v. Hardy	4 N.Y.3d 192 (2005)	Crawford Issue
People v. Douglas	4 N.Y.3d 777 (2005)	Crawford Issue
People v. Seeber	4 N.Y.3d 780 (2005)	Felony Murder
People v. Burnwell & People v. Pitts	4 N.Y.3d 303 (2005)	DNA Testimony
People v. Thomas	4 N.Y.3d 143 (2005)	Filing of Information Containing New Charges
People v. Combest	4 N.Y.3d 341 (2005)	Defense Access to Media Tapes
People v. Catu	4 N.Y.3d 242 (2005)	Post Release Supervision
People v. Smith	4 N.Y.3d 806 (2005)	CPL § 210.30 Motion
People v. Andrades	4 N.Y.3d 355 (2005)	Ineffective Assistance of Counsel
People v. Bedros-Yauro-Sakuk	4 N.Y.3d 814 (2005)	In Camera Review
People v. Aiken	4 N.Y.3d 324 (2005)	Duty to Retreat
People v. McClemore	4 N.Y.3d 821 (2005)	Order to Protect
People v. Dunn	4 N.Y.3d 495 (2005)	Prosecutions Right to Appeal
People v. Schulz	4 N.Y.3d 521 (2005)	Photo I.D.
People v. Williams	4 N.Y.3d 535 (2005)	Traffic Stop
In re Nassau County Grand Jury Subpoena et al v. Spitzer	4 N.Y.3d 665 (2005)	Self Incrimination
People v. Van Buren	4 N.Y.3d 640 (2005)	Authority of DEP Police
People v. Hanley	5 N.Y.3d 108 (2005)	Limitation of Defense Witnesses
People v. Kelly	5 N.Y.3d 116 (2005)	Lack of Preservation
People v. Hunter	5 N.Y.3d 752 (2005)	CPL § 180.50 Inquiry
People v. Johnson	5 N.Y.3d 790 (2005)	CPL § 180.50 Inquiry
People v. Lopez	5 N.Y.3d 753 (2005)	Mapp/Dunaway Hearing
Katharine B. v. Cataldo	5 N.Y.3d 196 (2005)	Unsealing of Criminal Records
People v. Hill	5 N.Y.3d 772 (2005)	Misleading Information to Grand Jury
People v. Wilson	5 N.Y.3d 778 (2005)	Independent Source Hearing Regarding Identification

Harriet Miers Nomination to United States Supreme Court Withdrawn and President Bush Appoints Samuel A. Alito, Jr. to Replace Justice O'Connor

Harriet Miers

On October 3, 2005, as the United States Supreme Court opened its 2005–2006 term with Chief Justice Roberts assuming the Supreme Court Bench for the first time, President Bush announced that he was nominating Harriet Miers to fill the seat being vacated by Justice O'Connor as a result of her retirement. Harriet Miers had been serving as President Bush's White House Counsel and had been part of the President's inner circle since the time he was serving as Texas Governor.

Although Harriet Miers had no prior judicial experience, she had extensive legal practice both in the private and governmental sectors. She was the first woman to be President of the State Bar Association of Texas. She received her law degree from the Southern Methodist University School of Law in 1970. Prior to her two years of service as White House Counsel, she served as Deputy Chief of Staff for Policy. Prior to her entry into government service she had an extensive private law practice from 1972 to 2000, serving as a partner in a large law firm and engaging in extensive litigation. Judge Miers is 60 years of age and would have been one of the youngest members of the Court.

Samuel A. Alito, Jr.

President Bush's selection drew criticism from various quarters and Harriet Miers withdrew from consideration in late October. President Bush then selected Samuel A. Alito, Jr. as his new nominee and the Senate is currently considering the President's new appointment in its confirmation process. If Judge Alito is confirmed by the Senate, we will print a full biographical sketch of the new appointee in our next issue.

Summary of 2004 Annual Report of the Clerk of the New York Court of Appeals

By Spiros A. Tsimbinos

In a recently released annual report reviewing the Court's caseload and operation for the year 2004, Clerk Stuart M. Cohen of the New York Court of Appeals reported that the Court decided 185 appeals last year. This compares with 176 in 2003, but is still far below 250 and 300 decisions which were rendered in the mid-1990s. In civil matters it was reported that the Court affirmed 51 percent of the time and in criminal cases the Court affirmed in 76 percent of the cases. With respect to criminal matters, the 2004 affirmance rate was substantially higher than the affirmance rate of 67 percent in 2003.

Of special interest to criminal law practitioners is the fact that the number of criminal appeals being handled by the Court continues to be a small amount. This is clearly reflected by the fact that with respect to criminal leave applications the Court granted leave in only about 1.7 percent of the cases. Thus in 2004 only 48 leave applications were granted and 9 of these were granted as a result of prosecution applications. In 2004 each of the 7 Court of Appeals judges entertained an average of 367 criminal leave applications but granted an average of only 7.

A major and interesting development which is revealed by the 2004 report is the dramatic increase in the number of dissenting opinions which were issued. In 2004 the Court of Appeals had split decisions 44 times, compared with only 15 dissenting opinions in 2003. While the Court voted unanimously 87 percent of the time in 2003 it was divided in 25 percent of the 185 cases which it decided last year. The 3 most recent Pataki appointees—Judges Robert S. Smith, Read and Graffeo—were the most persistent dissenters. The increase in the number of dissents appears to reflect ideological differences within the Court with Judges Robert S. Smith, Read and Graffeo usually on one side and Cuomo appointees Kaye, Ciparick and George Bundy Smith on the other. Judge Albert M. Rosenblatt, who has emerged as the critical swing vote,was in the majority opinion in 181 of the 184 cases decided and dissented only 4 times in 2004, the lowest dissenting rate on the Court. Chief Judge Judith S. Kaye, who has always strived for unanimity on the Court, dissented in 7 opinions.

"A major and interesting development . . . is the dramatic increase in the number of dissenting opinions which were issued."

An additional piece of interesting information which is revealed by the 2004 report is that the Court apparently welcomes *amicus curiae* briefs and finds them helpful in the determination of a matter. In 2004, of the 93 motions filed for leave to file *amicus* briefs, 88—or 95 percent—were accepted.

Despite the increase in the number of dissents, the report continues to characterize the Court as harmonious and congenial and the Court is up-to-date and timely in dealing with its caseload. Last year the Court on average handed down a decision within less than 6 weeks after oral argument. 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.

Cases of Interest in the Appellate Divisions

Discussed below are some interesting decisions from the various Appellate Divisions which were decided from August 4, 2005 to November 1, 2005.

People v. Pauly (N.Y.L.J., August 8, 2005, pp. 1 and 2)

The Appellate Division Third Department denied an equal protection challenge to the Rockefeller Drug Law Reform Act which was based on a claim that retroactive application was given to the most serious drug offenders but not to those charged with lesser drug crimes. The Third Department found that a rational basis existed for the disparate treatment afforded to drug offenders. In rendering its decision the Court also noted in a footnote that the new drug sentences which became effective on January 13, 2005 would not apply to persons who committed drug crimes before that date but were sentenced afterwards. The Third Department indication is the first Appellate decision dealing with claims advanced by certain Trial Judges that the ameliorative benefits of the new law could be applied retroactively. It appears that the eventual determination of this controversy will have to be decided by the New York Court of Appeals.

People v. Moyett (N.Y.L.J., August 15, 2005, pp. 1 and 2 and August 18, 2005, p. 18)

In a unanimous decision, the Appellate Division First Department held that a cursory inquiry by a Trial Court with respect to whether the defendant was waiving his right to appeal as part of a plea negotiation was sufficient to prevent a further appeal with regard to the defendant's conviction. The Trial Court during the plea colloquy had merely asked the defendant whether he understood that by pleading guilty he was giving up the right to appeal the conviction to which the defendant replied "Yes." In rendering its determination the Appellate Division stated :

> In our view, as the record demonstrates, this was a thoughtful, extensive and comprehensive plea allocution by a patient and experienced trial judge, who elicited an admission to a detailed account of the crime and painstakingly secured defendant's rights accorded him in a criminal prosecution, including a waiver of the right to appeal.

In a concurring decision, Justice Marlow indicated, however, that he felt that the inquiry regarding the waiver of appeal should have been more extensive and should avoid creating the impression that the waiving of the right to appeal is an automatic consequence of the guilty plea.

People v. Conway (N.Y.L.J., August 19, 2005, pp. 1 and 2 and August 22, 2005, p. 24)

In a 4-1 decision, the Appellate Division First Department reversed an assault conviction of a police officer who was charged with negligently permitting his revolver to be fired as he was attempting to apprehend a suspect. The Appellate Court reversed the determination which had been reached at a bench trial because a prosecution's expert witness had been allowed to "usurp" the fact-finding function. The majority opinion found that the expert's testimony essentially imposed a standard of strict liability that was completely at odds with the doctrine of criminal negligence. The majority opinion further concluded that to find the police officer guilty under the circumstances of the case imposed criminality on the mere fact of an accidental discharge. Justice Milton Williams, in a dissenting opinion, took a contrary view and concluded that the near mortal wounding of the victim constituted grossly negligent misconduct.

People v. Figueroa (N.Y.L.J., August 31, 2005, p. 18)

In a unanimous decision, the Appellate Division First Department remitted a matter back to the Trial Court for reconsideration with respect to an application for re-sentencing of an A-I felony drug offender pursuant to the recently enacted Rockefeller Reform Act. The Trial Court had denied the defendant's request for re-sentencing without the holding of a hearing. The Appellate Division pointed out that the new legislation—effective as of January 13, 2005—specifically provided for a hearing to determine any application for re-sentencing and ruled that the Trial Court's summary denial was improper.

People v. Wiltshire (N.Y.L.J., September 12, 2005, pp. 1 and 2 and September 14, p. 18)

In a unanimous decision, the Appellate Division First Department vacated a defendant's guilty plea to the crime of aggravated harassment, finding that the

Trial Court lacked the authority to accept the plea. The defect which occurred was that the prosecution and the defense had arranged for a plea agreement based upon a felony complaint. The original presentation to the Grand Jury was defective because the defendant had been deprived of his right to appear before a Grand Jury and the plea agreement had been negotiated before any representment to another Grand Jury had been made. The Appellate Division had pointed out that CPL § 210.05 provides that the only method of prosecuting an offense in a Superior Court are by an indictment filed by a Grand Jury or by Superior Court information filed by a District Attorney. In the instant matter none of the requirements had occurred, causing the Trial Court to lack the authority to accept the plea.

People v. Kisoon (N.Y.L.J., September 20, 2005, pp. 1 and 18)

In a 3-2 decision, the Appellate Division Second Department reversed a defendant's felony drug conviction and ordered a new trial because the trial judge failed to read out loud and on the record a note from a deadlocked jury. The majority opinion voted to reverse the conviction—even though there were no objections from defense counsel—and held that the normal rule requiring preservation did not apply to the situation which occurred. The jury note in question read as follows:

> We took a vote. We are not unanimous. We are 10 guilty to 2 not guilty on all three counts. Furthermore, we believe that further deliberation will not change our decision.

Instead of reading the note verbatim, the Court merely announced that the jury had sent the note saying they were hopelessly deadlocked. The Court then gave the jury an Allen charge and the jury eventually announced a conviction. In writing for the majority, Justice Fisher stated that the trial court's decision not to read the note verbatim but to summarize it in a way that among other things concealed the status of the jury's vote was essentially the same type of error condemned by the New York Court of Appeals in *People v. O'Rama*, 78 N.Y.2d 270 (1992).

The two-judge dissent distinguished the Court of Appeals decision in *O'Rama* finding that in that case the jury note was quite lengthy and that the trial judge's brief summary of the jury note in the case at bar was sufficient to convey the jury's information. Because of the sharp split in the case at bar and the importance of the preservation issue, it appears that this case will be eventually determined by the New York Court of Appeals.

People v. Swinton (N.Y.L.J., September 26, 2005, pp. 1 and 3)

In a 3-1 vote, the Appellate Division Second Department affirmed a conviction for assault in the first degree of two parents who were accused of nearly starving their daughter to death as a result of utilizing a vegan diet. The four-judge majority found that the evidence was legally sufficient to establish the defendants' guilt and that the verdict was not against the weight of the evidence. The majority pointed to the fact that over a 16-month period the defendants fed their daughter nothing more than nuts and fruit and that she weighed 10 pounds when she should have weighed about 25 pounds. She had soft bones, was seriously underdeveloped and could not even lift her own head. Justice Sandra Miller in dissent argued that the assault conviction should be vacated. Justice Miller stated that even though the defendants could be characterized as naive, misguided and even unfit to serve as guardians of their child, their actions did not constitute criminal recklessness required to sustain the assault conviction.

People v. Nelson (N.Y.L.J., October 3, 2005, p. 26 and October 4, 2005, pp. 1 and 8)

In a unanimous decision, the Appellate Division First Department has firmly concluded that the more lenient sentences available under the recent modifications of the Rockefeller Drug Law are not to be applied retroactively and are only applicable to defendants who have committed crimes after January 13, 2005, the effective date of the new laws. Several trial judges had applied the more lenient sentencing provisions to defendants who were being sentenced after January 13, 2005, but whose crimes had been committed before that date. These trial judges had relied upon the New York Court of Appeals decision in *People v. Belog*, 74 N.Y.2d 237 (1990), which indicated that under the "amelioration doctrine" subsequently passed more lenient sentences could be applied retroactively. The Appellate Division pointed out, however, that the 2005 legislation specifically included language indicating the sentencing provisions would only take effect 30 days after being signed into law. The Appellate Division concluded that in light of the clear legislative expression, no retroactive application was warranted.

In our last issue we addressed this matter and pointed out that prosecutors throughout the state had strongly opposed the retroactive application of the new sentences to defendants who were awaiting sentence, but whose crime had occurred prior to January 13, 2005. We also pointed out that based upon the actual language of the 2005 legislation, the decision of

the prosecutors appeared to be a sound one but that the matter would eventually be determined by our Appellate Courts. This decision by the First Department follows a similar expression made by the Third Department in *People v. Pauly* discussed above. It appears likely that the New York Court of Appeals will have to finally address this issue and we await further developments.

People v. Samuels (N.Y.L.J., October 7, 2005, pp. 1 and 7 and October 11, 2005, p. 18)

In a unanimous decision, the Appellate Division Second Department reversed a defendant's murder conviction and ordered a new trial. During the trial the Court recessed overnight while the defendant was still being cross-examined. The Trial Judge directed the defendant not to discuss his testimony with his assigned counsel during the overnight recess. The Appellate Division, relying upon prior appellate precedent, ruled that the Trial Court had made a fundamental mistake which deprived the defendant of his right to counsel. The Appellate Division reached this determination even though defense counsel made no objection to the trial court's direction. The Appellate Division in rendering its ruling stated:

> The defendant correctly contends that this restriction denied him his right to counsel, and accordingly, his conviction must be reversed. Although the defendant failed to preserve this issue for appellate review, we reach it in the exercise of our interest of justice jurisdiction.

In making its ruling, the Court relied upon *People v. Lowery*, 253 A.D.2d 893 (2d Dep't 1998).

People v. Retamozzo (N.Y.L.J., October 19, 2005, pp. 1 and 2 and October 24, 2005, p. 18)

In a unanimous decision, the Appellate Division First Department reversed a defendant's drug possession conviction because of the Trial Judges' repeated intervention in the case in favor of the prosecution. In a 28-page decision written by newly appointed Justice James M. McGuire, the Appellate Court enumerated 16 instances in which the Trial Judge interrupted questioning in a manner that prejudiced the defendant's case. The Appellate Panel also cited 15 other instances where the Trial Court demonstrated favoritism to the People's case. In ordering a reversal, the Appellate Division also directed that a new trial be held before a different judge.

People v. Paul (N.Y.L.J., October 28, 2005, pp. 1 and 2 and November 2, 2005, p. 18)

In a unanimous decision, the Appellate Division First Department held that the admission of a dying declaration did not violate the Crawford principles recently annunciated by the United States Supreme Court. In the case at bar, two neighbors had testified that the victim had identified his shooter as he lay dying on the street. The Court held that the admission of the dying declaration was not testimonial since it was not prepared by the government for in-court use. The statements in question were not elicited in a formal matter nor elicited by a law-enforcement official. According to the Appellate Panel, the statements in question were thus not subject to the Crawford ruling.

Friedgood v. New York State Board of Parole (N.Y.L.J., October 24, 2005, pp. 1 and 6)

In a rare ruling, the Appellate Division Third Department found the denial of parole for an 87-year-old defendant to be so irrational as to border upon impropriety. The panel ordered the Parole Board to grant the defendant a new hearing in light of the Appellate Division decision. The defendant in question was an incontinent 87-year-old with terminal cancer who the Appellate Division viewed as posing no possible threat to society.

For Your Information

New Appointments to Appellate Divisions

Governor Pataki recently announced five new appointments to the various Appellate Divisions. Supreme Court Judges James M. McGuire and Brian J. Malone have been appointed to the Appellate Division First Department. Supreme Court Judges Robert J. Lunn, Mark C. Dillon and Joseph Covello have been appointed to the Appellate Division Second Department. Judge McGuire, a former Counsel to Governor Pataki, was recently elected to the Supreme Court and has been sitting in Queens. Judge Malone had been serving in Albany. Justice Lunn is from Rochester, Justice Dillon had been serving in White Plains and Justice Covello is from Nassau County.

Chief Administrative Judge Lippman Elected to Westchester Supreme Court

As a result of the creation of an additional Supreme Court seat in Westchester County and a bipartisan cross-endorsement agreement, Chief Administrative Judge Johnathan Lippman has been elected to a Supreme Court Judgeship in Westchester County. His election as a Supreme Court Justice would qualify Judge Lippman for appointment to the Appellate Division—a situation which has been widely rumored during the last two years. While serving as a Supreme Court Justice Judge Lippman will continue to remain in his present post as Chief Administrative Judge of the Supreme Court system.

Deportation as a Consequence of a Criminal Conviction

With the fight against terrorism and the increasing restrictions on immigration into the United States, criminal law practitioners are increasingly finding that in dealing with defendants charged with a crime they must be ever vigilant to the deportation consequences of a criminal conviction. A recent report from the Immigration and Customs Service indicates that currently thousands of immigrants face the prospect of being forcibly removed from the United States because of their conviction of a designated serious crime. A wide range of crimes can classify as a deportable offense. During the year 2003–2004 the Office of Immigration Statistics of the Department of Homeland Security reported that 161,676 people were deported from the United States. Many of these deportations were the result of criminal convictions, and others involved immigrants who had entered the country illegally. Often an immigrant's illegal status is determined following an arrest for a crime, and deportation can result from both factors.

In New York a specific statute requires a defendant to be informed by the court at the time of his plea that deportation can be a consequence of his criminal conviction. Although the statute also states that failure to so advise does not affect the validity of the plea, the failure to consider the deportation factor can subject a defense attorney to a claim of ineffective assistance of counsel—causing Appellate Courts to grapple with the issue.

Prison System Dealing with Increasingly Older Inmates

The New York Times recently reported in its issue of October 2, 2005 that the number of aging inmates is continually increasing throughout prisons in the United States as a result of tough sentencing laws which have been imposed during the last 20 years and a growing number of convicted felony offenders who are receiving life sentences. According to the *Times*, some 132,000 inmates within the United States are serving life sentences. This is approximately 1/10th of the current prison population, and the number of lifetime inmates has almost doubled in the last 10 years. As a result of this sharp increase in life sentences, the prison system is being faced with an increasingly aging population. As a result, the *Times* reported that the United States is now housing a large and permanent population of prisoners who will die of old age behind bars. The aging population of prisoners is also having a considerable economic and financial effect. The *Times* article estimated that it currently costs $3 billion a year to house prisoners serving life sentences, and as they age the medical care which must be afforded to them by the correctional facilities is becoming increasingly more expensive.

Contributing to the situation is the fact that in recent years parole boards have been increasingly reluctant to grant parole and governors have sharply limited the awarding of executive pardons. All of these circumstances have contributed to an increasingly aged prison population which our correctional institutions must deal with.

FBI Reports Decline in National Homicide Rate

In a recently released report, the FBI indicated that the United States homicide rate in 2004 dropped to its lowest level in 40 years. There were 391 fewer homicides nationwide in 2004 than in 2003. The FBI reported that the 2004 total of 16,137 homicides comes out to 5.5 homicides for every 100,000 which amounts to a decline of 3.3 percent from 2003—the lowest homicide rate since 1965. Decreases in the number of homicides were reported for several large cities including Chicago and Washington, D.C., which saw significant declines. Of 19 large cities with more than 100 homicides apiece in 2003, 13 saw declines in 2004, but 6 recorded increases. New York City saw a modest decline in its homicide statistics. New York City also had an overall reduction in its crime rate of 4 percent from the previous year. The city is now ranked as one of the safest of the nation's 25 largest cities.

The FBI report also indicated that the rates for all 7 major crime categories were down and that the overall violent crime rate reached a 30-year low. The four major violent crimes—to wit homicide, rape, robbery and aggravated assault—declined from 1.38 million in 2003 to 1.37 million in 2004, resulting in a 2.2 percent drop in the violent crime rate. The 2004 violent crime rate amounted to 465.5 violent crimes per 100,000 people within the United States.

The FBI report also dealt with the three major property crimes—to wit burglary, auto theft and larceny-theft. These property crimes declined from 10.42 million to 10.33 million in 2004, resulting in a 2.1 percent decline in the property crime rate. The three major property crime rate for 2004 resulted in 3.517 crimes per 100,000 people.

Judicial Pay Raises

In our last issue, we reported that although the Legislature had adjourned during the summer without enacting judicial pay increases, it was possible that the issue would again be raised in the upcoming legislative session. Chief Judge Judith Kaye in fact announced in late October that she was putting the issue of judicial pay raises at the top of the OCA agenda and that another major effort would be made in the coming months to pass legislation which would substantially increase the salaries of judges throughout the state. We will keep our readers advised of developments.

About Our Section and Members

Formation of Special Committee

A special committee recently formed by our Section will be dealing with the issue of providing a better transition into the community for criminal defendants upon their discharge from prison. The Committee on Transition from Prison to Community is exploring what the Department of Correctional Services (DOCS) does to help inmates succeed after release, including obtaining a decent job, a decent place to live, and help with special needs (physical, mental, substance abuse). In a meeting with the Chauncey Parker, Director of Criminal Justice and Commissioner of DOCS, the committee learned that Parker has created a task force of 14 state agencies to develop programs and policies to reduce recidivism and is also working with The Legal Action Center on ways of helping releasees. The committee has asked for information about programs and policies within DOCS that affect success on the outside and intends to prepare a list of all post-prison programs throughout the state.

Commissioner Parker also advised that defense attorney responses to the letter sent by the parole division as an inmate is coming up for parole can be very helpful and urged lawyers to answer them. The Special Committee is Chaired by Malvina Nathanson and includes as committee members Marty Adelman, Noha Arafa, Gerry Damiani, Norm Effman, Susan Lindenauer, Ashley Martabano, Bob Morra, John Rowley, Marv Schechter, Craig Schlanger and Peter Theis. The Special Committee is working diligently and will be periodically issuing additional reports and recommendations. We thank Malvina and her committee for their efforts.

Annual Winter Meeting

Our Section has numerous events planned for the Annual Winter Meeting of the New York State Bar Association, which will be held in January at the Marriott Marquis Hotel in New York City January 23–28, 2006. The Section's Annual Dinner will be held on Wednesday, January 25, 2006. The Annual Section Meeting will be on Thursday, January 26, followed by the Annual Awards Luncheon and a 3-credit CLE program. Our Section Vice-Chair, Jean T. Walsh, Esq., will Chair the Annual Meeting festivities. We urge our members to attend one or all of these events and we look forward to a good turnout and interesting and successful programs.

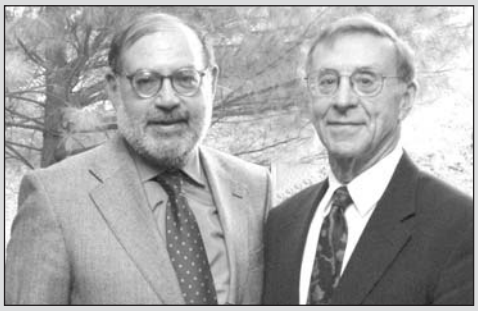
Criminal Justice Section
Fall Meeting
November 4-5, 2005 • Poughkeepsie, NY

Edward Nowak discusses recent Court of Appeals decisions.

Our Fall Meeting was held on November 4 and 5, 2005 at the Best Western Inn and Conference Center in Poughkeepsie, NY. The program was both informative and successful and featured the Honorable Albert Rosenblatt as our luncheon speaker.

The theme of the meeting was devoted to recent decisions and developments from the New York Court of Appeals. Recent Court of Appeals decisions were discussed by Edward J. Nowak from the Monroe County Public Defenders Office and Steven S. Kartagener, private practitioner. An afternoon symposium discussed the contributions of Justice Rosenblatt and analyzed his current pivotal role as the swing vote on the Court.

Albany Law School Professor Vincent M. Bonventre presented a statistical report on the workings of the Court of Appeals.



Section Chair Roger Adler with luncheon speaker Hon. Albert Rosenblatt from the New York Court of Appeals.

The Panelists included Mark Dwyer, Chief of the Appeals Bureau of the New York County District Attorneys Office; Anthony Girese, Counsel to the District Attorney, Bronx County; Steven Kartagener, private practitioner; Robert S. Dean from the Center for Appellate Litigation; H. Elliot Wales of the Appellate Practice Section; and Professor Vincent Bonventre, from Albany Law School.

In addition to the formal legal discussions, the Fall meeting also included an enjoyable dinner at the Ristorante Caterina de'Medici and a tour of the Franklin Delano Roosevelt home and museum. We thank Section Chair Roger B. Adler and the organizers of this event for an enjoyable and worthwhile program.

Section members Donald Zuckerman and Hillel Hoffman with Section Chair Roger Adler and speakers Hon. Judge Rosenblatt and Elliot Wales.

Panelists discuss Judge Rosenblatt's contributions to the Court of Appeals.

Attendees listen to the CLE program.

Speakers Kartagener, Wales, Dwyer and Nowak with New Paltz Town Judge Hon. Judith M. Reichler.

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NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

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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.

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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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